AN OUTLINE

OF THE

LAW OF INSURANCE

SECOND EDITION

WITH ILLUSTRATIVE CASES

BY

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TABLE OF CONTENTS.

PART I.

DEFINITIONS.

PART II.

THE CONTRACT OF INSURANCE.

A.

Of the Parties to the Contract.

B.

The Form of the Contract.

C.

Consummation of the Contract.

D.

The Nature of the Contract.

PART III.

THE SUBJECT-MATTER OF INSURANCE, AND THE RISKS WHICH MAY BE INSURED AGAINST.

PART IV.

INSURABLE INTEREST.

PART V.

THE CONSIDERATION OR PREMIUM.

PART VI.

WARRANTIES.

PART VII.

REPRESENTATIONS.

PART VIII.

CONCEALMENT.

PART IX.

INSURANCE AGENT.

PART X.

SPECIAL PROVISIONS CONTAINED IN THE POLICY.

Stipulations of the First Class.

A.

B.

C.

D.

Stipulations of the Second Class.

A.

B

PART XI.

WAIVER AND ESTOPPEL.

PART XII.

ASSIGNMENT, RIGHTS OF BENEFICIARY.

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AN OUTLINE

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LAW OF INSURANCE.

SECOND EDITION.

PART I.

DEFINITIONS.

§ 1. INSURANCE DEFINED.

Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against loss or damage on a certain subject-matter by certain contemplated perils.

Insurance is a contract whereby one, for a consideration, undertakes to compensate another, if he shall suffer loss. "This," says May (section 1), "is substantially the definition given by Roccus, and is recommended alike by its brevity and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve."

In Lucena v. Craufurd, 2 Bos. & P. N. R. 300, 6 Rev. Reports, 685, insurance is defined as "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."

Cooke (section 1) defines insurance as "a contract to make compensation (or pay) on the happening of any injury to life or property."

In Com. v. Wetherbee, 105 Mass. 149, 160, the contract of life insurance is defined as "an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest."

Biddle (volume 1, § 1) says that the general term insurance "is applied to two species of contract,—insurance in respect of property, and insurance in respect of life,—which are not analogous in their elements, and which proceed upon different principles."

Insurance in respect of property he defines as "an agreement by the insurer, for a consideration, to indemnify the insured against loss, damage, or prejudice to certain property that may be during a certain period sustained, by reason of specified perils to which the property may be exposed."

Insurance in respect of life, "which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer to pay to the insured or his nominee a specified sum of money, either at the death of the designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended."

Bunyon (page 1) defines life insurance as "a contract in which one party agrees to pay a given sum upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain periodical payments by another."

Insurance other than life includes the common forms of fire and marine insurance.

Fire insurance is a contract to indemnify the insured for loss or damage occasioned by fire during the specified period.

Wood's Flanders, §§ 1, 2, 5.

"Marine insurance," says Phillips (volume 1, § 1), "is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all of these risks, during a certain period or voyage."

Duer (volume 1, p. 1) says simply that it is "a contract of indemnity against the perils of the sea."

Arnould (volume 1, p. 16) says: "Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks, to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time."

For other definitions, see:
Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765.
Supreme Commandery v. Ainsworth, 71 Ala. 436.
State v. Farmers' Ben. Ass'n, 18 Neb. 276, 25 N. W. 81.
Bolton v. Bolton, 73 Me. 299.
Paterson v. Powell, 9 Bing. 320.
Wilson v. Jones, L. R. 2 Exch. 150.
Dalby v. India & L. L. Assur. Co., 15 C. B. 365.
Elliott's Appeal, 50 Pa. St. 75.
Park, c. 22.
1 Couteau, Traite des Assurance sur la Vie, § 31, p. 28.
1 Cauvet, Assurances Maritime, p. 1.

§ 2. TERMS IN COMMON USE.

The party undertaking to indemnify the assured is called the "insurer" or "underwriter."

The party to be indemnified is called the "insured" or "assured." There is no difference between the words.

Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949.

The agreed consideration is called the "premium." The written instrument evidencing the contract is called the "policy."

The events and causes insured against are known as "risks" or "perils."

The interest of the insured in the life or property is the subject-matter of the contract of insurance. The property in which the interest exists is often called the subject-matter.

§ 3. REINSURANCE.

A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of the original insurance. The original insurer has no interest in the contract of reinsurance.

Commercial Mut. Ins. Co. v. Detroit Fire & Marine Ins. Co., 38 Ohio St. 15.

Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 323, 6 Sup. Ct. 750, 1176.

Gantt v. Insurance Co., 68 Mo. 533.

Goodrich's Appeal, 109 Pa. St. 523, 2 Atl. 209.

"The original contract," says Emerigon, "subsists precisely as it was made, without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the insurer has assumed constitute between him and the reinsurer the subject-matter of the contract of reinsurance, which is a new contract totally distinct from the first."

Emerigon, Traite des Assurance, c. 8, § 14:

"A contract of reinsurance is where the insurer, in order to lessen his own liability on the contract of

insurance, reinsures or transfers the insurance he has agreed to carry, in whole or in part, to a new insurer, who thereupon occupies the same position as the original insurer does to the original insured, which latter is not a privy, however, to the new contract."

1 Biddle, §§ 7, 378.

New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359.

Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 573, 11 Sup. Ct. 909.

Travelers' Ins. Co. v. California Ins. Co., 1 N. D. 151, 45 N. W. 703.

Strong v. Phoenix Ins. Co., 62 Mo. 289.

See "Statute of Frauds," infra, § 7.

As to the extent of reinsurer's liability, see:

Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant's Cas. (Pa.) 71.

Strong v. American Cent. Ins. Co., 4 Mo. App. 7.

Hovey v. Home Ins. Co., 3 Ins. Law J. 815, Fed. Cas. No. 6,743.

Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364.

In re Athenaeum Life Assur. Co., 1 Johns. Eng. Ch. 633.

On the subject of reinsurance generally, see Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co., 153 Mass. 63, 26 N. E. 244, and note 10 Lawy. Rep. Ann. 423.

PART II.

THE CONTRACT OF INSURANCE.

A.

Of the Parties to the Contract.

§ 4. WHO MAY BE PARTIES.

Any one sui juris, and under no legal disability to contract generally, may be insured or may insure another against a specified peril, unless prevented by statute.

(a) THE INSURED.

An infant cannot make a valid contract of insurance upon a stock of goods owned by him. Whatever relates to his property is the business of his guardian, and, if transacted by the infant, may be avoided at his option.

New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345.

2 Biddle, §§ 15, 60.

With reference to a contract of life insurance, the supreme court of Minnesota said: "Life insurance in a solvent company at the ordinary and usual rates for an amount reasonably commensurate with the infant's estate or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and, if such should appear to be the character of this contract, the plaintiff could not recover the premiums which he has

paid in, so far as they were intended to cover the current annual risk assumed by the company under the policy."

Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 57 N. W. 934, and 59 N. W. 992.

As to the right of married women to make contracts of insurance, see 2 Biddle, § 16.

Mutual Ben. Life Ins. Co. v. Wayne Co. Sav. Bank, 68 Mich. 116, 35 N. W. 853.

McQuitty v. Continental Life Ins. Co., 15 R. I. 573, 10 Atl. 635.

(b) THE INSURER.

The business of insurance is principally carried on by corporations organized for that purpose, but when there is no prohibitory statute, it may be done by individuals or partnerships.

Porter, 361.

1 Biddle, §§ 9, 29, 34.

1 Beach, c. 1.

1 May, c. 2.

Noble v. Mitchell, 100 Ala. 519, 14 South. 581.

Foreign insurance corporations may do business in a state, subject to the laws of the state. The state may regulate the business within its borders, and impose such conditions upon foreign corporations as its wisdom dictates.

Hoadley v. Purifoy (Ala.) 18 South. 220.

Paul v. Virginia, 8 Wall. 181.

(c) TEMPORARY DISABILITY.

Parties having general power to contract may be disqualified for a time by reason of the existence of some special condition. Thus the subjects of two hostile nations cannot make a valid contract of insurance.

The Hoop, 1 C. Rob. Adm. 196.

Griswold v. Waddington, 16 Johns. 438.

New York Life Ins. Co. v. Stathan, 93 U. S. 24.

1 Biddle, § 487.

The occurrence of hostility has the effect of suspending existing valid contracts between the citizens of the hostile states.

Brandon v. Curling, 4 East, 410.

Ex parte Boussmaker, 13 Ves. 71.

As to the effect of Civil War, see Kershaw v. Kelsey, 100 Mass. 561.

New York Life Ins. Co. v. Clayton, 7 Bush (Ky.) 179.

Hamilton v. Mutual Life Ins. Co., 9 Blatchf. 234, Fed. Cas. No. 5,986.

Effect of existence of war as an excuse for nonpayment of premiums, see Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543.

Hillyard v. Mutual Ben. Life Ins. Co., 35 N. J. Law, 415.

New York Life Ins. Co. v. Stathan, 93 U. S. 24.

Dillard v. Manhattan Life Ins. Co., 44 Ga. 119.

B.

The Form of the Contract.

§ 5. STATUTORY REQUIREMENTS.

No particular form is necessary to a valid contract of insurance unless one is prescribed by statute. "Policies of insurance," said Chief Justice Marshall, "are generally the most informal instruments which are brought into courts of justice." It is sufficient if the scope and meaning of the language used import a contract of insurance.

The contract which finally came into use was described by Mr. Justice Buller as an "absurd and incoherent instrument." The "absurdity" from the standpoint of the insurer was increased by the manifold conditions, exceptions, and limitations which were gradually added to the written contract by the insurance companies, and which rendered recovery practically impossible in the face of a contest. This practice has induced many states to prescribe a form of contract which shall be used, and the conditions which it shall contain.

Gen. Laws Minn. 1889, c. 217 (Rev. St. 1894, § 3200).
Gen. Laws Minn. 1891, c. 94 (Rev. St. 1894, § 3157).

In Anderson v. Manchester Fire Ins. Co. 59 Minn. 182, 63 N. W. 241, Gen. Laws 1889, c. 217 (Rev. St. 1894, § 3200) which provides for the preparation and adoption by the insurance commissioner of the "Minnesota Standard

Policy," was held unconstitutional as an attempted delegation of legislative powers to the insurance commissioner.

A new form is provided for by
Gen. Laws Minn. 1895, c. 175, § 53.

1 Duer, p. 61.

Such statutes have been in force in European countries for many years. Thus, it was provided by 35 Geo. III. c. 63, that every contract or agreement for any insurance liable to a duty by the terms of the act should be engrossed, printed, and written, and that the writing should be called a "policy of insurance." In France the Code requires that the contract shall be written, and specifies with minute particularity the facts and conditions which it must contain. It is said by Boulay du Patty (volume 3, c. 246) that, notwithstanding these provisions of the Code, an unwritten agreement will be executed by the courts; and, according to Valin (volume 2, c. 20) and Pothier (Traite du Contrait d'Assurance, note 96), the same construction was formerly given to similar provisions under the Ordinance of the Marine. Most of the foreign ordinances are imperative in requiring that the contract shall be in writing, and shall specify certain enumerated facts; and some of them prescribe the form of the policy or policies that can alone be used. 1 Duer, p. 62.

§ 6. ORAL CONTRACTS.

In the absence of an express statutory prohibition, it is very well settled that a parol contract of insurance, as well as a parol contract to insure, is valid and binding when all the elements of a contract are present.

Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060.

Stickley v. Insurance Co., 37 S. C. 56, 16 S. E. 280.

Baile v. Insurance Co., 73 Mo. 371.

Thompson v. Adams, 23 Q. B. Div. 361.

Relief Fire Ins. Co. v. Shaw, 94 U. S. 574.
Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318.
Ide v. Phoenix Ins. Co., 2 Biss. 333, Fed. Cas. No. 7,001.
Fish v. Cottenet, 44 N. Y. 538.
Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402.
Angell v. Hartford Fire Ins. Co., 59 N. Y. 171.
Heiman v. Phoenix Mut. Ins. Co., 17 Minn. 153 (Gil. 127).
Wiebeler v. Milwaukee M. Mut. Ins. Co., 30 Minn. 462, 16 N. W. 363.
Salisbury v. Hekla Fire Ins. Co., 32 Minn. 458, 21 N. W. 552.
Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Id., 38 Minn. 74, 35 N. W. 584.
1 Wood, § 4.
1 Phillips, c. 9.
1 Biddle, § 138.
1 Beach, § 498.

The following requisites must concur before there can be a valid parol contract of insurance:

1. The subject-matter to which the policy is to attach must exist.

See Union Ins. Co. v. American Fire Ins. Co., 107 Cal. 327, 40 Pac. 431.

2. The risk insured against.
3. The amount of indemnity must be definitely fixed.
4. The duration of the risk.
5. The premium or consideration to be paid must be agreed upon or paid, or exist as a valid and legal charge against the party insured where payment in advance is not a part of the conditions upon which the policy shall attach.

1 Wood, § 5.
First Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153.

When a contract is closed by parol or binding slip, and the issuance of a policy is contemplated, the contract is subject to the terms of the usual policy.

Lipman v. Niagara Fire Ins. Co., 121 N. Y. 456, 24 N. E. 699.

Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373.

Karelsen v. Sun Fire Office, 122 N. Y. 549, 25 N. E. 921.

Green v. Liverpool & London & Globe Ins. Co. (Iowa) 60 N. W. 189.

In Insurance Co. v. Colt, 20 Wall. 560, it was held that a provision in the charter of the company that the contract should be in writing and under the seal of the corporation did not prevent the making of a valid oral contract to make and deliver a policy. And in Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. 318, it was held that a statute which required all policies to be signed by the president and countersigned by the secretary of the company did not prevent the making of a valid oral contract to insure.

To the same general effect, see:

Emery v. Insurance Co., 138 Mass. 398.

Walker v. Insurance Co., 56 Me. 371.

City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276.

§ 7. THE STATUTE OF FRAUDS.

The contract of insurance is not within that provision of the statute of frauds which requires "every agreement that by its terms is not to be performed within one year from the making thereof" to be in writing. In a contract of insurance the thing to be done depends on a contingency that may happen within a year.

Wiebeler v. Milwaukee M. Mut. Ins. Co., 30 Minn. 464, 16 N. W. 363.

Fish v. Cottenet, 44 N. Y. 538.

Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601.

Walker v. Metropolitan Ins. Co., 56 Me. 371.
Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448.
Phoenix Ins. Co. v. Spiers, 87 Ky. 286, 8 S. W. 453.
Alabama G. L. Ins. Co. v. Mayes, 61 Ala. 163.
Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318.
1 Biddle, § 138.
1 May, § 12A.
A contract of reinsurance is not within the statute.
Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601.
Contra:
Egan v. Fireman's Ins. Co., 27 La. Ann. 368.

An agreement to renew a policy from year to year is not within the statute of frauds.

Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305.

§ 8. VARIOUS KINDS OF POLICIES.

(a) VALUED AND OPEN.

A valued policy is one in which the amount of indemnity to be paid in the event of loss is fixed by the terms of the contract. An open policy is one in which the sum to be paid is not fixed, but is left to be determined by the parties in the event of loss. This determination is called the adjustment of the loss.

Under a valued policy, the actual value of the subject-matter need not be proved, as the sum agreed upon is taken as conclusive except in case of fraud or such excessive valuation as raises a presumption of fraud.

Alsop v. Commercial Ins. Co., 1 Sumn. 451, Fed. Cas. No. 262.
Cushman v. Northwestern Ins. Co., 34 Me. 487.
Borden v. Hingham Ins. Co., 18 Pick. (Mass.) 523.

Overvaluation must be "grossly enormous," to admit of dispute.

Miner v. Taggert, 3 Bin. (Pa.) 205.

It is sometimes difficult to determine whether a policy is valued or open.

Harris v. Eagle Fire Ins. Co., 5 Johns. (N. Y.) 368.
Phoenix Ins. Co. v. McLoon, 100 Mass. 475.

Some policies may be open as to one article, and valued as to another.

Post v. Hampshire Ins. Co., 12 Metc. (Mass.) 555.

(b) WAGER AND INTEREST.

A wager policy is one in which it appears by its terms that the insured has no interest in the subject-matter of the insurance. It is a mere bet. Such policies are now generally prohibited, and it is a disputed question whether or not a wager policy was valid at common law.

Alsop v. Commercial Ins. Co., 1 Sumn. 467, Fed. Cas. No. 262.

An interest policy is one in which it appears by its terms that the insured has an interest in the thing insured. He has something at stake, and, in the event of loss, something for which to be indemnified.

Williams v. Smith, 2 Caines (N. Y.) 13.
1 May, § 33.

(c) TIME AND VOYAGE.

A time policy is one in which the duration of the risk is fixed for a definite period of time. A voyage policy is one in which the duration of the risk is fixed by geographical limits. It is applicable to transportation by land or water.

Boehm v. Combe, 2 Maule & S. 172.

C.

Consummation of the Contract.

§ 9. WHEN CONTRACT CONSUMMATED.

A contract of insurance is completed when the terms thereof have been agreed upon between the parties. The reciprocal rights and obligations of the parties date from that time, without reference to the execution and delivery of the policy, unless these elements are embraced within the terms agreed upon, or the statute makes such delivery a condition precedent to its validity.

(a) IN GENERAL.

If there has been no payment of the premium and no delivery of the policy, the contract is prima facie incomplete, and he who claims under such a policy must show that it was the intention of the parties that it should be operative, notwithstanding these facts.

Faunce v. State Mut. Life Assur. Co., 101 Mass. 279.
Heiman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127).
Lightbody v. Insurance Co., 23 Wend. (N. Y.) 18.
Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 Utah, 41, 29 Pac. 826.

(b) NEGOTIATIONS BY CORRESPONDENCE.

Contracts of insurance are very commonly made by correspondence. The making of contracts in this manner is governed by the following rules:

1. When an offer has been made, and a letter of acceptance mailed within a reasonable time, the contract is complete.

2. The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before the acceptance is mailed.

3. The acceptance, in order to complete the contract, must be unconditional, and in accordance with the terms of the offer.

Adams v. Lindsell, 1 Barn. & Ald. 681.
Mactier v. Frith, 6 Wend. (N. Y.) 103.
Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390.
McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278.
Thayer v. Middlesex Ins. Co., 10 Pick. (Mass.) 326.
West. Jur. May, 1882, p. 339.
Bish. Cont. § 328.

The acceptance need not be by letter, but may be by any other method which amounts to a manifestation of a formal determination to accept, communicated or put in a way to be communicated to the party making the offer. A mere mental assent not communicated is not sufficient, nor is mere silence or neglect to respond, although the applicant has done all that is required of him. Changes or modifications made by either party after the terms of the contract are agreed upon must be accepted by the other party. Thus, if an agent agrees with the applicant upon terms of insurance, subject to the approval of the principal, and the principal returns the policy with certain modifications, the contract is not consummated till the new terms are accepted by the applicant.

Myers v. Keystone Ins. Co., 27 Pa. St. 268.

Sandford v. Trust Fire Ins. Co., 11 Paige (N. Y.) 547.
Wallingford v. Home Mut. Fire Ins. Co., 30 Mo. 46.

(c) DELIVERY OF THE POLICY.

It is ordinarily necessary that the policy should be delivered before the contract is binding upon the insurance company, but this does not require an actual manual delivery. Thus, an agreement upon all the terms, and the issue and transmission to the agent of the insurer for delivery without conditions, are equivalent to a delivery to the insured.

New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536.
Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312.
Insurance Co. v. Colt, 20 Wall. (U. S.) 560.
1 May, § 55.

But a delivery of the policy to the agent to be delivered to the insured upon payment of the premium is not a delivery to the insured. In Wainer v. Insurance Co., 153 Mass. 335, 26 N. E. 877, it was said: "Previous to the time of receiving the policy he [the insured] had paid no money, and signed no obligation, other than the application. It is clear, upon this statement, that there was no oral contract of insurance, and no contract contemplated, except upon the delivery of the policy, and the payment of the premiums. The agent was the agent of the defendant to receive the premiums and deliver the policy for it, and there is no evidence that he had authority to deliver the policy except upon payment of the premiums. There was no contract of insurance until the payment of the premiums, and delivery of the policy."

Delivery may be by any act intended to signify that the instrument shall have present validity.

Commercial Ins. Co. v. Hallock, 27 N. J. Law, 645.
Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.
Lightbody v. Insurance Co., 23 Wend. (N. Y.) 18.
Heiman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127).

Delivery obtained by misrepresentation will not give effect to the contract. The possession of the policy by the insured makes a prima facie case, which may be overturned by evidence that it was never actually delivered, or that it was obtained by fraud.

McKay v. Mutual Ins. Co., 103 Mass. 78.
Collins v. Insurance Co. of Philadelphia, 7 Phila. (Pa.) 201.
Faunce v. State Mut. Life Assur. Co., 101 Mass. 279.

A policy of insurance may be conditionally delivered, and the performance of the conditions is a condition precedent to the existence of the contract of insurance. The rule that a deed cannot be delivered conditionally has no application to an insurance policy.

Harnickell v. Insurance Co., 111 N. Y. 390, 18 N. E. 632.
Benton v. Martin, 52 N. Y. 570.

(d) COUNTERSIGNING THE POLICY.

When a policy provides that it shall not be binding until countersigned by a certain agent, the policy is invalid without such signature.

Badger v. American Popular Ins. Co., 103 Mass. 244.
Peoria Ins. Co. v. Walser, 22 Ind. 73.
Hardie v. St. Louis Mut. Life Ins. Co., 26 La. Ann. 242.
Noyes v. Phoenix Life Ins. Co., 1 Mo. App. 584.
Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400.
Contra:
Norton v. Phoenix Mut. Life Ins. Co., 36 Conn. 503.
In Myers v. Keystone Mut. Life Ins. Co., 27 Pa. St. 268, it was said that such a provision in the policy could be waived by the agent.
1 May, § 65.
1 Biddle, § 134.

(e) SPECIFIC PERFORMANCE OF AGREEMENT TO INSURE.

There is a difference between a contract of insurance and an agreement to insure. The latter may exist prior to the drawing of and delivery of the policy, and contemplate the delivery of the policy, as the consummation of the contract. It is sometimes difficult to determine at what point in the negotiations for insurance the insurer becomes liable for the loss where no policy has in fact been issued. The courts will usually compel the issue of a policy and the indemnification of the insured when the negotiation has reached a point where nothing remained for either party but to execute what had been agreed upon.

This was done in Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, where it appeared that a voyage was undertaken with the understanding that the risk had been accepted, and that a policy would be issued, and that the premium would be paid when demanded. "It is well established," said the court, "that upon clear proof that a contract had been made to do something, the consummation of which involves the execution of a written instrument, which is afterwards refused to be made, a court of equity will coerce the execution of the written contract which the parol evidence has shown was agreed upon."

Wooddy v. Insurance Co., 31 Grat. 362.
Gerrish v. Insurance Co., 55 N. H. 355.
Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166.
Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441.
As to the right to recover the amount of the damages without first requiring the issuance of a policy, see Rockwell v. Insurance Co., 4 Abb. Prac. 179.

D.

The Nature of the Contract.

§ 10. IN GENERAL.

"The contract of insurance had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its wants, and to cover its ever-widening fields; and under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage."

1 May, § 2.

§ 11. THE PRINCIPLE OF INDEMNITY.

Indemnity is the fundamental principle which lies at the basis of every contract of insurance with respect to property.

The general principle stated above excludes insurance on lives, which, in this respect, is governed by other principles.

The contract of insurance protects the interest of the insured, and is hence one of indemnity. But "it is not, strictly speaking, intended necessarily to be an absolute indemnification of the insured, nor to place him in precisely the same position he occupied before the loss. But the indemnity intended is simply the repayment to the insured of so much of the insured subject-matter as is lost at an estimated value, or at its then market value."

1 Biddle, § 2.
1 Phillips, § 3.
Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 208.
Wilson v. Hill, 3 Metc. (Mass.) 66.

The principle is, in practice, subject to certain other limitations.

Irving v. Manning, 6 C. B. 391.
Richards, § 20.

Certain states have enacted laws to the effect that the value stated in the policy shall, in the absence of fraud, be taken as the value of the property.

See Ampleman v. Insurance Co., 35 Mo. App. 308.

(a) INDEMNITY AGAINST NEGLIGENCE.

A contract of insurance covers a loss occasioned by the negligence of the insured, unless the negligence is so gross as to show an evil intent.

Richards, § 22.
Matthews v. Howard Ins. Co., 11 N. Y. 21.
Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534.
Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934.

(b) THE DOCTRINE OF SUBROGATION.

"In fire insurance as in marine insurance, the insurer, upon paying to the insured the amount of a loss of the property insured, is doubtless subrogated in corresponding amount to the insured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the insured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the insured. In a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the insured, and, if the insured has no rights of action, none passes to the insurer."

St. Louis, etc., Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 235, 11 Sup. Ct. 554.

Phenix Ins. Co. v. Pennsylvania Co., 134 Ind. 215, 33 N. E. 970.

Deming v. Storage Co., 90 Tenn. 306, 17 S. W. 89.

Castellain v. Preston, 11 Q. B. Div. 380.

Sheld. Subr. c. 7.

When the loss is occasioned by the negligence of one other than the insured, the wrongdoer must not be released without the consent of the insurer.

Newcomb v. Insurance Co., 22 Ohio St. 382.

A release without the consent of the insurer will bar the right of action upon the policy.

Dilling v. Draemel, 9 N. Y. Supp. 497.

Hall v. Railroad Co., 13 Wall. 367.

Hart v. Railroad Corp., 13 Metc. (Mass.) 99.

So, if the wrongdoer pays the insured with the knowledge of the fact that the insurer has made a payment under the policy, it is a fraud upon the insurer, and will not protect the wrongdoer.

Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399.
Clark v. Wilson, 103 Mass. 223.

(c) LIFE INSURANCE NOT A CONTRACT OF INDEMNITY.

The contract of life insurance is a mere contract to pay a certain sum of money on the death of a certain person. It is not a contract of indemnity.

It may now be considered as settled that the contract of life insurance is not one of indemnity. In the early case of Godsall v. Boldero, 9 East, 72, Lord Ellenborough held to the contrary, but, after being generally condemned, that case was overruled by Dalby v. India & L. Life Assur. Co. (1854) 15 C. B. 365. Baron Parke said, with reference to Godsall v. Boldero, that: "It is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was in point of law founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought; and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burrows, 1198. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an 'assurance for life.' It really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the statute 14 Geo. III. c. 48."

Cousins v. Nantes, 3 Taunt. 513.
Craufurd v. Hunter, 8 Term R. 13, 4 Rev. Reports, 576.

Lucena v. Craufurd, 3 Bos. & P. 75, 2 Bos. & P. N. R. 269, 6 Rev. Reports, 623.

Law v. London, etc., Co., 1 Kay & J. 223.

Warnock v. Davis, 104 U. S. 775.

Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.

1 Biddle, § 185.

1 May, § 8.

See "Insurable Interest," infra.

May (volume 1, §§ 116, 117) contends that the contract of life insurance is one of indemnity, and, after reviewing the English and American cases, says that: "The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is a contract of indemnity; but that that form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that with the possibility of something more. It can never, therefore, properly be entered into except for the purpose of security or indemnity, though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it if entered into in conformity with the principles which underlie it; but, so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance, and ingrafts upon that contract a purpose foreign to its nature."

§ 12. A CONDITIONAL CONTRACT.

The contract is also conditional upon the risk attaching. "Where the risk has not been run," said Lord Mansfield, "whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." Thus, in marine insurance, the premium must be refunded if the ship is never dispatched

on the voyage. The risks "are the occasion of the contract being made, and, without exposure to them, it never applies."

1 Arnould, p. 10.

Tyrie v. Fletcher, Cowp. 666.

§ 13. A PERSONAL CONTRACT.

The contract of insurance protects the person, and not the thing in which he is interested. It is strictly a contract with a person to indemnify him against loss if his interest suffers a diminution in value from certain specified causes.

1 May, § 6.

Rayner v. Preston, 18 Ch. Div. 1.

In Sadlers Co. v. Badcock, 2 Atk. 554, Lord Hardwicke said: "To whom, or for what loss, are the insurers to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called 'insuring the thing,' for there is no possibility of doing it. It therefore must mean insuring the person from damage."

Being a personal contract, it does not run with the land.

Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505.

§ 14. AN ALEATORY CONTRACT.

The French writers use the word "aleatory" (from alea, a die) to describe one of the characteristics of the contract of insurance. In an ordinary contract, the thing given or done by one party is considered the equivalent of the thing given or act done by the other. But in the contract of insurance each party assumes a certain risk. If no loss happens, the insurer gains the amount of the premium. If a loss occurs, the insured receives a sum much larger than the premium.

Defrénois, Assurance sur la Vie, c. 3, § 79.

PART III.

THE SUBJECT-MATTER OF INSURANCE, AND THE RISKS WHICH MAY BE INSURED AGAINST.

§ 15. GENERAL RULE.

Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against.

Whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or that he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance, subject to the limitation that—

(a) LIMITATIONS.

Whatever the law discourages and disapproves of, whether by special statute or on general principles enforced by the common law, in the interest of good morals, good order, and general public policy, will not be encouraged by insurance.

1 May, § 71.
1 Duer, § 3 et seq.
Barber, art. 2, p. 27.
1 Pardessus, Cours de Droit Com. § 589.

Properly, the subject-matter of the insurance is the interest of the insured, and not the life or property out of which

the interest arises. The contract attaches to the interest, and not the property. The interest must be in a species of property which the law permits one to own, or in a business or enterprise which is lawful and consistent with the policy of the law. Thus, a valid contract cannot be made for the protection of an interest in a lottery or other gambling enterprise.

(b) INTEREST IN AN ILLEGAL BUSINESS.

Policies insuring an illegal traffic are void. Thus, a contract insuring a person engaged in selling liquor against fine or forfeiture would be invalid. But a contract of insurance upon a stock of intoxicating liquors illegally kept for sale against loss by fire has been held valid. "By insuring his property, the insurance company has no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters are not affected by an illegal transaction with which they may be remotely connected."

Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.
People's Ins. Co. v. Spencer, 53 Pa. St. 353.
Black, Intox. Liq. § 247.
1 Biddle, § 483.
1 May, § 246.

This rule was applied where the liquor was kept by a druggist as a part of his stock, and it was left for the jury to say whether the insurance was collateral to or in aid of the violation of law.

Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418.

In Massachusetts an insurance upon liquors illegally kept for sale is void.

Kelly v. Worcester Ins. Co., 97 Mass. 284.
Johnson v. Union Ins. Co., 127 Mass. 557, note.

Lawrence v. National Ins. Co., 127 Mass. 557.

Sales during brief expiration of license will not invalidate a policy. Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. 737.

The risks which may be insured against are innumerable, and include such as arise from fire, perils of the sea, accident to persons, death of persons or animals, fidelity of servants and employés, the solvency of a debtor, nonpayment of a note at maturity, loss of expected profits, injury to growing crops, the nonpayment of rents, the invalidity of titles, etc.

In Fidelity & Casualty Co. v. Eickhoff (Minn.) 65 N. W. 351, a contract guaranteeing the honesty of an employé was held not invalid as against public policy.

§ 16. THE DESCRIPTION OF THE PROPERTY SUBJECT TO RISK.

Where the description of the property is vague and ambiguous, it should be so construed as to give effect to the contract of insurance.

In Rickerson v. Insurance Co., 149 N. Y. 307, 43 N. E. 856, the court said:

"The application for insurance was very brief, consisting mainly of the names of persons desiring insurance, and a description of the property to be insured, as '160 Mott,' occupied for 'stores and dwellings.' The company consulted its insurance map before issuing the policy, and thus learned that there were two buildings upon the property, and the general location of each. It also learned the same facts from the clerk who delivered the application. The policy describes the property insured as 'the brick building and additions, including gas, steam, and water pipes, yard fixtures, railings, stoops and sidewalks in front of, and all fixtures contained in or attached thereto, or under sidewalk thereof, situate No. 160 Mott street, city of New York, occupied for stores and dwellings. Loss, if any, payable to

the Washington Life Insurance Company of New York, mortgagee.' In attempting to analyze this description, the first words that attract attention are, 'the brick building and additions.' The words 'brick building' apply with equal force to the structure in front and to that in the rear, while the word 'additions' is somewhat ambiguous; but the use of the plural form is not without significance, as it calls for more than one addition. 'Yard fixtures' apply to one building as well as to the other, while 'No. 160 Mott street' applies to both, and is the fundamental, if not the controlling, part of the description. 'Stoops' applies to neither building, unless the steps extending from the yard to the door, entering upon the main floor of the rear building, are covered by that word. 'Stores' apparently includes both buildings, if a saloon, or a manufactory with a salesroom, can either be properly called a store. As more than one store is called for by the plural form, unless both are included the meaning of the term is uncertain. 'Dwellings' applies to the front building only, as no part of the rear building was used as a habitation.

"We thus have a policy which, if it had been read before the fire, by a person standing upon the premises, and familiar with the buildings and the way they were occupied, would leave him in doubt whether the property insured embraced all the buildings, or only a part. For this ambiguity the company is responsible, because it prepared and executed the contract, and the language used is wholly its own. While it is the duty of the court to so construe the policy as, if possible, to give effect to every word used, if the sense in which they were used is uncertain, and the meaning is ambiguous, that meaning should be given which is most favorable to the insured. Herrman v. Insurance Co., 81 N. Y. 184, 188; Allen v. Insurance Co., 85 N. Y. 473, 477; Kratzenstein v. Assurance Co., 116 N. Y. 54, 59, 22 N. E. 221; Marvin v. Stone, 2 Cow. (N. Y.) 806; May, Ins. § 175."

PART IV.

INSURABLE INTEREST.

§ 17. DEFINITION OF INSURABLE INTEREST.

Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

Every person has an insurable interest in the life and health of himself, of any person on whom he depends wholly or in part for education or support, of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance, and of any person upon whose life any estate or interest vested in him depends.

§ 18. INSURABLE INTEREST IN PROPERTY.

(a) GENERAL STATEMENT.

In Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 12, 25 N. E. 1058, Mr. Justice Andrews said: "It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation which may be frustrated by the happening of some event is not an insurable interest."

Williams v. Roger Williams Ins. Co., 107 Mass. 377.
Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 12, 25 N. E. 1058.
Warnock v. Davis, 104 U. S. 775.
Lucena v. Craufurd, 3 Bos. & P. 75.
Loomis v. Eagle Ins. Co., 6 Gray (Mass.) 396.
1 Biddle, § 156.
Cooke, § 59.

Different parties may have an insurable interest in the same subject-matter.

Strong v. Manufacturers' Ins. Co., 10 Pick. 40.
Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25.
Sadlers Co. v. Badcock, 2 Atk. 554.
Harris v. York Mut. Ins. Co., 50 Pa. St. 341.
Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176.
New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.
Mitchell v. Home Ins. Co., 32 Iowa, 421.

Mayor, etc., of New York v. Brooklyn Fire Ins. Co., 41 Barb. (N. Y.) 231.

Warren v. Davenport Fire Ins. Co., 31 Iowa, 464.

Herkimer v. Rice, 27 N. Y. 163.

Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151.

Lazarus v. Commonwealth Ins. Co., 19 Pick. 81, 2 Am. Lead. Cas. (5th Ed.) 806.

Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229.

1 May, §§ 76–117.

1 Wood, c. 8.

1 Duer, p. 313.

1 Arnould, p. 229.

3 Kent, Comm. 262–278.

(b) ILLUSTRATIONS OF INSURABLE INTEREST IN PROPERTY.

A mortgagee in the property covered by his mortgage, Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495.

The holder of a mortgage as collateral security, Sussex Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541.

A mortgagor, after foreclosure, but before expiration of time for redemption, Essex Sav. Bank v. Meriden Fire Ins. Co., 57 Conn. 335, 17 Atl. 930, and 18 Atl. 324.

Successive mortgagees holding claims on the same property, Fox v. Phoenix Fire Ins. Co., 52 Me. 333.

Executors or administrators in the property of the testator, Phelps v. Gebhard Fire Ins. Co., 9 Bosw. (N. Y.) 404; Herkimer v. Rice, 27 N. Y. 163.

Sheriffs in property attached, White v. Madison, 26 N. Y. 117.

Landlord in goods of tenant, Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

A stockholder in the property of a corporation, see Warren v. Davenport Fire Ins. Co., 31 Iowa, 464;

Seaman v. Enterprise Ins. Co., 18 Fed. 250; Riggs v. Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 466.

The sole owner of the stock of a corporation is not the sole and unconditional owner of the property of the corporation, within the meaning of an insurance contract. Syndicate Ins. Co. v. Bohn, 12 C. C. A. 531, 65 Fed. 165.

The holder of an equitable title, Coursin v. Pennsylvania Ins. Co., 46 Pa. St. 323; Fenn v. New Orleans Mut. Ins. Co., 53 Ga. 578; Cross v. National Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390.

A trustee, Dick v. Franklin Ins. Co., 81 Mo. 103.

A cestui que trust, Gordon v. Massachusetts Ins. Co., 2 Pick. 249.

A husband in his wife's property, Cohn v. Virginia Ins. Co., 3 Hughes, 272, Fed. Cas. No. 2,970.

A partner in the partnership property, Manhattan Ins. Co. v. Webster, 59 Pa. St. 227.

Common carrier, The Sidney, 23 Fed. 88; Savage v. Corn Exch. Ins. Co., 36 N. Y. 655.

Creditor in property of debtor, Foster v. Van Reed, 5 Hun (N. Y.) 321; Spare v. Home Mut. Ins. Co., 15 Fed. 707; Grevemeyer v. Southern Mut. Fire Ins. Co., 62 Pa. St. 340.

The owner of an interest in the profits of a voyage or enterprise, Sawyer v. Dodge Co. Mut. Ins. Co., 37 Wis. 503.

An interest in the freight of a vessel, McGaw v. Ocean Ins. Co., 23 Pick. 405.

The holder of a mechanic's lien, Longhurst v. Star Ins. Co., 19 Iowa, 364.

Railway companies in property along their line for the loss of which by fire communicated from engines they are made responsible, Eastern Ry. Co. v. Relief Ins. Co., 98 Mass. 425.

A party in possession under a defective title, Travis v. Continental Ins. Co., 32 Mo. App. 198.

In Creed v. Sun Fire Office, 101 Ala. 522, 14 South. 323, it was held that a simple contract creditor had an insurable interest in a building belonging to the estate of a deceased debtor, it appearing that the personal property was insufficient to pay the debts. The court said:

"The next proposition involves a question new in this state. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor, which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation, our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien either statutory or contract, without a jus in re or a jus in rem, owing to a mere personal claim against his debtor, has not an insurable interest in the property of his debtor. Such contracts are void, as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt, and which, if destroyed, will result in the loss of the debt. The real estate as well as personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor, the debt is no longer enforceable in personam. The proceedings to reach the property of the estate of the deceased debtor are in rem. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor, and wrongfully converts it, is answerable to the creditor. 3 Brick. Ala. Dig. p. 464, § 148; Id. p. 465, §§ 162, 163. The relation of creditor and debtor invests the creditor with an insurable interest in the life of his debtor, to the extent of his debt. Alexander v. Sanders, 93 Ala. 345, 9 South. 521; 11 Am. & Eng. Enc. Law, 319. It would seem, upon like principles, that, when the property becomes directly subject to proceedings in rem for the satisfaction of the debt, the creditor should become invested with an in-

surable interest in the property. Certainly, if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceeding in rem against a building belonging to the estate of his deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee, nor such lien as the statute may confer on an attaching or execution creditor; but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of Herkimer v. Rice, 27 N. Y. 163, the question arose as to whether an administrator of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, C. J., rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition that the creditors had such an interest, which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect could be done by the creditor for himself. Rohrbach v. Insurance Co., 62 N. Y. 47. Other reasons might be given, but we are of opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected, by proceedings in rem, to the payment of the debts. The recovery cannot exceed the amount of the insurable interest."

(c) TIME OF INTEREST.

It was formerly held that the interest must exist at the time the contract is made, and at the time of the loss.

Lynch v. Dalzell, 4 Brown, Parl. Cas. 431.
Sadlers Co. v. Badcock, 2 Atk. 554.

Fowler v. New York Indemnity Ins. Co., 26 N. Y. 422.
Folsom v. Merchants' Marine Ins. Co., 38 Me. 414.
"An interest must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime." Civ. Code Cal. § 2552.

But this rule no longer prevails unless invoked by the conditions of the policy. "The interest that shall entitle the insured to recover," says Arnould (volume 1, p. 59), "must be a subsisting interest during some period of the pendency of the risk, and at the time of the loss. Formerly the rule was so laid down as to extend also to the time of effecting the policy (Lucena v. Craufurd, 2 Bos. & P. [N. R.] 295, 6 Rev. Rep. 623); but it is now established that an insurable interest while the risk is still pending, and at the time of loss, is sufficient."

This statement is quoted with approval in Hooper v. Robinson, 98 U. S. 528, and by 1 Biddle, § 157.

In Omaha Fire Ins. Co. v. Dierks (Neb.; 1895) 61 N. W. 740, it was held that, where the insured incumbered his personal property contrary to the provisions of the policy, he was, nevertheless, entitled to recover if the lien had been removed at the time of the loss.

But see Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379.

(d) CONTINUITY OF INTEREST.

It has been held that the interest must be uninterrupted and continuous from the date of the contract to the time of the loss, and that if the insured at any time parts with his interest, although afterwards and before the loss he regains it, the policy will not attach.

Cockerill v. Cincinnati Ins. Co., 16 Ohio, 148.

But the rule is that, in the absence of a condition against alienation, the contract is merely suspended during the time

the interest is gone, and revives to secure the new interest acquired before the loss.

Worthington v. Bearse, 12 Allen (Mass.) 382.
Power v. Ocean Ins. Co., 19 La. 21.
Civ. Code Cal. § 2553; Civ. Code N. Y. § 1373.
See Phoenix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616.
Valton v. National Loan Fund Assur. Co., 22 Barb. 9.
St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.
Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.
Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576.

If the policy contains a provision that any alienation of the property or change of title shall work a forfeiture, a violation of the condition will terminate the policy.

Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.

The condition against alienation is generally held to refer only to an entire and absolute divestiture of interest, and must be strictly construed.

Jackson v. Massachusetts Ins. Co., 23 Pick. 418.
Cowan v. Iowa State Ins. Co., 40 Iowa, 551.
Kitts v. Massasoit Ins. Co., 56 Barb. 177.
Dolliver v. St. Joseph F. & M. Ins. Co., 9 Ins. Law J. 293, and note on "Alienation."

§ 19. INSURABLE INTEREST IN LIVES.

(a) AT COMMON LAW.

At common law, a contract of life insurance was a wager, and hence required no interest. Such contracts were sustained by the courts before the enactment of Stat. 14 Geo. III. c. 48, which made an interest in the life essential. The common-law rule was declared in Dalby v. India & L. Life Assur. Co. (1854) 15 C. B. 365, and in Trenton Mutual L. & F. Ins. Co. v. Johnson, 24 N. J. Law, 576. By some writers and courts it was held that, while the contract is not one

of indemnity, an interest was always required, and that the statute of 14 Geo. III. was simply declaratory of the common law.

Bunyon, p. 6.
Cooke, § 58.
1 Biddle, § 184.
Emerigon (Meredith) p. 157.
Roebuck v. Hammerton, Cowp. 737.
Mowry v. Home Life Ins. Co., 9 R. I. 354.
Arnould (page 123) says: "Whether such policies were legal at common-law is now a question of no moment. It will be sufficient to say that long prior to the 19 Geo. II. c. 37, and contrary to the older determinations, they had been held by our courts to be valid contracts of insurance."
Assevedo v. Cambridge (1710) 10 Mod. 77.
De Paba v. Ludlow (1721) 1 Comyn, 361.
Dean v. Dicker (1746) 2 Strange, 1250.

In Hurd v. Doty, 86 Wis. 1, 56 N. W. 371, the court said:

"The findings of the court are fully sustained by the evidence. It is contended that the plaintiff has no insurable interest in the life of Fannie E. Nash. The learned counsel for the defendant cites numerous cases to the effect that one procuring insurance upon the life of another cannot recover the policy without proving an interest in the life of the assured. The theory upon which such decisions are based is that such a contract is nothing more than a wagering or gambling contract, and hence is against public policy, and is therefore void. It is very questionable whether such a policy was void by the common law of England prior to 1774. Lucena v. Craufurd, 3 Bos. & P. 75; Cousins v. Nantes, 3 Taunt. 513; Dalby v. Assurance Co., 15 C. B. 365. In the year named, the statute of 14 Geo. III. c. 48, was enacted, and is to the effect that thereafter 'No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any

other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gambling or wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.' 12 Eng. St. at Large, 90. The preamble of the act speaks of it as a remedy for an existing mischief. The act is generally termed, and does not purport to extend to any English colony, and it was held as late as 1832 that it did not extend to Ireland. Shannon v. Nugent, Hayes, 536; Insurance Co. v. Magee, Cooke & A. 182. In Spaulding v. Railway Co., 30 Wis. 117, 118, it was held, in an opinion by Dixon, C. J., that the statute of 14 Geo. III. c. 48, passed the same year, and about the same time, was never in force in Wisconsin, for the reason that its passage was so near the Revolution that it was never received and acted upon as a part of the common law in this country. But cases are cited by counsel, from courts of high authority, holding that the act of 14 Geo. III. c. 48, was merely confirmatory of the common law as it previously existed in England, while others assume that the common law was and is as therein embodied, without making any reference to the act. So some of the cases cited seem to have gone so far as to hold that if a creditor, having an insurable interest in the life of his debtor, obtains an insurance thereon in his own favor, and the debt is subsequently paid or extinguished during the life of the assured, or the policy is assigned to one having no insurable interest in the debtor's life, such policy cannot be enforced against the company. But this court has held that a policy of life insurance, obtained in good faith by a person having an insurable interest in the life assured, may be assigned to any person, with the consent of the company; that an assignment by a son, of an insurance policy on his own life, as security for a debt due from his father to the assignee, is valid. Bursinger v. Bank, 67 Wis. 75, 30 N. W. 290, and cases there cited by Mr. Justice Taylor.

"The same principles seem to be sanctioned in England, notwithstanding the statute quoted. It has there been held that, 'where a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it, by reason of the provision of 14 Geo. III. c. 48.' Dalby v. Assurance Co., 15 C. B. 365. This is put upon the theory that a contract of life insurance is not a contract of indemnity, but is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of certain annual premiums during his life. That case has been repeatedly cited with apparent approval by the English courts. Knox v. Turner, L. R. 9 Eq. 163; Rankin v. Potter, L. R. 6 H. L. 119; Bradburn v. Railroad Co., L. R. 10 Exch. 2; Burnand v. Rodocanachi, 7 App. Cas. 340. See, also, Morrell v. Insurance Co., 10 Cush. (Mass.) 282. But in the case at bar the plaintiff did not, as a creditor or otherwise, procure the insurance in question. On the contrary, the same was procured by Fannie E. Nash upon her own life, payable as indicated. The contention is that the company had no lawful authority to insure her life, directly or indirectly, for the benefit of the plaintiff, and hence that, in so far as she attempted to do so in the name of the defendant as trustee, the policy is pro tanto void. The statute authorized the formation of a corporation in the manner therein provided, to promote the several objects therein named, and, among others, 'for the mutual support of the members, their families, or kindred in case of sickness, misfortune, poverty, or death, or for any lawful business or purpose whatever, except' as therein specifically named. Rev. St. Wis. § 1771. The by-laws of the association provided that 'the object and business of the association shall be to furnish pecuniary relief to its members when disabled by sickness or accident, and to provide a mortuary benefit for the burial of its members, and relief of their families or kindred.' It is undisputed that Miss Nash was an invalid for six or seven years immediately prior to her death; that

during that time she lived and made her home, for the most of the time, with the plaintiff, and as a member of his family; that, while she was there, one of her limbs was amputated, and she was much of the time under the care of a physician; that she was a blood relative of the plaintiff's wife and their son, as mentioned in the foregoing statement; that from January 27, 1885, to December 17, 1891, her life was insured in this company; that during the fore part of this time, and for about four years, one-fourth of the amount of the insurance was expressly payable to the plaintiff; that during the most of the balance of this time about one-half of the amount was expressly payable to the plaintiff; that the last change in the form of the policy, making $3,900 of the amount payable to the defendant upon her agreement to receive and hold the same in trust, and from the amount so received pay over to the plaintiff $1,950, as found by the court, was merely to obviate a supposed legal objection to the form of the policy. In all these transactions the manifest purpose of Miss Nash was to secure for herself a home, maintenance, and support in the family of the plaintiff, and to remunerate him for the same by way of such insurance. It was certainly a very appropriate way, if not the only way, in which she, as a member of the order, could, in the language of the statute, 'receive the mutual support of the [other] members,' or could be furnished with pecuniary relief by the other members. Neither the statute nor the by-laws limit the beneficiaries to blood relatives. In Barnes v. Insurance Co. [1892] 1 Q. B. 864, an action was brought to recover the amount of a policy of insurance upon the life of a child 10 years old, a stepsister of the plaintiff, and it appeared that the plaintiff had promised the mother of the child to take care of and help maintain it; and it was 'held that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objections as to the amount in fact expended by her, to recover the amount of the policy.' Lord Coleridge, C. J., in effect, said that it appeared that the plaintiff had undertaken the burden of keeping and maintaining the child; that 'that

was a duty not cast upon her by law, but was wholly self-imposed. * * * In that state of circumstances, it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected. That is perfectly clear upon the authorities. Is there such a pecuniary insurable interest there? I think there is. * * * I cannot find that anything has been said in any case to the contrary effect.' And, in one of the cases cited by counsel for the defendant, Mr. Justice Field, speaking for the whole court, said: 'It is not very easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. * * * But, in all cases, there must be a reasonable ground, founded upon the relation of the parties to each other, either pecuniary, or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured.' Warnock v. Davis, 104 U. S. 779."

(b) MODERN RULE.

It is now the rule that an interest is necessary to support a life policy.

Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 12 Sup. Ct. 745.

Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862.

United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439.

Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S. W. 495.

Amick v. Butler, 111 Ind. 578, 12 N. E. 518.
Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35.
Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175.
1 Biddle, § 185.
1 May, § 75B.
Cooke, § 8.
2 Beach, § 850.

(c) INTEREST OF BENEFICIARY DESIGNATED BY INSURED.

The reason ordinarily given for requiring an interest in a life notwithstanding the fact that the contract is not one of indemnity is that it is contrary to public policy "that one person should have an expectation of a benefit conditioned on the happening of the death of another; that the temptation to destroy the life of such other, in order to obtain such benefit, must be balanced, or counteracted, as it were, by the existence of an insurable interest in that life."

Cooke, § 58.

But this reason is assumed to have no application where the contract is made by the insured; and accordingly the rule is that "one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured."

Olmstead v. Keyes, 85 N. Y. 593.
Mallory v. Travellers' Ins. Co., 47 N. Y. 52.
Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746.
Vivar v. Knights of Pythias, 52 N. J. Law, 455, 20 Atl. 36.
Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 613.
Scott v. Dickson, 108 Pa. St. 6.
Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331.

This is true although the beneficiary so designated by the insured pays the premium.

Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 613.
Langdon v. Union Mut. Life Ins. Co., 14 Fed. 272.

(d) THE INTEREST OF ASSIGNEE.

The rule stated in the preceding section has not been extended to the case of the assignee of a policy, and the prevailing rule is that an assignment of a policy to one having no insurable interest in the life insured is invalid, as contrary to public policy.[1] There are many cases, however, holding the contrary,[2] and Mr. Cooke says[3] "that the doctrine of the necessity of an insurable interest to support an assignment has been so frequently dissented from that it can scarcely be said to be sustained by the weight of authority."

[1] Warnock v. Davis, 104 U. S. 775.
Michigan Mut. Ben. Ass'n v. Rolfe, 76 Mich. 146, 42 N. W. 1094.
Roller v. Moore's Adm'r, 86 Va. 512, 10 S. E. 241, and cases there cited.
Price v. Supreme Lodge, 68 Tex. 361, 4 S. W. 633.
Mayher v. Insurance Co., 87 Tex. 169, 27 S. W. 124.
In Valton v. National Fund Life Assur. Co., 20 N. Y. 32, it was said that a person has an insurable interest in his own life, and no use made by him of the policy after the contract is completed will convert it into a wager policy.

[2] St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.
Olmstead v. Keyes, 85 N. Y. 593.
Eckel v. Renner, 41 Ohio St. 232.
Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657.
Rittler v. Smith, 70 Md. 261, 16 Atl. 890.
Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290; Clark v. Allen, 11 R. I. 439.
Richards, § 29.
Bliss, § 30.

[3] Cooke, § 73.

In Carpenter v. Insurance Co., 161 Pa. St. 9, 28 Atl. 943, it was held that the assumption of parental relations by a man towards a young girl, although without any legal obligation, created an insurable interest in the life of the man. It appeared that one Tyrell, a man about 60 years of age, had living in his family, as a domestic, a poor girl named Adaline Carpenter. "So far as appears from the evidence, prompted solely by benevolent and kindly disposition, this old man befriended this girl, sent her to school, and paid her expenses. In return, she, at times, for small wages, performed some services for him, such as keeping his books and copying his letters. He was a designer and builder of coal breakers, and seems to have had considerable business. On the 10th of December, 1892, he took out a policy of insurance on his life, in the sum of $2,000, payable to himself, in the defendant company. He paid the first annual premium, $104.84. Thirteen days thereafter, on the 23d of the same month, he assigned the policy, in writing, to Adaline Carpenter, sealed it in a package, and delivered it to her, with the injunction not to open it until after his death. Notice of the assignment, as provided by the company, was duly given the company; and, without objection, acknowledgment of the notice was made by indorsement on the duplicate. On April 1, 1893, Tyrell died. Adaline Carpenter inspected the package delivered to her, found in it the policy regularly assigned to her, and made proper proof of the death of the assured, and demand for the payment. The company, on the ground that the policy was a wagering contract, refused payment. Thereupon this suit was brought, and the learned judge of the court below, holding that, so far as concerned the plaintiff, the contract was a wagering contract, and therefore void, nonsuited her; and from that judgment we have this appeal.

"The judgment of the court below is based on Gilbert v. Moose's Adm'rs, 104 Pa. St. 74; Meily v. Hershberger, 16 Wkly. Notes Cas. 186; Downey v. Hoffer, 110 Pa. St. 109, 20 Atl. 655,—and that line of cases which hold that the absolute assignment of a policy to one having no interest

in the life of the assured, the assignment parting with all control over the policy, renders it a wagering contract, as to such assignee, and he cannot recover thereon. It seems to us the learned judge's conclusion is not drawn from all the material facts, but only from a part of them. At the trial, counsel on both sides admitted the following facts, which were put upon the record: 'Alanson B. Tyrell, after he had made the assignment of the policy in question to the plaintiff, placed the policy and the assignment and the receipt in an envelope, and sealed it, and inclosed it in a package, and delivered it to the plaintiff, and it has remained in her possession ever since; and further that, at the time the papers in question were delivered to the plaintiff, she was not a creditor of the insured, nor a relative, nor connected by ties of blood or marriage, but only a friend of the assured.' The facts, as contained in this admission, were assumed to be all of the material facts bearing on the issue. From them it was inferred that the plaintiff had no insurable interest in the life of Tyrell; and as he had, by the assignment and delivery of the policy, relinquished control over it, it was, under the authority of the line of cases already noticed, held to be a wagering contract. But do all the facts of which there is evidence, when taken together, warrant the conclusion that this plaintiff had no insurable interest in the life of Tyrell? If Tyrell, when she was young, had taken this girl into his family, treated her as a member of it, reared and educated her; when she was of age, had assisted her in getting remunerative employment, had watched over her, and interested himself in her welfare,—it could have been truthfully said he stood in the place of a parent to her, not by virtue of the legal relation of a child born to him in wedlock, or by adoption under our statute, but by his voluntary assumption of the parental relation towards her, with her consent. Without any legal obligation other than a friend, he chose to assume all the burdens incident to this domestic relation of parent and child. * * * We think, having in view these facts, as well as those admitted of record, the plaintiff had an

insurable interest in the life of the deceased. It does not matter that this interest was one without legal obligation on the part of the insured. It was a relation in every other respect parental. Pecuniarly and otherwise, he assumed a parent's part towards her, and she was justified in expecting the continuance of it. The question in Gilbert v. Moose's Adm'rs, supra, was as stated by this court in these words: 'Can one having no interest in the life of the assured, and for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?' In Downey v. Hoffer, supra, this court assumed, with the court below, that the purchase by Downey was purely for a speculative purpose, and says, 'The mischief resulting from the sale of the policy for purposes of speculating on human life is so contrary to the policy of the law, and so in conflict with the just principles of life insurance, that it is unsafe to relax the rule that the holder of a policy must have some pecuniary interest in the life of the assured.' And so with all other cases cited by appellee where no recovery by the assignee of a policy was permitted. In each the holder of the policy was interested in the death, rather than in the life, of the assured, and the policy was speculative. In the case before us the plaintiff's interest was wholly in the life of the assured. From the facts, the benefit to her from his fatherly care and pecuniary aid would, in a very few years, have far more than equaled the two thousand dollar policy assigned to her. From the severance of this relation by death, she perhaps sustains a greater pecuniary loss than any of his children. There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest, present or prospective. Cooke, Life Ins. § 59. A moral obligation is sufficient to support it. Ferguson v. Insurance Co., 32 Hun (N. Y.) 306. A creditor has an insurable interest in the life of his debtor who has been discharged in bankruptcy. Says May on Insurance (section 107): 'The relationship seems to be of but little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doc-

trine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one, perhaps, of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance.' Here the plaintiff had nothing whatever to do with the procurement of the policy, or its assignment, paid no part of the premium, and, so far as appears, never expected to pay any, for she was ignorant of its existence during the lifetime of the insured. She had substantial grounds for expecting decided pecuniary advantage from his life. Why, then, should the contract be termed 'speculative'? Her expectancy, except in the one feature,—the absence of legal obligation to enforce it,—was as well founded as that of a wife or creditor. If a voluntary co-partnership gives to each partner an insurable interest in the lives of the others; if the relation of superintendent or manager of a business concern gives to his employer an insurable interest in the life of the superintendent or manager, as well settled,—then the voluntary relation here gave to this plaintiff an insurable interest in the life of one who, in all pecuniary respects, occupied towards her the place of a parent; and the court below ought not to have held otherwise."

(e) CONTINUANCE OF INTEREST IN LIFE.

In fire and marine insurance, the interest must exist when the contract is made, and at the time of the loss; but in life insurance it is sufficient if there is an insurable interest at the time the contract is made. Hence the contract may be enforced though the interest has entirely ceased at the time of the death of the insured.

Phoenix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616.
Mutual Ins. Co. v. Allen, 138 Mass. 24.
Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.
McKee v. Phoenix Ins. Co., 28 Mo. 383.
Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.

Scott v. Dickson, 108 Pa. St. 6.
Rittler v. Smith, 70 Md. 261, 16 Atl. 890.
Cooke, § 64.
1 May, §§ 100A, 108, 117. See § 17, c. supra.

"If obtained as security for a debt, it remains valid for the full amount after the debt is paid, so that the creditor may really be paid twice over,—once by his debtor, and once by the insurance company. Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282." Bliss, § 30. And it is of no importance, so far as the company is concerned, what the assignee paid as a consideration for the assignment.

But in Grand Lodge A. O. U. W. v. Child, 70 Mich. 173, 38 N. W. 1, it was held that whatever right a woman has to a fund to be derived from a benefit certificate issued upon the life of a man to whom she was engaged to be married ceased upon her marriage to another person.

(f) VALUE OF CREDITOR'S INTEREST.

The amount of the insurance which a creditor may lawfully take on the life of his debtor must bear some relation to the amount of the debt. If it is grossly disproportionate, the contract will be treated as a wager.

Cammack v. Lewis, 15 Wall. 643.
Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35.
Mowry v. Home Life Ins. Co., 9 R. I. 346.
Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.
Amick v. Butler, 111 Ind. 578, 12 N. E. 518.
Rittler v. Smith, 70 Md. 261, 16 Atl. 890.
Cooper v. Shaeffer (Pa. Sup.) 11 Atl. 548.
Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862.

(g) INTEREST FOUNDED ON RELATIONSHIP.

Some confusion has grown out of an attempt to found insurable interest on relationship without pecuniary interest. It is now settled:

1. Ties of affection or kinship do not of themselves constitute an insurable interest.

2. An element of dependency, coupled with the relationship, will furnish the basis for an insurable interest.

Richards, § 27.

(h) ILLUSTRATIONS OF INSURABLE INTEREST AND NO INTEREST IN LIVES.

Parent in life of child, Grattan v. National Life Ins. Co., 15 Hun (N. Y.) 74; Mitchell v. Union Life Ins. Co., 45 Me. 104.

Child in life of parent, Reserve Mut. Ins. Co. v. Kane, 81 Pa. St. 154; Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35; Loomis v. Eagle Ins. Co., 6 Gray, 396; Heinlein v. Insurance Co., 101 Mich. 250, 59 N. W. 615.

Sister in life of brother, Lord v. Dall, 12 Mass. 115; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 12 S. W. 621.

Upon the death of the insured the creditor to whom the policy has been assigned as security can collect the full amount of the debt, whether due or not at the time of the death of the insured.

Hale v. Investment Co. (Minn.) 68 N. W. 185.

Stepson in life of stepfather, United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439.

Contra:

Simcoke v. Grand Lodge, 84 Iowa, 383, 51 N. W. 8.

Uncle in life of nephew, Singleton v. St. Louis Mut. Life Ins. Co., 66 Mo. 63.

Partner in life of copartner, Valton v. National Fund Life Assur. Co., 20 N. Y. 32.

The relation of husband and wife, McKee v. Phoenix Ins. Co., 28 Mo. 383; Currier v. Continental Life Ins. Co., 57 Vt. 496; Watson v. Centennial Mut. Life Ass'n, 21 Fed. 698; Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338.

Creditor in life of debtor, Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Morrell v. Trenton Ins. Co., 10 Cush. 282; American Life & Health Ins. Co. v. Robertshaw, 26 Pa. St. 189; Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

Employer and employé, Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Hebdon v. West, 3 Best & S. 579.

Insurable interest of a trustee, Moore v. Woolsey, 28 Eng. Law & Eq. 248, s. c. 4 El. & Bl. 243.

"The interest which one has in his own life, being incapable of exact pecuniary estimate, may be valued at any amount which the parties agree upon; and so, generally, of all insurable interests which are founded on relationship."

Richards, § 27.

Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

A man may take a policy on his own life, and make it payable to one to whom he is engaged to be married, Lemon v. Insurance Co., 38 Conn. 298.

Chisholm v. Insurance Co., 52 Mo. 213.

Kinney v. Dodd, 41 Ill. App. 49.

In Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, it was held that a man's affianced wife is not, as a matter of law, "dependent upon him," within the meaning of the charter of a benevolent society. The court said: "When the statute under which a benevolent corporation is organized, and its charter adopted in pursuance of such statute, designate

certain classes of persons as those for whom a fund is to be accumulated, a person not belonging to either or any of such classes is not entitled to take the fund. The corporation has no authority to create a fund for other persons than the classes specified in the law, nor can a member direct the fund to be paid to a person outside of such classes. Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law of their right to, or interest in, the fund." Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Supreme Council v. Perry, 140 Mass. 580, 5 N. E. 634; Britton v. Supreme Council, 46 N. J. Eq. 102, 18 Atl. 675; Bac. Ben. Soc. § 245.

PART V.

THE CONSIDERATION OR PREMIUM.

§ 20. GENERALLY.

The premium paid is the consideration received by the insurers for the risk which they undertake. Ordinarily, therefore, and in the absence of a special stipulation to the contrary, the delivery of the policy, and consequent assumption of the risk, and the payment of the premium, are coincident. They are two acts on the part of the respective parties which perfect the contract and give it validity. (May, § 340.)

An essential element in the formation of the contract of insurance is the consideration, or, as it is usually called, the "premium." This may be cash or credit represented by a note or in some other manner. But it is not necessary that the consideration should be actually paid, unless such payment is especially made a condition precedent.

1 Biddle, § 198.

Dwelling-House Ins. Co. v. Hardie, 37 Kan. 674, 16 Pac. 92.

Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060.

Blanchard v. Waite, 28 Me. 58.

Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661.

Dailey v. Association, 102 Mich. 289, 57 N. W. 184.

In Fowler v. Insurance Co., 116 N. Y. 389, 22 N. E. 576, the court said: "A long line of authorities has settled the law to be that when it is expressly provided that the premium on a life insurance policy shall be paid on or before a certain day, and in default thereof the policy shall be void, the nonpayment of the premium upon the day named works a forfeiture."

Robertson v. Insurance Co., 88 N. Y. 541.
New York Life Ins. Co. v. Statham, 93 U. S. 24.
Bosworth v. Society, 75 Iowa, 582, 39 N. W. 903.
Ashbrook v. Insurance Co., 94 Mo. 72, 6 S. W. 462.

The fact that the insured was prevented from making the payment by an act of God will not relieve against a forfeiture thus provided for.

Wheeler v. Insurance Co., 82 N. Y. 543.
Dennis v. Association, 120 N. Y. 496, 24 N. E. 843.

In Wright v. Supreme Commandery, 87 Ga. 426, 13 S. E. 564, it was held that payment of an assessment might be made after the death of the insured, if within the time allowed by the by-laws for its payment. To the same effect is Bankers' & Merchants' Mut. Ben. Ass'n v. Stapp, 77 Tex. 517, 14 S. W. 168. If credit is given for premiums, payment may be made after the death of the insured.

Homer v. Insurance Co., 67 N. Y. 478.

§ 21. SPECIAL PROVISION IN POLICY.

But if the policy contains a provision that it shall not be binding until the premium is paid, notwithstanding the delivery of the policy, there can be no recovery, unless the premium is actually paid, or the provision is waived by the insurer.

Klein v. New York Ins. Co., 104 U. S. 88.
Schwartz v. Germania Life Ins. Co., 18 Minn. 448 (Gil. 404).

Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203, 10 N. W. 605.

Mattoon Manuf'g Co. v. Oshkosh Mut. Fire Ins. Co., 69 Wis. 564, 35 N. W. 12.

In Hoyt v. Mutual Benefit Ins. Co., 98 Mass. 539, it appeared that when the agent tendered the policy and demanded the premium he was referred to a third person, who would pay the premium. The agent promised to call on such person and collect the premium, but retained the policy, and never did so. It was held that there was no contract.

§ 22. MANNER OF PAYMENT.

A premium need not necessarily be paid in money, but an agent cannot, under his general authority, accept payment in any other manner.

Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545.

Hoffman v. John Hancock Mut. Life Ins. Co., 92 U. S. 161.

Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390.

National Ben. Ass'n v. Jackson, 114 Ill. 533, 2 N. E. 414.

Girard Life Insurance, Annuity & Trust Co. v. Mutual Life Ins. Co., 97 Pa. St. 15.

1 Biddle, § 201.

2 May, § 345b.

"A premium, as well as an assessment, is, in the absence of provision to the contrary, payable in cash. So well is this understood, that a local agent, at least, has no implied authority to receive payment otherwise than in cash. Raub v. N. Y. Co., 14 N. Y. St. Rep. 573. But it is obvious that by agreement the payment may be made otherwise, as by check (Kenyon v. Knights Templar Ass'n, 122 N. Y. 262, 25 N. E. 299), draft (Piedmont & A. Life Ins. Co. v. Ray, 50 Tex. 511), or charging in

account (Missouri Valley Ins. Co. v. Dunklee, 16 Kan. 158)."

Cooke, § 90.

§ 23. ACCEPTANCE OF NOTE FOR PREMIUM.

Where a promissory note is accepted by the insurer as payment of a premium, it has the same effect as though payment had been made in cash. The policy is not affected by the failure to pay the note at maturity.

Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543.

McAllister v. New England Ins. Co., 101 Mass. 558.

Pitt v. Berkshire Ins. Co., 100 Mass. 500.

Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275.

New York Life Ins. Co. v. McGowan, 18 Kan. 300.

National Ben. Ass'n v. Jackson, 114 Ill. 533, 2 N. E. 414.

Kansas Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275.

But when the note or the policy contains a provision that, if it is not paid at maturity, the policy shall be void, it is a written admission that the recital of payment in the policy is not to have the effect of an actual payment.

Kerns v. New Jersey Mut. Life Ins. Co., 86 Pa. St. 171.

Pitt v. Berkshire Life Ins. Co., 100 Mass. 500.

2 May, § 340.

Robinson v. Insurance Co., 76 Mich. 641, 43 N. W. 647.

§ 24. EXCUSES FOR NONPAYMENT.

The insurer is not bound to give notice of the day upon which a note will be due; and its failure to do so, though its usage has been to the contrary, will not excuse nonpayment.

Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252.

Smith v. National Life Ins. Co., 103 Pa. St. 177.

But there can be no forfeiture without notice when the insurer has informed the insured expressly that notice will be given.

Heinlein v. Insurance Co., 101 Mich. 250, 59 N. W. 615.

There may be excuses for nonpayment of the premium at the stipulated time.

See Cohn v. New York Mut. Life Ins. Co., 50 N. Y. 610.

Attorney General v. Guardian Mut. Life Ins. Co., 82 N. Y. 336.

Southern Life Ins. Co. v. McCain, 96 U. S. 84.

Seamans v. Northwestern Mut. Life Ins. Co., 3 Fed. 325.

People v. Empire Mutual Life Ins. Co., 92 N. Y. 105.

McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Nonpayment according to the terms of the policy is not excused by the fact that the insured was in such a condition, by reason of sickness or mental inability, that he was unable to attend to business.

Carpenter v. Centennial Mut. Life Ass'n, 68 Iowa, 453, 27 N. W. 456.

Klein v. New York Life Ins. Co., 104 U. S. 88.

Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543.

But in Dennis v. Association, 120 N. Y. 496, 24 N. E. 843, it was held that the failure to pay an assessment, by reason of a stroke of apoplexy, which caused unconsciousness which continued until death, did not work a forfeiture, when the certificate provided that it should be void for failure to pay assessments, but also provided that a member might be reinstated by paying arrearages, "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment)." What are "valid reasons" must be determined by the court, and not arbitrarily by the officers of the association.

§ 25. WAIVER.

Payment of the premium at the time agreed upon may be waived by the insurer after the policy takes effect, expressly or impliedly, by parol or in writing.

Miesell v. Globe Mut. Life Ins. Co., 76 N. Y. 115.
Smith v. St. Paul Fire & Marine Ins. Co., 3 Dak. 80, 13 N. W. 355.
Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314.

"The circumstances sufficient to produce a waiver are so infinite in number and variety that it is impracticable to lay down a more specific rule than that, as forfeitures are regarded as odious, a waiver will be found on slight evidence."

Cooke, § 99.
Lyon v. Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829.

Punctuality in the payment of the premiums is of the essence of the contract, but the insurer may, by its conduct, be estopped to avail itself of failure to pay premiums promptly. Such an estoppel arises where, by its conduct, the insurer has led the insured to believe that the premiums will be accepted after the appointed day.

Sweetser v. Association, 117 Ind. 97, 19 N. E. 722.

§ 25a. REINSTATEMENT.

A lapsed policy can only be reinstated by the actual payment and acceptance of the premium, or by a contract based upon a sufficient consideration. Thus, a promise made by an agent to receive the premium up to a certain day is a nudum pactum, and does not revive a lapsed policy.

Lantz v. Insurance Co., 139 Pa. St. 546, 21 Atl. 80.
Phœnix Ins. Co. v. Tomlinson, 125 Ind. 84, 25 N. E. 126.

PART VI.

WARRANTIES.

§ 26. WARRANTY DEFINED.

A warranty is a stipulation or statement inserted or referred to in, and made a part of, an insurance policy, upon the truth or performance of which the validity of the contract depends.

1 May, § 156.
1 Biddle, § 523.
Bliss, § 45.
Flanders, p. 226.
Angell, § 139.
1 Phillips, p. 413.
2 Arnould, p. 599.
Cooke, § 12.
Marshall, p. 248.
Richards, §§ 45–52.
1 Beach, § 455.
Fox, Warranties in Fire Insurance.
See the above references for general discussions of the law of warranty and representation.

In Aetna Ins. Co. v. Grube, 6 Minn. 84 (Gil. 32), the court said: "'An express warranty * * * in the law of insurance

is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin, or transversely, or on a subjoined paper referred to in the policy.' Angell, Ins. § 140. A representation, as distinguished from a warranty, in the law of insurance, 'is a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the writer more readily to assume the risk by diminishing the estimate he would otherwise have formed of it.' Angell, § 147. In the law of insurance, a warranty is always a part of the contract; a condition precedent, upon the fulfillment of which its validity depends. A representation, on the other hand, is not part of the contract, but is collateral to it. The essential difference between a warranty and a representation is that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty is material, and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still, if it is not material to the risk, the contract is not avoided."

Mutual Ben. Life Ins. Co. v. Robison, 7 C. C. A. 444, 58 Fed. 723.

Burritt v. Saratoga Co. Mut. Ins. Co., 5 Hill (N. Y.) 188.

When a policy of insurance provides that any untrue answers to questions contained in the application shall avoid the policy, the answers amount, in effect, to a warranty, and the matter of their materiality is not open. "Whether they have made the statement material, and in effect a warranty, is a question for the court, to be determined by an interpretation of the contract."

Stensgaard v. Insurance Co., 50 Minn. 429, 52 N. W. 910.

§ 27. MUST BE IN POLICY.

A warranty must be contained in the policy, or referred to in, and made a part of, the policy. Thus it is not a warranty where by-laws are printed on the back of the policy, and not expressly referred to in the policy.

Kingsley v. New England Ins. Co., 8 Cush. (Mass.) 393.
Standard Life & Acc. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105.

But a mere reference to another paper is not sufficient to make such paper a part of the policy, unless the intention is clearly expressed.

Houghton v. Manufacturers' Mut. Ins. Co., 8 Metc. (Mass.) 114.
Aetna Ins. Co. v. Grube, 6 Minn. 82 (Gil. 32).

Statements contained in the application are not warranties, unless referred to in and made a part of the policy.

Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.
Gen. Laws Minn. 1895, c. 2.

A statement written on the margin of the policy is a warranty.

Patch v. Phoenix Ins. Co., 44 Vt. 481.
McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 170.
1 Biddle, § 544.
1 Wood, c. 3, p. 348.

§ 28. KINDS OF WARRANTIES.

Warranties may be express or implied, affirmative or promissory.

(a) EXPRESS WARRANTIES.

An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the contract depends.

1 Arnould, § 577.
1 May, § 179.

(b) IMPLIED WARRANTIES.

In a contract of marine insurance it is impliedly warranted—

1. That the vessel is seaworthy for the service in respect to which she is insured.
2. That the goods are not exposed to extra risk by an unusual mode of storage.
3. That there will be no deviation.
4. That the risk is to commence within a reasonable time.
5. That the subject-matter of the insurance is neutral, when material to the risk.

1 Phillips, c. 8.
2 Arnould, c. 4.
Gibson v. Small, 4 H. L. Cas. 353.
Merchants' Ins. Co. v. Algeo, 31 Pa. St. 446.
Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100.

(c) AFFIRMATIVE WARRANTIES.

An affirmative warranty is one which affirms the existence of certain facts at the time of the insurance.

(d) PROMISSORY WARRANTIES.

A promissory warranty is one which requires the performance or omission of certain things, or the existence of certain facts after the taking out of the insurance.

11 Am. & Eng. Enc. Law, p. 293.
Stout v. City Fire Ins. Co., 12 Iowa, 371.

§ 29. EFFECT OF BREACH OF WARRANTY.

The effect of a warranty is to make void the policy if the statements made are not literally true, or the stipulations not fully observed, without regard to their materiality, the willfulness of the falsity or nonobservance, or the cause of the loss.

Campbell v. New England Ins. Co., 98 Mass. 381.
Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. St. 335; Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.
Thomas v. Fame Ins. Co., 108 Ill. 91.
Fisher v. Crescent Ins. Co., 33 Fed. 544.
Alabama Gold Life Ins. Co. v. Garner, 77 Ala. 210.
Phoenix Ins. Co. v. Benton, 87 Ind. 132.
McClure v. Watertown Fire Ins. Co., 90 Pa. St. 277.
Price v. Phoenix Mut. Ins. Co., 17 Minn. 497 (Gil. 473).
1 Biddle, § 557.
1 May, § 156.
Bliss, § 36.
Cooke, § 12.

In Ripley v. Aetna Ins. Co., 30 N. Y. 136, the court quotes from Marshall on Insurance (page 347) as follows: "A warranty, being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But, being once inserted in the policy, it becomes a binding condition on the insured, and, unless he can show that it has been literally fulfilled, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed."

§ 30. CONSTRUCTION.

The mere fact that the word warranty is used with reference to statements made by the insured is not conclusive that the statements are to be considered as warranties in the strict legal sense. If the context shows that such was not the intention of the parties, the statement will not be so regarded.

Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.

In Hoose v. Insurance Co., 84 Mich. 309, 47 N. W. 587, the court said: "In construing warranties contained in policies of insurance, it may be asserted that the prime object to be reached is the intention of the parties, and if that can be found such intention must control. The rules in the interpretation of such warranties are the same as those which apply to the interpretation of other mercantile contracts. All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation; and wherever, in a policy of insurance, there is a clear breach of the warranty contained therein, however immaterial it may be, the policy will be avoided. It may be said that the warranties contained in the policy are somewhat different from representations made, in this: that while a representation may be satisfied with a substantial or even an equitable compliance, a warranty requires a strict and literal fulfillment. As it is stated by Arnould on Marine Insurance, 'whatever the warranty avers must be literally true, and what is promised must be actually performed.' The reason for such literal construction appears to be that insurance is granted on the faith of the accuracy of the statements made by the assured, the information concerning which is generally, and often exclusively, within the knowledge of the assured; and it is only just to the insurer, when he asks for positive and accurate information, that it should be given him. It is in reliance upon the facts given that the contract of insurance is made, and the

purpose of requiring a warranty is to dispense with inquiry, and cast upon the insured the obligation that the facts shall be as he represents them."

Commonwealth Mut. Fire Ins. Co. v. Huntzinger, 98 Pa. St. 41.

If the language be ambiguous, it will be held not a warranty.

First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673.

The terms and conditions of the policy are to be construed strongly against the insurer.

Aetna Life Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86.

Anderson v. Fitzgerald, 4 H. L. Cas. 483.

Bartlett v. Union Mut. Life Ins. Co., 46 Me. 500.

Everett v. Continental Ins. Co., 21 Minn. 76.

Goddard v. Insurance Co., 67 Tex. 69, 1 S. W. 906.

In Daniels v. Hudson River Ins. Co., 12 Cush. (Mass.) 424, Chief Justice Shaw said that "the leaning of all courts is to hold such a stipulation to be a representation, rather than a warranty, in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract."

§ 30a. BURDEN OF PROOF.

It has been held that the burden rests upon the insured of showing that his warranties are true. In Price v. Insurance Co., 17 Minn. 497 (Gil. 473), it was said: "Warranties are conditions precedent, so that their truth must be pleaded by the insured, upon whom, of course, the burden of proving the same rests; whereas the falsity of representations is matter of defense, to be pleaded and proved by the insurer."

McLoon v. Insurance Co., 100 Mass. 478.

Wilson v. Insurance Co., 4 R. I. 159.

But in the recent cases of Chambers v. Insurance Co., 67 N. W. 367, and Hale v. Investment Co., 68 N. W. 182, the supreme court of Minnesota held that the burden was on the insurer. In the former case Mr. Justice Mitchell said: "A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act, or the happening of some event, after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so provides, if there is a breach of a warranty, the policy is void ab initio. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties. Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ignorant as to which of his numerous answers would be assailed as false. The number of questions in these applications is usually very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on part of the beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no hardship to require of the insurer, if he believes that any

of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. It would be superfluous to cite authorities on this subject; but, to the point that these warranties are not conditions precedent, in the legal sense of the term, we refer to Redman v. Insurance Co., 49 Wis. 431, 4 N. W. 591; and, for a forcible statement of the practical reasons for the rule, to Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U. S. 377. The dictum in Price v. Insurance Co., 17 Minn. 497 (Gil. 473), that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured, was, we think, inadvertent, and cannot be adhered to. We therefore hold that it was no part of plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false."

PART VII.

REPRESENTATIONS.

§ 31. REPRESENTATION DEFINED.

A representation is a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. If false and material to the risk, the contract is avoided. (May, § 181.)

In Daniels v. Hudson River Ins. Co., 12 Cush. 416, Chief Justice Shaw said: "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 a representation, and is untrue, it does not avoid the policy, if not willful, or if not material. To illustrate this: The application, in answer to an interrogatory, states: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence that ashes were taken up and removed in copper hods, perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is 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."

Campbell v. New England Mut. Llfe Ins. Co., 98 Mass. 381.

1 Biddle, § 531.

Richards, § 48.

§ 32. AFFIRMATIVE AND PROMISSORY.

Representations are either affirmative or promissory.

They are affirmative when they affirm the present existence of certain facts pertaining to the risk.

They are promissory when made concerning what is to happen during the term of the insurance.

The one is an affirmation, the other is a promise.

1 May, § 182.

§ 33. ORAL REPRESENTATIONS.

A representation may be oral or written; but, if the application is in writing, it will be conclusively presumed to contain all the representations which were made.

Dolliver v. St. Joseph Ins. Co., 131 Mass. 39.

Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544.

Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

"If a written application be made, it will be presumed to contain the representations which induce the contract, and proof of prior or subsequent verbal statements is inadmissible."

1 May, § 192.

Boggs v. American Ins. Co., 30 Mo. 63.

Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.

§ 34. WRITTEN AND ORAL PROMISSORY REPRESENTATIONS.

An important distinction has been made between the effect of affirmative and oral promissory warranties. May, citing the decision of Judge Gray in Kimball v. Aetna Ins. Co., 9 Allen (Mass.) 540, says: "Upon this distinction follows the important consequence that, while material falsity in an affirmative representation will be a complete defense to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defense whatever. And the reason of the distinction is this: The falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make, and therefore, in contemplation of law, because misled and deceived, does not make. He may therefore set up the fact that he was misled or deceived, as proof that no agreement was ever made, since there was no concurrence of consent upon the same facts. But an oral promissory representation, being an agreement prior in date to the actual contract of insurance, and in its nature such that it cannot be performed until after the contract of insurance has taken effect, cannot be set up to defeat the later contract; for this would be to violate a fundamental rule of evidence, and make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral promise be made mala fide, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made bona fide, and without intention to mislead and deceive, it cannot be set up to avoid a contract. Only those promissory representations are available for such a purpose which are reduced to writing, and made part of the contract; thus becoming substantially, if not formally, warranties."

Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544.

Murdock v. Chenango Co. Mut. Ins. Co., 2 N. Y. 210.

Alston v. Mechanics' Mut. Ins. Co., 4 Hill (N. Y.) 329.
1 Arnould, p. 498.
Bliss, § 47.

Other courts and writers have held that there is no such a thing as a promissory representation, and, according to a recent writer, the distinction above stated is opposed to the great majority of decided cases.

1 Biddle, § 533 et seq.
2 Duer, p. 716.
Bliss, § 47.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.

§ 35. REPRESENTATION OF BELIEF OR EXPECTATION.

There is a distinction between a promissory representation of a fact and a mere opinion or expectation. The former, when false and material, avoids the policy, while the latter has no effect.

Dennistoun v. Lillie, 3 Bligh, 202.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.
1 Arnould, p. 524.
Richards, § 49.

§ 36. CONTINUING CONDITIONS.

A representation that a certain condition exists at the time the representation is made is not a warranty that it will continue so to exist. Subsequent changes will not defeat the insurance.

Davenport v. Peoria Mut. Fire Ins. Co., 17 Iowa, 276.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.
Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 8 Sup. Ct. 1199.

§ 37. MATERIALITY OF REPRESENTATION.

When there is no moral fraud, a representation, although false, does not avoid the policy unless material.

Every representation is material which is of such a nature as would probably induce the insurer to take the risk, or to take it at a lower premium than he otherwise would. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the insurer.

1 Arnould, p. 530.
1 Phillips, 524.
2 Duer, 707.
Bliss, § 48.
Perine v. Grand Lodge, 51 Minn. 224, 53 N. W. 367.
Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).
Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98).
Wood v. Firemen's Ins. Co., 126 Mass. 316.
Campbell v. New England Ins. Co., 98 Mass. 381.
1 May, § 184.
Bac. Ben. Soc. §§ 209, 210.

The materiality of the facts is a question for the jury.

Caplis v. American Fire Ins. Co. (1895; Minn.) 62 N. W. 440.
Keeler v. Niagara Falls Ins. Co., 16 Wis. 523.
Washington Life Ins. Co. v. Harney, 10 Kan. 525.
Armour v. Transatlantic Ins. Co., 90 N. Y. 450.

§ 38. ANSWERS TO QUESTIONS MATERIAL.

But, when the representation is made in the form of an answer to a specific question by the insurer, the fact is conclusively held to be material, as "the inquiry and answer are tantamount to an agreement that the matter in-

quired about is material, and its materiality is not therefore open to be tried by a jury."

1 May, § 185.
Cuthbertson v. Insurance Co., 96 N. C. 480, 2 S. E. 258.
Wilson v. Conway Ins. Co., 4 R. I. 141.
Campbell v. New England Ins. Co., 98 Mass. 381.
Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.
Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).
See Gerhauser v. North British Ins. Co., 6 Nev. 15.

In Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, Mr. Justice Gray said: "Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant."

Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466.
Campbell v. New England Ins. Co., 98 Mass. 381.
Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurer to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495.
Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. (U. S.) 47.

Anderson v. Fitzgerald, 4 H. L. Cas. 484.
McDonald v. Law Union Fire & Life Ins. Co., L. R. 9 Q. B. 328.
Edington v. Aetna Life Ins. Co., 77 N. Y. 564; Id., 100 N. Y. 536, 3 N. E. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application.

Cazenove v. British Equitable Assur. Co., 29 Law J. C. P. 160; affirming s. c. 6 C. B. (N. S.) 437.

But where, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.

Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949.
Hall v. People's Ins. Co., 6 Gray, 185.
American Life Ins. Co. v. Mahone, 56 Miss. 180.
Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 44 N. J. Law, 210.
Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurer, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage when in fact there are two, the policy issued thereon is avoided.

Towne v. Fitchburg Ins. Co., 7 Allen, 51.

But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount.

Nichols v. Fayette Ins. Co., 1 Allen, 63.

§ 39. POLICY COVERING VARIOUS ITEMS.

When a policy covers different classes of property, and a false representation is made as to a material fact affecting one class only, one line of cases holds that the policy is valid as to the other class.

Schuster v. Dutchess Co. Ins. Co., 102 N. Y. 260, 6 N. E. 406.
Merrill v. Agricultural Ins. Co., 73 N. Y. 452.
Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164.

But in most of the states the rule is that where the premium is single, and the subject is substantially one risk, though the policy covers several items separately enumerated, the contract is entire, and a forfeiture as to one item will forfeit the entire contract.

1 Biddle, § 573.
Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137.
Plath v. Minnesota Farmers' Mut. Fire Ins. Co., 23 Minn. 479.
Day v. Charter Oak Fire & Marine Ins. Co., 51 Me. 91.

§ 40. CONSTRUCTION OF MATERIAL REPRESENTATIONS.

Representations as to material matters are less strictly construed than warranties. Substantial compliance only is required.

Horn v. Amicable Mut. Life Ins. Co., 64 Barb. 81.
Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019.
1 May, § 186.

§ 41. STATUTES.

In many states there are statutes providing that:

"No oral or written misrepresentation made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss."

Acts Mass. 1887, c. 214, § 21.

Gen. Laws Minn. 1895, c. 2.

White v. Society, 163 Mass. 108, 39 N. E. 771.

PART VIII.

CONCEALMENT.

§ 42. CONCEALMENT DEFINED.

A concealment is the intentional withholding by the insured from the insurer of facts material and prejudicial to the risk, which ought in good faith to have been made known. It is the opposite of a representation.

Concealment is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know.

Bliss, § 65; 1 May, § 200; 1 Wood, c. 6.
1 Arnould, p. 549.
Washington Mills Manuf'g Co. v. Weymouth Ins. Co., 135 Mass. 503.

§ 43. TIME OF CONCEALMENT.

In order that a concealment should have the effect of avoiding a policy, it must have taken place at the time of making the contract. Anything coming to the knowledge of either party thereafter, however material it may be, need not be communicated to the other, although the policy has not yet been executed in accordance with the agreement.

Cory v. Patton, L. R. 7 Q. B. 304.
1 Arnould, p. 548.

§ 44. WHAT MUST BE COMMUNICATED.

Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty. If specific information be required by the insurer on any point he deems material, it must be truly and fully communicated by the applicant.

Chaffee v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 376.
Valton v. National Fund Life Assur. Soc., 20 N. Y. 32.
Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442.

In fire and life policies, it seems that the applicant, if without fraudulent intent, need not communicate even material matters, about which no inquiry is made.

Washington Mills Manuf'g Co. v. Weymouth Ins. Co., 135 Mass. 503.
Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.
But see 1 Wood, § 211.

An answer clearly false to an unambiguous inquiry will vitiate a policy.

Jeffries v. Economical Life Ins. Co., 22 Wall. 47.
Campbell v. New England Ins. Co., 98 Mass. 381.
Bliss, § 72.

§ 45. WHAT NEED NOT BE COMMUNICATED.

Neither party is bound to communicate information, except in answer to inquiries, of—

(a) Matters which the other knows.

(b) Matters of which, in the exercise of ordinary care, the

other ought to know, and of which the party has no reason to suppose him ignorant.

Carter v. Boehm, 3 Burrows, 1905.
De Longuemere v. New York Fire Ins. Co., 10 Johns. 119.
Green v. Merchants' Ins. Co., 10 Pick. 402.
3 Kent, Comm. *373.
Bliss, § 76.
1 Wood, c. 6, § 212.

(c) Matters of which communication is waived.

2 Duer, p. 522.
Bliss, § 75.

(d) Those matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.

De Wolf v. New York Firemen's Ins. Co., 20 Johns. (N. Y.) 214.
2 Duer, p. 436.

(e) Matters which relate to a risk excepted from the policy and not otherwise material.

§ 46. CONCEALMENT OR MISREPRESENTATION BY AN AGENT.

An innocent principal cannot take advantage of the fraud of his agent, and hence is responsible for the concealment or misrepresentations of his agent authorized to effect insurance.

1 May, § 213.
1 Biddle, § 542.
2 Duer, p. 418.
Hamblet v. City Ins. Co., 36 Fed. 118.
National Life Ins. Co. v. Minch, 53 N. Y. 145.

In Fitzherbert v. Mather, 1 Term R. 12, an agent of the assured was employed to ship a cargo of oats, and to

communicate the shipment to another agent, who was employed to effect an insurance. The omission of the former agent to inform the latter of the loss of the ship was held fatal to the insurance. Ashurst, J., said: "On general principles of policy, the act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows; and there is no hardship on the plaintiff, for, if the fact had been known, the policy could not have been effected."

In Gladstone v. King, 1 Maule & S. 35, which was an action on a policy on a ship "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock. The owners, in ignorance of the accident, effected the insurance. It was held that the captain was bound to communicate the fact, and, for want of such communication, there could be no recovery for the loss, although there was no fraud. The policy was valid, but did not cover the particular loss. To the same effect is Stribley v. Imperial M. Ins. Co., 1 Q. B. Div. 507.

In Proudfoot v. Montefiore, L. R. 2 Q. B. 511, it appeared that at the time of the insurance the agent had knowledge of the loss. The court said: "The question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defense to the underwriter on a claim to enforce the policy." It was held that there could be no recovery. Chief Justice Cockburn said "that if an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the

basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the commercial world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriters, and through such ignorance fails to disclose it." To the same effect is Blackburn v. Vigors (1887) L. R. 12 App. Cas. 531.

See 1 Arnould, p. 550.

In Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, Judge Story held that there could be a recovery where the owner effected the insurance while ignorant of the loss, although the knowledge had been fraudulently withheld by his agent, in order that the insurance might be effected. The case was affirmed by the supreme court (12 Wheat. 408) on other grounds.

In Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450, it was held that a material misrepresentation made in applying for a policy, although honestly made, avoids the policy. The court said: "A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself. Carpenter v. American Ins. Co., 1 Story, 57, Fed. Cas. No. 2,428. In this case (which was a case of fire insurance) Story, J., said: 'A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design.' * * * The rules as to misrepresentations and concealments, or omissions to state facts ma-

terial to the risk, are more strict in cases of marine than of fire insurance. But the distinctions are founded on the differences in the character of the property, and the greater facility the insurers possess of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat, and the distinctions are applied, ordinarily, in cases where the insurer sets up the omission of the insured to state material facts. In those cases there is a difference between the rules applicable to marine insurance and those applicable to fire insurance. But where the defense is a material affirmative misrepresentation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance."

Mr. Arnould (Volume 1, p. 559) says: "If an agent, in ignorance of a loss, effects insurance for his principal, who knew of the loss, but not in time to countermand the policy, it is not void by reason of the noncommunication. If a principal, knowing of the loss, effects insurance through an agent who was ignorant of it, this concealment of the fact of loss vitiates the policy."

Valin, liv. 3, t. 6, art. 40, p. 45.

PART IX.

INSURANCE AGENT.

§ 47. GENERAL STATEMENTS.

The transactions of insurance agents are subject to the general principles of the law of agency.

The policy of the law requires that the authority of agents of insurance companies be construed liberally.

Whether one is the agent of the insurer or the insured is a question of fact to be determined by the circumstances of each case.

Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222.
Abraham v. Insurance Co., 40 Fed. 717.
Eastern R. Co. v. Relief Ins. Co., 105 Mass. 570.
Southern Life Ins. Co. v. McCain, 96 U. S. 84.

§ 48. GENERAL AGENTS.

An agent authorized to issue and renew policies and to transact the business of the company in a particular locality is a general agent.

Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.
Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77.

Goode v. Insurance Co. (Va.) 23 S. E. 744.

Possession of blank policies as evidence, Carroll v. Charter Oak Ins. Co., 40 Barb. 292; Seamans v. Knapp, Stout & Co., 89 Wis. 171, 61 N. W. 757.

Power of general agents to appoint subagents, Krumm v. Jefferson Fire Ins. Co., 40 Ohio St. 225.

Such an agent may generally make the contract which the insurer is empowered to make.

1 Biddle, §§ 116, 121.

A "local agent" is one not authorized to make a contract of insurance, but possessing certain limited and special powers.

Haden v. Farmers' & Mechanics' Fire Ass'n, 80 Va. 683.

Murphy v. Southern Life Ins. Co., 3 Baxt. (Tenn.) 440.

1 Biddle, § 122.

Cooke, § 9.

The authority of a general agent may be limited to a single state.

Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606.

Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r, 90 Ky. 39, 13 S. W. 585.

An ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk.

Bodine v. Insurance Co., 51 N. Y. 117.

Arff v. Insurance Co., 125 N. Y. 57, 25 N. E. 1073.

Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514.

Deitz v. Insurance Co., 33 W. Va. 526, 11 S. E. 50.

§ 49. SECRET LIMITATIONS UPON AGENT'S AUTHORITY.

A general agent may bind his principals by any act within the scope of his authority, although it may be contrary to his special instructions.

Story, Ag. § 733.

Ruggles v. American Cent. Ins. Co., 114 N. Y. 421, 21 N. E. 1000.

Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5.

Thus a policy upon subject-matter beyond the territory in which the agent is authorized to act is valid, unless the want of authority is brought home to the insured.

Lightbody v. North American Ins. Co., 23 Wend. 18.

§ 50. LIMITATIONS CONTAINED IN POLICY.

The provisions of the policy relative to the authority of agents, of which the assured had knowledge, are held binding upon him. He is bound to know what is in the policy which is delivered to him.

In Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1, the court said: "It is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly relies. There are two provisions in the policy to which he refers in support of his contention. The first is that 'no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon.' Following Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, which is abundantly supported by the authorities. This contains no limitation upon

the authority of any class of agents, prohibiting them from waiving any of the terms or conditions of the policy. It applies alike to all representatives of the company,—executive or general officers as well as others; and, so far as it assumes to be a limitation at all, it is upon the company itself, to the effect that it can only waive the conditions of the policy in a certain way, or, rather, it assumes to provide what shall be the exclusive evidence of such waiver. This provision, therefore, will not support defendant's contention, but the other or second one does. It is as follows: 'This policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing, signed by the secretary of the company.' The words 'policy' and 'contract' are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff."

In Anderson v. Manchester Fire Assurance Co. (Minn.) 60 N. W. 1095, the doctrine of Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, was held not applicable to the provision inserted in the standard policy by the insurance commissioner. On reargument, it was held that the statute was unconstitutional, and that, by delivering the policy with knowledge of other insurance, the condition was waived, notwithstanding the fact that such waiver was not indorsed on the policy.

§ 51. STIPULATIONS IN THE POLICY AS TO WHO ARE AGENTS OF THE INSURER.

Insurance policies often contain a provision that any person who may have procured the insurance to be taken shall be deemed to be the agent of the insured, and not of the

company; or that in any matter relating to the insurance, no person, unless duly authorized in writing, shall be deemed the agent of the insurer. Life insurance policies often contain a provision that no agent is authorized to change or waive any of the provisions of the policy.

The question of agency is one of fact, to be determined by the circumstances of the case, and not by provisions in the policy, of which the insured had no knowledge until the contract was consummated.

In Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 31 Minn. 17, 16 N. W. 430, Mr. Justice Mitchell said:

"The parties who are induced by these agents to make application for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application; and, in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured.

American Ins. Co. v. Mahone, 21 Wall. 152.
Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222.
Malleable Iron Works v. Phoenix Ins. Co., 25 Conn. 465.
Hough v. City Fire Ins. Co., 29 Conn. 10.
Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 517.
Miner v. Phoenix Ins. Co., 27 Wis. 693.
Winans v. Allemania Fire Ins. Co., 38 Wis. 342.
Rowley v. Empire Ins. Co., 36 N. Y. 550.
Brandup v. St. Paul Fire & Marine Ins. Co., 27 Minn. 393, 7 N. W. 735.
2 Wood, c. 12.
1 May, § 120.

"After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured, and not of the insurer. But, as has been well remarked by another court, 'there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.' If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principle to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence, we think that, if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through his agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts; but the conclusion we have reached is

not without authority to sustain it, and is, we believe, sound in principle and in accordance with public policy."

Commercial Ins. Co. v. Ives, 56 Ill. 402.
Sullivan v. Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112.
Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108.
Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.
Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207.
Kister v. Insurance Co., 128 Pa. St. 553, 18 Atl. 447.
Boetcher v. Hawkeye Ins. Co., 47 Iowa, 253.
Masters v. Madison Co. Mut. Ins. Co., 11 Barb. 624, 3 Benn. Fire Ins. Cas. 398.
See Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128.
2 Wood, § 409.
1 May, § 140.
1 Biddle, § 469 et seq., where the conflicting cases are reviewed in detail.

In a number of states there will be found laws to the effect that:

"Whoever solicits, procures, or receives in or transmits from the state any application other than his own for membership or insurance in any corporation or association * * * shall be deemed and held to be an agent of such corporation or association."

Minn. Laws 1895, c. 175, § 25.
Acts Mass. 1887, c. 214, § 87.
McClain's Iowa Code, § 1732.

§ 52. WAIVER BY AGENT.

Unless expressly forbidden by the policy, or the want of authority is otherwise brought to the knowledge of the insured, an agent acting within the scope of his employment may waive provisions of the policy.

German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637.
Silverberg v. Phoenix Ins. Co., 67 Cal. 36, 7 Pac. 38.

Niagara Fire Ins. Co. v. Brown, 123 Ill. 356, 15 N. E. 166.

Wing v. Harvey, 23 Law J. Ch. (N. S.) 511.

Miner v. Phoenix Ins. Co., 27 Wis. 693.

Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98).

Guernsey v. American Ins. Co., 17 Minn. 104 (Gil. 83).

Eastern R. Co. v. Relief Ins. Co., 105 Mass. 570.

But see Kyte v. Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518.

The limitation in a policy upon the agent's power to waive provisions of the policy is binding, unless overcome by proof of actual or ostensible authority emanating from the principal.

Messelback v. Norman, 122 N. Y. 578, 26 N. E. 34.

Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234.

§ 53. NOTICE TO AGENT.

Notice to a general agent of the insurance company is notice to the company.

North British M. Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458.

Brandup v. St. Paul Fire & Marine Ins. Co., 27 Minn. 393, 7 N. W. 735.

Quigley v. St. Paul Title-Insurance & Trust Co. (Minn.; 1895) 62 N. W. 287.

2 Biddle, § 989.

As to the effect of notice to a local agent, see Hartford Fire Ins. Co. v. Smith, 3 Colo. 422.

Watertown Fire Ins. Co. v. Grover & Baker S. M. Co., 41 Mich. 131, 1 N. W. 961.

Phoenix Ins. Co. v. Spiers (Ky.) 8 S. W. 453.

Donnelly v. Cedar Rapids Ins. Co., 70 Iowa, 693, 28 N. W. 607.

Notice to the agent's clerk is notice to the agent, and hence to the company.

Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948.

In Home Fire Ins. Co. v. Hammang (Neb.; 1895) 62 N. W. 883, the court said:

"Here, then, was actual knowledge of the additional insurance complained of in the possession of the insurance company's agent when he solicited and wrote the insurance policy in suit. This knowledge of the agent was the knowledge of the company. Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company.

Gans v. Insurance Co., 43 Wis. 108.

Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948.

"This precise question was before this court in Phoenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12. Ryan, C., writing the opinion of the court, said that 'where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void, because consent to such concurrent insurance was not given in writing.' This case is decisive of the question under consideration. We are satisfied with the rule as there announced, and adhere to it. That it states the rule correctly we have no doubt, and that it is sustained by the authorities, see, among others, the following cases:

State Ins. Co. v. Jordan, 29 Neb. 514, 45 N. W. 792.

German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660.

American Ins. Co. v. Gallatin, 48 Wis. 36, 3 N. W. 772.

Oshkosh Gaslight Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819.

Renier v. Insurance Co., 74 Wis. 89, 42 N. W. 208.

Vankirk v. Insurance Co., 79 Wis. 627, 48 N. W. 798.

Kitchen v. Insurance Co., 57 Mich. 135, 23 N. W. 616.

"In this last case the court said: 'An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein.'

Crouse v. Insurance Co., 79 Mich. 249, 44 N. W. 496.
Gristock v. Insurance Co., 84 Mich. 161, 47 N. W. 549."

See, also, Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222.

New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837.

McCoy v. Metropolitan Ins. Co., 133 Mass. 82.

McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 16 Atl. 263.

The general principle that the insurer is bound by knowledge of facts known to its agent at the time the contract was made was applied in:

Hamilton v. Insurance Co., 98 Mich. 535, 57 N. W. 735.

Forward v. Insurance Co., 142 N. Y. 382, 37 N. E. 615.

Dailey v. Association, 102 Mich. 289, 57 N. W. 184.

Michigan Shingle Co. v. State Inv. & Ins. Co., 94 Mich. 389, 53 N. W. 945.

Goode v. Insurance Co. (Va.) 23 S. E. 744.

§ 54. ERROR OR FRAUD OF AGENT OF INSURER.

The applicant for insurance is not bound by the errors or fraud of the insurer's agent. The rule is thus stated by Judge Cooley in Aetna Live-Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 251: "When an agent, who at the time and place is the sole representative of the principal, assumes to know what the principal requires, and, after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is induced to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud."

In Mutual Ben. Life Ins. Co. v. Robison, 7 C. C. A. 444, 58 Fed. 723, the rule was applied to a case where the medical examiner drew certain conclusions from the truthful statements of the answer.

Kansas Protective Union v. Gardner, 41 Kan. 397, 21 Pac. 233.

Hough v. Insurance Co., 29 Conn. 10.

Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87.

In some states the insured is not permitted to show by oral testimony either that the insurer knew that the statements contained in the application were untrue when the policy was issued, or that the agent wrote the answers incorrectly after being truthfully informed of the fact. See McCoy v. Insurance Co., 133 Mass. 82; Franklin Fire Ins. Co. v. Martin, 40 N. J. Law, 568.

PART X.

SPECIAL PROVISIONS CONTAINED IN THE POLICY.

All insurance contracts contain certain special provisions, intended for the protection of the insurer. Such provisions may, for purposes of convenience and construction, be divided into two general classes. Those of the first class relate to the interest of the insured in the property subject to the risk insured against, the condition of the property at the time the insurance is effected and during its continuance, and things to be done or refrained from by the insured. The limits of the risk assumed are also clearly defined by provisions describing the property, and excepting from the contract certain property and certain risks which would otherwise be included within the general terms of the policy. Life policies contain provisions regulating the conduct of the person whose life is insured.

Provisions of the second class relate to things to be done by the beneficiary after loss under the policy.

Stipulations of the First Class.

A.

§ 55. STIPULATIONS RELATING TO THE INTEREST OF THE INSURED.

(a) AS TO THE TITLE.

When the insured makes no written application and no representations as to ownership, the policy is not affected by a provision in the policy that it shall be void "if the interest of the assured be other than unconditional and sole ownership."

Knop v. National Fire Ins. Co. (Mich.) 59 N. W. 653.
Dupreau v. Insurance Co., 76 Mich. 615, 43 N. W. 585.

The answer to inquiries contained in an application respecting the applicant's title, which are made a part of the policy, become warranties, the falsity of which vitiates the policy.

Ehrsam Mach. Co. v. Phenix Ins. Co., 43 Neb. 554, 61 N. W. 722.
Leonard v. American Ins. Co., 97 Ind. 299.

Unless more particularly inquired about, or there is fraudulent concealment or misrepresentation, a statement by the applicant that he is the owner of the property, or that it is his, does not invalidate the policy if it is true in some substantial sense, although he has not a perfect and absolute estate.

Walsh v. Philadelphia Fire Ass'n, 127 Mass. 383.
Morrison v. Tennessee Ins. Co., 18 Mo. 262.

See Columbian Ins. Co. v. Lawrence, 2 Pet. 25.
Davis v. Quincy Ins. Co., 10 Allen, 113.
Insurance Co. of North America v. Bachler (Neb.) 62 N. W. 911.

But if more exact information as to title is called for, as where "the true title is called for," or where it is provided that "if the interest of the insured be any other than the entire unconditional and sole ownership of the property for the use and benefit of the insured," the true interest must be represented to the company, and expressed in the policy.

Philips v. Knox Co. Mut. Ins. Co., 20 Ohio, 174.
Pinkham v. Morang, 40 Me. 587.
Hough v. City Fire Ins. Co., 29 Conn. 10.
Hope Mut. Ins. Co. v. Brolaskey, 35 Pa. St. 282.

A statement that the insured has "a clear title" is not sustained by an executory contract.

Wooliver v. Boylston Ins. Co. (Mich.) 62 N. W. 149.
Hall v. Insurance Co., 93 Mich. 184, 53 N. W. 727.
Hamilton v. Insurance Co., 98 Mich. 535, 57 N. W. 735.

There may be a waiver of this provision.

Union Ins. Co. v. Clipp, 93 Ill. 96.

The owner of all the stock of a corporation has not the sole and unconditional ownership of the corporate property.

Syndicate Ins. Co. v. Bohn, 27 U. S. App. 564, 12 C. C. A. 531, and 65 Fed. 165.

(b) ALIENATION (CHANGE OF INTEREST).

A provision prohibiting alienation without the consent of the company is valid.

J. B. Ehrsam Mach. Co. v. Phenix Ins. Co. (Neb.) 61 N. W. 722.
Smith v. Union Ins. Co., 120 Mass. 90.
Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 123.

A void sale is not an alienation.

School Dist. v. Aetna Ins. Co., 62 Me. 330.
Pitney v. Glen Falls Ins. Co., 65 N. Y. 6.

Such a provision does not extend to every change of interest.

In Gibb v. Fire Ins. Co. of Phila. (Minn.) 61 N. W. 137, it was held that an executory agreement to convey the premises and change of possession was a breach of the condition against change of interest.

The court said: "It is held by the great weight of authority that, when the condition is against any change in the title, there is no breach unless there is a change in the legal title; that, as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous. The word 'interest' is broader than the word 'title,' and includes both legal and equitable rights."

Power v. Ocean Ins. Co., 19 La. 28.
Hooper v. Hudson River Ins. Co., 17 N. Y. 424.

If the insured sells only a portion of his interest, the policy will protect his remaining interest.

Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385.
Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176.

It does not comprehend a mortgage, nor a contract to convey, nor the levy of an execution.

Bryan v. Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454.
Kempton v. State Ins. Co., 62 Iowa, 83, 17 N. W. 194.
Clark v. New England Ins. Co., 6 Cush. 342.

Where a policy provides that the mortgagee to whom the insurance is payable shall notify the company of any change of ownership of the property, a foreclosure of the mortgage

does not work such an alienation as to defeat the policy before the expiration of the time for redemption.

Washburn Mill Co. v. Fire Ass'n (Minn.) 61 N. W. 828.

The provision in most policies extends to any change of title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, and also to mortgages, proceedings to foreclose a lien, contracts of sale, and the levy of an execution.

Foote v. Hartford Ins. Co., 119 Mass. 259.

Barnes v. Union Mut. Fire Ins. Co., 51 Me. 110.

Loy v. Home Ins. Co., 24 Minn. 315.

Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.

Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

Meadows v. Hawkeye Ins. Co., 62 Iowa, 387, 17 N. W. 600.

Hill v. Cumberland Val. Mut. Protection Co., 59 Pa. St. 474.

Seybert v. Pennsylvania Mut. Fire Ins. Co., 103 Pa. St. 282.

A provision against alienation may be waived without a written indorsement on the policy.

McFetridge v. American Fire Ins. Co. (Wis.) 62 N. W. 938.

Stanhilber v. Insurance Co., 76 Wis. 285, 45 N. W. 221.

(c) OTHER INSURANCE.

A provision forbidding other or subsequent insurance is valid without regard to the motive or intention of the party in obtaining the additional insurance.

Pennsylvania Fire Ins. Co. v. Kittle, 39 Mich. 51.

Colby v. Cedar Rapids Ins. Co., 66 Iowa, 577, 24 N. W. 54.

Moulthrop v. Insurance Co., 52 Vt. 123.

Zinck v. Phoenix Ins. Co., 60 Iowa, 266, 14 N. W. 792.
Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112.

The object is to limit the amount of insurance, so that the insured will continue to have an interest in the preservation of the property.

Funke v. Minnesota Farmers' Ins. Ass'n, 29 Minn. 347, 13 N. W. 164.
Church of St. George v. Sun Fire Office Ins. Co., 54 Minn. 167, 55 N. W. 909.

Other insurance in violation of such a provision renders the policy voidable, not void. It may be confirmed and made valid by the acts of the company.

Schreiber v. German-American Ins. Co., 43 Minn. 367, 45 N. W. 708.
Turner v. Meridan Ins. Co., 16 Fed. 454.
Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325.
See New York Cent. Ins. Co. v. Watson, 23 Mich. 486.

The provision applies to an assignee of the policy as well as to the party originally insured.

Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433.

It has been held that, if the other insurance is invalid, the stipulation will have no effect on the policy.

Emery v. Mutual, etc., Ins. Co., 51 Mich. 469, 16 N. W. 816.
Knight v. Eureka Fire Ins. Co., 26 Ohio St. 664.
Kennedy v. Insurance Co., 10 Barb. 285.
Allison v. Phoenix Ins. Co., 3 Dill. 480, Fed. Cas. No. 252.
Sutherland v. Old Dominion Ins. Co., 31 Grat. 176.

In Funke v. Insurance Ass'n, 29 Minn. 347, 13 N. W. 164, it was held that the securing of other insurance without the consent of the first insurer avoided the first policy, notwith-

standing the fact that the second policy was void by reason of misrepresentations.

In Reed v. Insurance Co., 17 R. I. 785, 24 Atl. 833, it was held that the policy in question was avoided by the existence of other insurance at the time of its issuance, although such other insurance was not in effect at the time of the loss.

To avoid the policy, it is sufficient if the other insurance covers some part of the property.

Mussey v. Atlas Mut. Ins. Co., 14 N. Y. 79.
Sloat v. Royal Ins. Co., 49 Pa. St. 14.

The interests of different persons in the same property may be insured without violating a condition against other insurance.

Acer v. Merchants' Ins. Co., 57 Barb. 68.
Titus v. Glen Falls Ins. Co., 81 N. Y. 410.

A condition against other insurance is for the benefit of the insurer, and may be waived.

Home Fire Ins. Co. v. Hammang (Neb.) 62 N. W. 883.
Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112.
If the agent knows of the existence of concurrent insurance, the company is estopped to insist that the policy is thereby void.
Phoenix Ins. Co. v. Covey (Neb.) 60 N. W. 12.

Thus, the condition is not broken by a mortgagee's insurance of his interest.

Church of St. George v. Sun Fire Office Ins. Co., 54 Minn. 162, 55 N. W. 909.

(d) AS TO INCUMBRANCE — CHATTEL MORTGAGE.

The violation of a condition avoiding the policy if it be or become incumbered by a chattel mortgage renders the contract void.

First Nat. Bank v. American Cent. Ins. Co. (Minn.) 60 N. W. 345.

In Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440, it was held that a lease containing a clause "that said lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes" did not amount to a chattel mortgage within the meaning of a stipulation in the policy that it should "be void if the building become encumbered by a chattel mortgage."

A judgment against the insured is not an "incumbrance" within the meaning of a clause avoiding the policy "if an incumbrance be placed" on the property.

Lodge v. Capital Ins. Co. (Iowa) 58 N. W. 1089.
Hosford v. Insurance Co., 127 U. S. 404, 8 Sup. Ct. 1202.
Green v. Insurance Co., 82 N. Y. 517.

B.

§ 56. Stipulations Relating to the Care and Condition of the Property during the Term of the Insurance.
- (a) Vacancy.
- (b) The Use and Manner of Occupation.
- (c) Alteration.
- (d) Keeping and Use of Certain Articles.

§ 56. STIPULATIONS RELATING TO THE CARE AND CONDITION OF THE PROPERTY DURING THE TERM OF THE INSURANCE.

(a) VACANCY.

A stipulation that the premises shall not become vacant or unoccupied without the consent of the company indorsed on the policy is valid, and its violation renders the policy voidable without regard to the increase of risk.

Insurance Co. of North America v. Garland, 108 Ill. 220.

Dennison v. Phoenix Ins. Co., 52 Iowa, 457, 3 N. W. 500.

McClure v. Watertown Fire Ins. Co., 90 Pa. St. 277.

Galveston Ins. Co. v. Long, 51 Tex. 89.

Continental Ins. Co. v. Kyle, 124 Ind. 132, 24 N. E. 727.

The words "vacant and unoccupied" must be construed with reference to the ordinary use and adaptability of the building.

Limburg v. Insurance Co., 90 Iowa, 709, 57 N. W. 626.

Such a provision is waived if the property was vacant when the policy was issued.

Rochester Loan & Banking Co. v. Liberty Ins. Co. (Neb.) 62 N. W. 877.

Anderson v. Manchester Fire Ins. Co., 59 Minn. 182, 63 N. W. 241.

A policy on a house and barn, conditioned to be void if the premises become vacant, is void only on the vacancy of both.

German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

A vacancy of three days, incident to a change of tenants, will not avoid policy.

Worley v. State Ins. Co. (Iowa) 59 N. W. 16.

Liverpool, etc., Ins. Co. v. Buckstaff, 38 Neb. 146, 56 N. W. 695.

Construction of clause "if the insured building become vacant and unoccupied."

Moriarty v. Home Ins. Co., 53 Minn. 549, 55 N. W. 740.

Moody v. Insurance Co., 52 Ohio St. 12, 38 N. E. 1011.

A policy not containing such a provision is not affected by the vacancy of the building.

Somerset Co. Mut. Fire Ins. Co. v. Usaw, 112 Pa. St. 80, 4 Atl. 355.

Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610, 12 N. W. 874.

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

(b) THE USE AND MANNER OF OCCUPATION (INCREASE OF RISK).

A provision that the premises shall not be occupied so as to increase the risk without the consent of the company is valid, and in the event of its breach the policy becomes void, without regard to the cause or origin of the fire.

Mack v. Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. 343.

In the absence of such a provision, a use and occupation increasing the risk bars recovery only when it was the cause of the loss.

Pim v. Reid, 6 Man. & G. 1.

Loehner v. Home Mut. Ins. Co., 19 Mo. 628.
Breuner v. Insurance Co., 51 Cal. 101.

What change increases the risk is a question for the jury, unless the policy contains a list of hazards which are prohibited.

Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306.
Smith v. Insurance Co. (Mich.) 65 N. W. 236.
In Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, the court said: "An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests, and since there is a provision that in case of an increase of risk which is not assented to or known by the assured, and not disclosed, and the assent of the insurer obtained, the policy should be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such risk."

The following have been held not to constitute such change in the use or occupation as to avoid the policy: The making of repairs on a dwelling house; shutting down a factory temporarily; running the engine and certain shafting at night, when the policy recites, "Run by day only;" changing from a dwelling to a boarding house; changing occupants; ceasing to occupy the premises; lighting temporarily with gasoline; mortgaging the insured property.

Brighton Manuf'g Co. v. Reading Fire Ins. Co., 33 Fed. 232.
Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.

(c) ALTERATION.

A common provision of the policy is one intended to guard against an increase of risk by alteration. It may take place in the building, or in the mode of use or occupation, or in its situation with reference to other buildings, or in any other circumstances tending to change the character of the risk. But it is not every alteration that is material; and whether, in any particular case, an alteration will avoid the policy, depends, as a general rule, upon its materiality, and this is determined by the question whether it increases the risk, which is a question of fact to be determined by a jury.

Curry v. Commonwealth Ins. Co., 10 Pick. 535.
Limburg v. Insurance Co., 90 Iowa, 709, 57 N. W. 626.

The question of materiality does not depend upon whether the loss is or is not caused by the alteration.

It is competent for the parties to agree that a certain change or alteration shall work a forfeiture, although the risk is not thereby increased.

Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379.
Frost's Detroit Lumber, etc., Works v. Millers', etc., Ins. Co., 37 Minn. 300, 34 N. W. 35.
Mack v. Rochester Ins. Co., 106 N. Y. 560, 13 N. E. 343.

Unless stipulated to the contrary, the insured may use, protect, and enjoy his property as such property is customarily used, enjoyed, and protected. He may make such ordinary changes and repairs as are customary.

Jolly's Adm'rs v. Baltimore Equitable Soc., 1 Har. & G. (Md.) 296.

Any change in the situation of the property insured with reference to other property within the limits of fair and

honest dealing is permissible, although the change cause the destruction of the property.

Joyce v. Maine Ins. Co., 45 Me. 168.
"Contiguous building," Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432, 29 N. W. 125.

If the policy provides against an alteration and increase of risk, an alteration not incidental to the use of the property will avoid the policy if it increase the risk during the alteration.

Lyman v. State Mut. Fire Ins. Co., 14 Allen, 329.

The insured is responsible for the alteration made by his tenant without his knowledge.

Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391.
Fire Ass'n of Philadelphia v. Williamson, 26 Pa. St. 196.

(d) THE KEEPING OR USE OF CERTAIN ARTICLES.

The keeping or use of prohibited articles renders the contract invalid. But a policy is sometimes issued upon a building which is used, and to be used, for a purpose designated in the policy, such as for a restaurant, a general store, or for "mercantile purposes." Such policies generally contain printed provisions absolutely prohibiting the use of certain enumerated articles. The difficulty arises when such prohibited articles are necessarily or commonly used in the business to be conducted in the insured building. Thus, in Maril v. Insurance Co., 95 Ga. 604, 23 S. E. 463, the policy was written upon "watches, jewelry," etc., and "watchmaker's material, all while contained in the three-story brick building," etc. The policy, on its face, provided that it should be void "if the risk be increased by any means within the control of the insured, * * * or if * * * benzine, gasoline, etc., etc., are kept or used on the premises without written consent." The plaintiff offered to prove that both kerosene and ben-

zine, in reasonable quantities, were used in his business as watchmaker's material, and that their use as such was necessary, customary, and usual in the conduct of such business; that he was engaged in the conduct of this business at the time this business was effected, and that the defendant knew such to be the fact. He was not permitted to show these facts, and the trial court directed a verdict for the insurance company, on the ground that the policy was invalidated by the keeping of a small quantity of gasoline and benzine on the premises without the consent of the insurer. The supreme court, in reversing the trial court, said: "If the articles were employed by the insured in the conduct of the particular business, and the use of such article is a necessary incident to the conduct of such a business, the parties will be presumed to have contracted with reference thereto; and at the time the insurance policy was issued the insurer will be presumed to have had in contemplation the use of such substances by the assured when he assumed the risk, and, under such circumstances, will be presumed to have waived the condition under which the use of such substances would render the policy void."

In Faust v. Insurance Co. (Wis.) 64 N. W. 883, it was held that the keeping of a small quantity of benzine, necessary for use in a furniture repair shop, did not invalidate a policy describing the building as a "furniture store and repair shop," although the printed portion of the policy provided that it should be void if benzine was kept on the premises without written permission.

See, also:

Mears v. Insurance Co., 92 Pa. St. 17.

Viele v. Insurance Co., 26 Iowa, 9.

Phœnix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393).

Hall v. Insurance Co., 58 N. Y. 292.

As to when gasoline is "kept, used, or allowed" on the premises, see Smith v. Insurance Co. (Mich.) 65 N. W. 236.

In Garretson v. Insurance Co. (Iowa) 60 N. W. 540, the policy described the building as used for "mercantile purposes," and expressly prohibited the keeping of gasoline. It was held that the policy did not authorize the use of the building as a "restaurant" in which the use of gasoline would be necessary, and that the plaintiff could not recover.

C.

§ 57. STIPULATIONS CONTAINED IN LIFE POLICIES RELATING TO THE CONDITION AND CONDUCT OF THE INSURED.

(a) HEALTH.

A warranty that the insured is in "good health" means that he is free from any conscious derangement of organic functions.

Goucher v. North Western, etc., Ass'n, 20 Fed. 596.
Morrison v. Wisconsin, etc., Ins. Co., 59 Wis. 162, 18 N. W. 13.
Ross v. Bradshaw (1760) 1 W. Bl. 312.

Such words are to be given their common meaning. Whether the party was in "good health" is a question of fact for the jury.

Swick v. Home Ins. Co., 2 Dill. 160, Fed. Cas. No. 13, 692.
Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274.
Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119.
Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466.

Continental Life Ins. Co. v. Yung, 113 Ind. 159, 15 N. E. 220.

"Disorder tending to shorten life."

See Watson v. Mainwaring, 4 Taunt. 763; World Mut. Life Ins. Co. v. Schultz, 73 Ill. 586.

(b) OCCUPATION.

The occupation if called for, must be correctly stated.

Dwight v. Germania Life Ins. Co., 103 N. Y. 341, 8 N. E. 654.

United Brethren M. A. Soc. v. White, 100 Pa. St. 12.

A change of occupation, when forbidden by the policy, defeats the insurance.

Stone's Adm'rs v. United States Casualty Co., 34 N. J. Law, 371.

Summers v. United States Ins. Co., 13 La. Ann. 504.

(c) TEMPERATE HABITS.

Provision that the policy shall be void if the insured shall become intemperate, or be guilty of the excessive use of intoxicating liquors, or shall die from the habitual use of intoxicating liquors, or shall die by reason of intemperance in the use of intoxicating liquors, or death shall be caused by the use of intoxicating drinks or opium, will have the stipulated effect.

Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.

Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582.

Odd Fellows Mut. Life Ins. Co. v. Rohkopp, 94 Pa. St. 59.

Davey v. Aetna Life Ins. Co., 38 Fed. 650.

Bloom v. Franklin Life Ins. Co., 97 Ind. 478.

The burden of proof is on the company to show a violation of such stipulation.

Boisblanc v. Louisiana Equitable Life Ins. Co., 34 La. Ann. 1167.

A warranty of correct and temperate habits by an applicant for life insurance refers to the habits of the assured, and not to occasional practices.

Union Mut. Life Ins. Co. v. Reif, 36 Ohio St. 596.
Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350.

(d) AGE.

The misrepresentation of the age of an applicant will defeat the insurance.

Attorney General v. Ray, 9 Ch. App. 397.
Hartford Life & Annuity Ins. Co. v. Gray, 91 Ill. 159.
Linz v. Massachusetts Ins. Co., 8 Mo. App. 363.

(e) OTHER APPLICATION.

A false answer stating that the applicant has never been rejected as an applicant for insurance avoids the policy.

Edington v. Aetna Life Ins. Co., 100 N. Y. 536, 3 N. E. 315.

(f) MARRIED OR SINGLE.

A warranty that the insured is single when he is married avoids the policy.

Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. 47.
United Brethren M. A. Soc. v. White, 100 Pa. St. 12.

(g) FAMILY PHYSICIAN.

An untrue statement that the applicant has had no medical attendance avoids the policy.

Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 766.

A "family physician" means the physician who usually attends and is consulted by the members of the family in the capacity of physician.

Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).

(h) SUICIDE.

In the absence of any provision in the policy, suicide will not avoid the policy.

Richards, § 184.

Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.

Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312.

Contra, Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

Death resulting from poison taken by accident or mistake is not within the contemplation of a provision that the policy shall be void if the insured "die by his own hand."

Penfold v. Universal Life Ins. Co., 85 N. Y. 317.

Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582.

This is true although the accident was due to intoxication.

Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338.

A policy containing a clause that it shall be avoided if the insured "die by his own hand" is not avoided by self-destruction while insane.

Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224.

Schaffer v. National Life Ins. Co., 25 Minn. 534.

Schultze v. Insurance Co., 40 Ohio St. 217.

Contra, if the act be knowingly and intentionally committed.

Dean v. American Mut. Life Ins. Co., 4 Allen, 96.

Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169.

American Life Ins. Co. v. Isett, 74 Pa. St. 176.

Borradaile v. Hunter, 5 Man. & G. 639.

Clift v. Schwabe, 3 Man., G. & S. 437.

In New York Mut. Life Ins. Co. v. Terry, 15 Wall. 580, Mr. Justice Hunt stated the rule as follows:

"If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not with the contemplation of the parties to the contract, and the insurer is liable."

In Massachusetts a policy to be void if the insured shall "die by suicide" is vitiated by such act, although the insured was insane, if it be the result of his will and intention.

Cooper v. Mutual Life Ins. Co., 102 Mass. 227.

Gay v. Union Mut. Life Ins. Co., 9 Blatchf. 142, Fed. Cas. No. 5,282.

Schultz v. Insurance Co., 40 Ohio St. 217.

Blackstone v. Insurance Co., 74 Mich. 592, 42 N. W. 156.

Contra, Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. St. 92.

There is no presumption of law that self-destruction arises from insanity. The burden of proving that the insured committed suicide is upon the insurance company alleging it as a defense.

Connecticut Mut. Life Ins. Co. v. Akens, 14 Sup. Ct. 155.

Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36.

Mallory v. Insurance Co., 47 N. Y. 52.

Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731.

Terry v. Life Ins. Co., 1 Dill. 403, Fed. Cas. No. 13,839.

Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414.

Hale v. Life Ind. & Inv. Co. (Minn. Dist. Ct.) 2 Minn. Law J. 316.

A provision that the policy shall be void if the insured commits suicide, "whether sane or insane," is valid.

Pierce v. Travelers' Life Ins. Co., 34 Wis. 389.

Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284.

But the company is still liable if the death was accidental.

Phillips v. Louisiana Equitable Life Ins. Co., 26 La. Ann. 404.

For a general discussion, see 21 Cent. Law J. 378.

(i) MILITARY OR NAVAL SERVICE.

If the insured enters the military or naval service without the consent of the company, and contrary to the provisions of the policy, the policy is avoided.

Welts v. Connecticut Mut. Life Ins. Co., 46 Barb. 412, 48 N. Y. 34.

Ayer v. New England Mut. Life Ins. Co., 109 Mass. 430.

(j) RESIDENCE AND TRAVEL.

Provisions limiting residence and travel within certain limits are valid.

Rainsford v. Royal Ins. Co., 33 N. Y. Super. Ct. 453.

A provision that the assured shall not "pass beyond the settled limits of the United States" means beyond the territorial limits of the nation.

Casler v. Connecticut Mut. Life Ins. Co., 22 N. Y. 427.

How waived, Home Life Ins. Co. v. Pierce, 75 Ill. 426.

Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

Where the permission is granted to go without the fixed limits by a fixed course, such course cannot be departed from without violating the stipulation, even though the course taken be both shorter and safer.

Hathaway v. Trenton Ins. Co., 11 Cush. 448.

(k) DEATH IN VIOLATION OF LAW.

To render this provision binding, the insured must die while engaged in the perpetration of the unlawful act, or as the direct result thereof. Death from some other cause, although following indirectly therefrom, will not come within its meaning.

Cluff v. Mutual Ben. Life Ins. Co., 13 Allen, 308.
Bradley v. Mutual Ben. Life Ins. Co., 45 N. Y. 422.
Bloom v. Franklin Ins. Co., 97 Ind. 478.

In Duran v. Insurance Co., 63 Vt. 437, 22 Atl. 530, it was held that there could not be a recovery on a policy which was to become invalid if the insured was injured while engaged in the "violation of law," when it appeared that the insured was injured by slipping on the frozen ground while returning from a hunting expedition on Sunday.

D.

§ 58. STIPULATIONS RELATING TO RISKS AND ARTICLES EXCEPTED FROM THE PROTECTION OF THE POLICY.

Policies ordinarily provide that the insurer shall not be liable for damages caused by mobs, riots, war, explosion, and other such agencies. Certain articles, such as benzine, gunpowder, fireworks, and the like, are also considered of such a dangerous nature that they are not insurable. For construction of clauses relating to such excepted matters, see:

Insurance Co. v. Boon, 95 U. S. 117.

City Fire Ins. Co. of New York v. Corlies, 21 Wend. (N. Y.) 370.

Security Ins. Co. v. Mette, 27 Ill. App. 324.

Renshaw v. Insurance Co., 33 Mo. App. 394. (Fall of building).

Ermentrout v. Insurance Co., 60 Minn. 418, 62 N. W. 543.

Stipulations of the Second Class.

A.

§ 59. PROVISIONS RELATING TO THINGS TO BE DONE AFTER THE LOSS.

(a) NOTICE OF LOSS.

Insurance contracts generally provide that notice of loss be given to the insurer forthwith, or within a certain number of days. Where the notice is to be given forthwith, the insured must act with reasonable diligence. Ordinarily it is a question for the jury to determine whether reasonable diligence has been exercised.

Griffey v. Insurance Co., 100 N. Y. 417, 3 N. E. 309.
Carpenter v. Insurance Co., 135 N. Y. 298, 31 N. E. 1015.
Trask v. Insurance Co., 29 Pa. St. 198.

In the absence of statute, the time fixed by the policy will govern, unless so short as to be unreasonable. As said in Ermentraut v. Insurance Co. (Minn.) 65 N. W. 635: "It is a settled law that, where the policy requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to the right of action on the policy."

(b) PROOF OF LOSS.

Proof of loss must be made as required by the policy, as a condition precedent to an action on the policy, or it must

be shown that the insurer has waived the requirement, or is estopped to require compliance therewith.

Bruce v. Insurance Co., 24 Or. 486, 34 Pac. 16.
McCullough v. Insurance Co., 113 Mo. 606, 21 S. W. 207.
Johnson v. Insurance Co., 112 Mass. 49.
Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83.
See Kahnweiler v. Insurance Co., 57 Fed. 562.
Hall v. Insurance Co., 90 Mich. 403, 51 N. W. 524.
Jacobs v. Insurance Co., 86 Iowa, 145, 53 N. W. 101.

(c) PRODUCTION OF BOOKS AND PAPERS.

The insured must comply with the requirements of the policy with reference to the production of his books and papers in order that they may be inspected by the insurer; but where, owing to the destruction of books, bills of sale, and invoices, and other papers, the assured is unable to furnish a specific statement of the property destroyed, the law will hold the terms of the policy requiring proofs of loss as sufficiently complied with by furnishing such as it is within the power of the assured to make. The law does not require the assured to do an impossible thing.

People's Fire Ins. Co. v. Pulver, 127 Ill. 246, 20 N. E. 18.
Miller v. Insurance Co., 70 Iowa, 704, 29 N. W. 411.

(d) CERTIFICATE OF MAGISTRATE.

The provision that the insured shall, if required, furnish a certificate of the nearest notary or magistrate to the effect that he believes that the insured has, without fraud, sustained loss on the property covered by the policy, is a valid condition; and, if not complied with, there can be no recovery on the policy.

Lane v. Insurance Co., 50 Minn. 227, 52 N. W. 649.
Roumage v. Insurance Co., 13 N. J. Law, 110.

Paltrovitch v. Insurance Co., 68 Hun, 304, 23 N. Y. Supp. 38.

Agricultural Ins. Co. v. Bemiller, 70 Md. 400, 17 Atl. 380.

McNally v. Insurance Co., 137 N. Y. 389, 33 N. E. 475.

Such a requirement is prohibited by Minn. Gen. Ins. Law 1895.

(e) EXAMINATION OF INSURED.

Where a policy contains a provision to the effect that in the event of loss the insured shall submit to an examination under oath with reference to the loss, there can be no recovery on the policy until this requirement is complied with or waived.

Harris v. Insurance Co., 35 Conn. 310.

B.

§ 60. PROVISIONS RELATING TO THE REMEDY ON THE CONTRACT.

(a) ARBITRATION.

A provision for the arbitration of special matters, such as the amount of the damage, is valid. But a provision for the arbitration of the general question of the liability of the insurer is invalid, as an attempt to oust the courts of jurisdiction.

2 May, Ins. § 492.
2 Beach, Ins. c. 36.

The general rules regulating arbitration of matters growing out of insurance contracts are well stated in the recent case of Chapman v. Insurance Co., 89 Wis. 572, 62 N. W. 422. After quoting the provision of the policy, the court said: "This provision furnishes a speedy, convenient, and inexpensive mode of ascertaining the loss or damage of the assured, if he is entitled to recover, and does not appear to be obnoxious to the objection that it is void, as ousting the courts of their rightful jurisdiction. Under it the right of recovery is left open, and the appraisal serves only to liquidate and determine the amount of the loss or damage. The validity of such stipulation appears to be beyond doubt. We think that the question is perfectly well settled, and that it has been so considered ever since the case of Scott v. Avery, 5 H. L. Cas. 811, and that when parties to a contract agree that money shall be paid when something else happens, and that something else is that a third person named in it, or persons to be named as therein provided, shall determine the amount, then the cause of action does not arise until the amount has been so ascertained or determined, unless some-

thing has occurred which may operate as a waiver of such precedent condition, or to dispense with its performance, or that, with fair and reasonable efforts, performance of it cannot be obtained. The rule is stated by Jessel, M. R., in Dawson v. Fitzgerald, 1 Exch. Div. 257, 260, in the brief, to be this: 'There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that the arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring,' etc. Here the covenant to pay is, by necessary implication, conditioned upon the appraisal, if properly claimed, and the plaintiff is in no position to claim anything until an appraisal has been made, waived, or in some manner legally dispensed with. Elliott v. Assurance Co., L. R. 2 Exch. 240. The questions to be considered are: 'Whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one.' Collins v. Locke, 4 App. Cas. 689; Edwards v. Society, 1 Q. B. Div. 592, 598. We think that the stipulation in question is a valid and reasonable one, and not open to the objection urged against it, that it ousts the jurisdiction of the court, and it leaves the general question of liability, if any exists, to be judicially determined. The case of Hamilton v. Insurance Co., 136 U. S. 242, 254, 10 Sup. Ct. 945, seems decisive. President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Insurance Co., 138 Mass. 572, 576; Hudson v. McCartney, 33 Wis. 331. In such cases a party may not, of his own mere option or volition, revoke the arbitration or submission clause, any more than any other provision of the contract. A contrary view, however, obtains in Pennsylvania, in cases where

the person or persons who are to make the appraisal or award are not named in the contract, but are to be chosen thereafter by the parties. Mentz v. Insurance Co., 79 Pa. St. 478; Commercial Union Assur. Co. of London v. Hocking, 115 Pa. St. 414, 8 Atl. 589. But we are unable to see any substantial grounds for the distinction. Upon the other hand, the case of Hamilton v. Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, is one where the provision that an appraisal should be made was not either expressly or by necessary implication a condition precedent to the obligation to pay, but where the stipulation for an appraisal was held to be independent and collateral, and the assured entitled to sue without an appraisal; and the principal cases on this point are here collected. The cases relied on by the respondents' counsel fall within the category of Hamilton v. Insurance Co., and Reed v. Insurance Co., supra; Rowe v. Williams, 97 Mass. 165; Hood v. Hartshorn, 100 Mass. 121; Nute v. Insurance Co., 6 Gray (Mass.) 181; Stephenson v. Insurance Co., 54 Me. 70. The doctrine laid down in this state in Hudson v. McCartney has not been departed from, or materially qualified. In Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504, and Vangindertaelen v. Insurance Co., 82 Wis. 112, 51 N. W. 1122, where there were provisions, in substance, as in these cases, no arbitration was demanded. In Canfield v. Insurance Co., 55 Wis. 419, 13 N. W. 252, the policy did not provide, either expressly or by necessary implication, that an award should be a condition to the right to sue; and the same is true of the contract in Oakwood Retreat Ass'n v. Rathborne, 65 Wis. 177, 26 N. W. 742. We hold, therefore, that, where an appraisal has been properly demanded, an appraisal or award on the question of the amount of loss or damage is made by these policies, by necessary implication, a condition precedent to the right of the assured to sue, and he cannot maintain his action unless the condition is waived, or in some way dispensed with, and that he has in such case no right, at his mere option or volition, to revoke the arbitration clause in the policy, or a submission under it."

(b) LIMITATIONS AS TO TIME AND PLACE OF BRINGING SUIT.

The policy may contain a valid provision limiting the time within which a suit upon it may be maintained.

Ripley v. Insurance Co., 30 N. Y. 136.
Woodbury Savings Bank & Building Ass'n v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 518.
Harris v. Insurance Co., 35 Conn. 310.

But attempts to thus limit the place or court where the action shall be brought are ineffectual.

Hall v. Insurance Co., 6 Gray (Mass.) 185.
Minn. Gen. Ins. Law 1895, § 25.

(c) INSURER'S RIGHT TO REPLACE THE PROPERTY.

In the absence of a stipulation to that effect in the policy, the insurer has no right to rebuild or replace the insured property.

Wallace v. Insurance Co., 4 La. 289.

The right, when reserved, must be exercised within the time stipulated, or within a reasonable time.

Daul v. Insurance Co., 35 La. Ann. 98.
Haskins v. Insurance Co., 5 Gray (Mass.) 432.

PART XI.

WAIVER AND ESTOPPEL.

§ 61. DEFINITIONS.

Waiver is the voluntary relinquishment of a known right.

When one party has, by his representations or conduct, induced the other party to a contract to give him an advantage which it would be against equity and good conscience for him to assert, the courts will not permit him to avail himself of that advantage.

Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520.
Union Mutual Ins. Co. v. Wilkinson, 13 Wall. 222.
Bigelow, Estop.

§ 62. WAIVER REQUIRES KNOWLEDGE.

Waiver implies knowledge, and the insured, to claim a waiver, must be able to show "knowledge on the part of the insurer of the act or omission on the part of the insured which he is claimed to have dispensed with or waived. The knowledge on a waiver need not be expressly shown, but may be implied, when the act of commission or omission is

of such a character as fairly to preclude the idea of ignorance."

2 Biddle, § 1053.

Miller v. Union Cent. Life Ins. Co., 110 Ill. 102.

McMartin v. Continental Ins. Co., 41 Minn. 198, 42 N. W. 934.

Stevens v. Queen Ins. Co., 81 Wis. 335, 51 N. W. 555.

Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326.

Mershon v. National Ins. Co., 34 Iowa, 87.

Illustrations—Delivery of policy, without requiring prepayment of premium, Dilleber v. Life Ins. Co., 76 N. Y. 567; Elkins v. Susquehanna M. F. Ins. Co., 113 Pa. St. 386, 6 Atl. 224.

When it is known that the risk is prohibited by the by-laws, Merchants' & Manufacturers' Ins. Co. v. Curran, 45 Mo. 142.

That the premises are vacant, Haight v. Continental Ins. Co., 92 N. Y. 51.

Accepting premises after notice of the infirmity, Clapp v. Massachusetts Ben. Ass'n, 146 Mass. 519, 16 N. E. 433.

§ 63. LIMITATIONS IN POLICY.

The various provisions which insurance companies have placed in their policies for the purpose of limiting or altogether taking away the power of agents to waive conditions in the policy may be classified as follows:

1. Those forbidding agents to waive except in a specified manner; as, for example, by writing indorsed on the policy. The courts are divided as to the validity of such provisions.

Held valid in:

Carlin v. West Assur. Co., 57 Md. 515.

Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353.

Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731.

Held invalid in:

Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408.

Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769.

Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

2. Those forbidding agents to waive except subject to the approval of certain officers of the company, and prescribing the manner in which such waiver may be made.

McCormick v. Springfield F. & M. Ins. Co., 66 Cal. 361, 5 Pac. 617.

Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

This provision is held valid in:

McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 21 Atl. 80.

Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34.

Van Allen v. Farmers' Joint-Stock Ins. Co., 64 N. Y. 469.

3. Those placing an absolute prohibition upon the power of agents to waive. Such a provision is binding, but the insurer may be estopped from asserting it by a course of conduct manifestly inconsistent with an intention to observe it.

Franklin Ins. Co. v. Sefton, 53 Ind. 380.

Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601.

A provision that "agents are not authorized to make, alter, or discharge contracts" has been held not to apply to a general agent.

Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y. 625.

In Ruthven v. American Fire Ins. Co. (Iowa) 60 N. W. 663, the court said:

"The policy provides, in substance, that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agree-

ment indorsed thereon or added thereto. There is some conflict in the authorities as to whether this kind of an agreement or provision is valid or not. But we think the decided weight is in favor of the proposition that it is.

Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010.
Weidert v. Insurance Co., 19 Or. 261, 24 Pac. 242.
Cleaver v. Insurance Co., 71 Mich. 414, 39 N. W. 571.
Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31.
Smith v. Insurance Co., 60 Vt. 682, 15 Atl. 353.
Walsh v. Insurance Co., 73 N. Y. 5.
Hankins v. Insurance Co., 70 Wis. 1, 35 N. W. 34.
Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455.
Clevenger v. Insurance Co., 2 Dak. 114, 3 N. W. 313.
Enos v. Insurance Co., 67 Cal. 621, 8 Pac. 379.
Kyte v. Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518.
And many other cases cited in the authorities.

"Whether this is the correct rule or not, it is the one adopted by this court in the recent case of Kirkman v. Insurance Co. (Iowa) 57 N. W. 953, decided since this cause was tried in the lower court. The principle was also recognized in Zimmermann v. Insurance Co., 77 Iowa, 691, 42 N. W. 462; Wood Mowing Mach. Co. v. Crow, 70 Iowa, 340, 30 N. W. 609. We do not mean to be understood as holding that the company could not itself, through its general agents, waive these provisions of the policy. What we do hold is that the provisions we have quoted are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had or are presumed to have had knowledge, and that any agreement or waiver which they attempted to make would not be binding upon the company, because not authorized."

A provision that no waiver shall be binding except it be in writing, plainly expressed in the policy, and the like, has been held, like the other clauses, not to prevent a parol

waiver by the insurer, as the power to insert such a stipulation cannot be greater than the power to disregard it.

2 Biddle, 1081.

Gans v. St. Paul Fire & Marine Ins. Co., 43 Wis. 108.

McFarland v. Kittanning Ins. Co., 134 Pa. St. 590, 19 Atl. 796.

Anderson v. Manchester Fire Ins. Co. (Minn.) 63 N. W. 241.

A local agent, who is simply authorized to fix rates of insurance, and countersign and deliver policies, subject to the approval of the company, has no authority to waive a provision of the policy that, when a loss occurs, "the assured shall forthwith give notice of said loss to the company," etc.

Ermentrout v. Insurance Co., 60 Minn. 418, 62 N. W. 543.

Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.

Edwards v. Lycoming Co. Mut. Ins. Co., 75 Pa. St. 378.

2 Biddle, § 988.

§ 64. EFFECT OF KNOWLEDGE BY INSURER'S AGENT OF FALSITY OF STATEMENT IN THE APPLICATION.

In a recent case it was said that it is settled beyond question that, if at the time the policy is issued the agent of the insurer knows that the application contains false statements, the insurer is estopped to assert such falsity in order to escape liability.

Waterbury v. Insurance Co., 6 Dak. 468, 43 N. W. 697.

The reason for this rule is stated in Michigan Shingle Co. v. State Inv. & Ins. Co., 94 Mich. 389, 53 N. W. 945. The insured warranted that "a continuous clear space of 150 feet shall hereafter be maintained" between the property in-

sured and a building of a certain description. The agent of the insurer knew that the existing facts were otherwise, and that there was no intent to change the situation, and that it was not within the power of the applicant to do so. The court said: "The defendant insists that the clause, 'there shall be hereafter maintained 150 feet clear space,' must be rendered literally, and without regard to the knowledge of the agent as to what the actual distance was; thereby asserting that it has the right to accept the money of the assured, issuing its policy therefor, and lead him to understand that he has a valid insurance until a loss occurs, and then to repudiate its liability. Such a rule as this would enable it to affirm a contract entered into by it with full knowledge of all the facts, in so far as such contract might be of advantage to it, and to repudiate it the moment it ceased to be advantageous. This is inequitable, and contrary to the well-established rule in reference to when and how the repudiation of a contract shall be made. The knowledge of the agent is the knowledge of the company. 'If the insurer receives the premium with full knowledge of facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for that cause is gone.' Mershon v. Insurance Co., 34 Iowa, 87."

To the same effect, see:

Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812.

Dunbar v. Insurance Co., 72 Wis. 492, 40 N. W. 386.

Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291.

Pickel v. Insurance Co., 119 Ind. 291, 21 N. E. 898.

Cotten v. Casualty Co., 41 Fed. 506.

Reynolds v. Insurance Co., 80 Iowa, 563, 46 N. W. 659.

Manhattan Fire Ins. Co. v. Weill, 28 Grat. (Va.) 389.

Germania Fire Ins. Co. v. Hick, 125 Ill. 361, 17 N. E. 792.

Anderson v. Assurance Co., 59 Minn. 182, 195, 60 N. W. 1095, and 63 N. W. 241.

But there are many cases which hold the insured strictly to the truth of his warranty, regardless of the knowledge of the agent of the insurer. Thus, in Clemans v. Society, 131 N. Y. 485, 30 N. E. 496, it was held that a false warranty by an applicant for life insurance avoided a contract of which it became a part, although he believed it to be true, and the agent knew it to be false. "It is not important that the party making the warranty really believed in its entire truth. If it be false, it avoids the contract. Nor does the mere knowledge of the agent of the company, at the time when it is made, that the warranty is false, prevent the defendant from setting up the breach as a defense to the action on the policy."

And see:
Kenyon v. Association, 122 N. Y. 247, 25 N. E. 299.
Pottsville Mut. Fire Ins. Co. v. Fromm, 100 Pa. St. 347.
McCoy v. Insurance Co., 133 Mass. 82.

§ 65. COLLUSION BETWEEN APPLICANT AND AGENT OF THE INSURER.

No estoppel arises where there is a want of good faith on the part of the applicant, or collusion between the applicant and the agent of the insurer.

Rockford Ins. Co. v. Nelson, 75 Ill. 548.

§ 66. ESTOPPEL BY CONDUCT AFTER LOSS.

The insurer may be estopped to deny liability, by its acts after the loss.

(a) GENERAL DENIAL OF LIABILITY.

Thus, a general denial of liability waives notice and proof of loss.

2 Biddle, § 1136.
2 May, § 464.
Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.

Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325, 30 N. W. 585.

Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275.

A provision in the policy relating to waiver may be waived.

Haight v. Continental Ins. Co., 92 N. Y. 51.

See Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326.

In Dwelling House Ins. Co. v. Brewster (Neb.) 61 N. W. 746, the court said: "One of the defenses relied on by the company was the fact that the insured had not furnished the proofs of the loss required by the terms of the policy of insurance. Whether this was true or not was immaterial, as the company denied that it was bound to pay the loss, claiming that the policy was not in force at the time of the destruction of the property. This was a waiver of the requirements of the proofs of loss."

(b) REFUSAL ON SPECIFIC GROUNDS.

Where an insurance company puts its refusal to pay a loss on another ground, it is a waiver of objections to insufficiency in the proofs of loss required by the policy.

Hand v. Insurance Co. (Minn.) 59 N. W. 538.

Newman v. Insurance Co., 17 Minn. 123 (Gil. 98).

Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393).

The authorities are collected in Omaha Fire Ins. Co. v. Dierks (Neb.; 1895) 61 N. W. 740.

German Ins. & Sav. Inst. v. Kline (Neb.; 1895) 62 N. W. 857.

(c) REFUSAL TO SEND BLANKS FOR PROOFS.

A refusal to send to the insured the customary blanks has been held a waiver of proofs.

Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281.

Effect of conduct subsequent to the loss. See:

Allemania Fire Ins. Co. v. Pitts Exposition Soc. (Pa. Sup.) 11 Atl. 572.

Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.

Fisher v. Crescent Ins. Co., 33 Fed. 544.

Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325, 30 N. W. 585.

Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149, 4 Atl. 8.

Continental Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242.

Niagara Fire Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385.

The condition of a policy requiring proofs of loss within a specified time is waived where, after notice of the loss, the company's adjuster examines the circumstances of the fire, takes possession of the books of insured, and, with his help, makes an estimate of the amount of the loss.

Home Fire Ins. Co. v. Hammang (Neb.) 62 N. W. 883.

See Slater v. Insurance Co., 89 Iowa, 628, 57 N. W. 422.

Faust v. Insurance Co., 91 Wis. 158, 64 N. W. 883.

Trippe v. Society, 140 N. Y. 23, 35 N. E. 316.

Paltrovitch v. Insurance Co., 143 N. Y. 73, 37 N. E. 639.

PART XII.

ASSIGNMENT, RIGHTS OF BENEFICIARY.

There is a difference at common law between life and fire and marine insurance contracts with respect to their assignability. This difference grows out of the common-law rule regarding the assignability of causes of action, and is also affected by the peculiar nature of marine insurance and life insurance.

§ 67. FIRE INSURANCE.

(a) NOT ASSIGNABLE.

Fire insurance contracts are not assignable without the consent of the insurer. Policies ordinarily contain a provision for their assignment with the written consent of the company.

As said in White v. Robbins, 21 Minn. 370: "Policies of insurance are not in their nature assignable, and unless made assignable at the pleasure of the insured, and by him assigned, or unless his assignment is assented to by the insurer, the effect of a sale by the insured of the property insured is to put an end to the contract of insurance. The vendor of the property cannot recover on the policy if the property is burnt, because he has sustained no loss. The

purchaser cannot recover because he has no contract with the insurer."

1 Biddle, § 261.
2 May, c. 19.
2 Wood, c. 10, § 361.

(b) EFFECT OF ASSIGNMENT WITH CONSENT OF INSURER.

When the policy is assigned with the consent of the insurer, a new contract arises as of that date, embracing the terms and stipulations as they were in the original contract between the assignor and insured.

Ellis v. Insurance Co., 32 Fed. 646 (Brewer, J.).
2 May, Ins. § 378A.
1 Biddle, Ins. § 321.

This contract is unaffected by any causes of forfeiture which existed at the time of the assignment, unknown to the other party. This is the doctrine of most of the recent cases.

Hall v. Insurance Co. (Mich.) 53 N. W. 727.
Ellis v. Insurance Co., 32 Fed. 646.
Continental Ins. Co. v. Munns, 120 Ind. 30, 22 N. E. 78.
Syndicate Ins. Co. v. Bohn, 27 U. S. App. 564, 12 C. C. A. 531, 65 Fed. 165 (under what is known as the "Union Mortgage Clause").

The rule is strengthened when the insurer had knowledge of the existence of a cause of forfeiture at the time of the assignment.

Steen v. Insurance Co., 89 N. Y. 319.
Breckinridge v. Insurance Co., 87 Mo. 62.
In Ellis v. Insurance Co., 68 Iowa, 578, 27 N. W. 762, it was held that the insurer did not waive a cause of forfeiture existing at the time of the assignment,

but which was unknown to the insurer. But see Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. 782.

In McCluskey v. Insurance Co., 126 Mass. 306, and in Eastman v. Insurance Co., 45 Me. 307, it was held that a policy which was void for want of insurable interest was invalid in the hands of one to whom it was assigned with the consent of the insurer, but upon no new consideration. And see Fogg v. Insurance Co., 10 Cush. 337; Phenix Ins. Co. v. Willis, 70 Tex. 12, 6 S. W. 825.

After an assignment assented to by the insurer, the assignor cannot affect the interests of the assignee by contracts with reference to the insurance.

American Cent. Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159.

Hall v. Fire Ass'n, 64 N. H. 405, 13 Atl. 648.

As by an accord and satisfaction, Hathaway v. Insurance Co., 134 N. Y. 408, 32 N. E. 40.

Or an arbitration without notice to the assignee (mortgagee), Bergman v. Assurance Co., 92 Ky. 494, 18 S. W. 122.

There is some conflict of authority on the question of the effect of a breach of condition by the assignor after the assignment. It is apparent that there should be a distinction made between the case of a transfer of the ownership of the property and an assignment of the policy to the new owner, and a mere assignment of the policy as collateral security for a debt. Some of the cases make no distinction, but hold that a new contract is created, which can in no way be affected by the subsequent acts of the assignor.

Pollard v. Insurance Co., 42 Me. 221.

Charlestown Ins. & F. Co. v. Neve, 2 McMul. 237.

But the later and better-considered cases hold that, where the assignment is as collateral security only, the policy is

avoided by breach of its conditions by the assignor subsequent to the assignment.

Buffalo Steam-Engine Works v. Sun Mut. Fire Ins. Co., 17 N. Y. 401.
Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151.
Pupke v. Insurance Co., 17 Wis. 378.
Swenson v. Sun Fire Office, 68 Tex. 461, 5 S. W. 60.
Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.
Reed v. Insurance Co., 54 Vt. 413.
Lycoming Fire Ins. Co. v. Storrs, 97 Pa. St. 354.

In Agricultural Ins. Co. v. Hamilton (Md.) 33 Atl. 429, the policy was payable to the mortgagee as his interest might appear. The court said: "But here the validity of the policy was made to depend upon the insured continuing to occupy the premises; and, no matter to whom the loss may be made payable, it cannot be recovered by any one if by the terms explicitly set forth in the policy no right of action can accrue at all upon the violation of some specific condition, whose observance by the insured is made necessary to fix the insurer's liability."

The uncertain nature of the security, which was thus at the mercy of the assignor, led to the adoption of a new form of assignment or mortgage clause, which expressly provides that no act of the assignor shall avoid the policy. The old form was an indorsement upon the policy, "Loss, if any, payable to ———, mortgagee, as his interest may appear." A new form, known as the "Union Mortgage Clause," provides that "the interests of the above-named mortgagee or beneficiary, or its assigns, only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c."

Of this clause, the court, in Syndicate Ins. Co. v. Bohn, 27 U. S. App. 564, 12 C. C. A. 531, and 65 Fed. 165, said: "Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a sep-

arate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause."

See, also:
Hartford Fire Ins. Co. v. Olcott, 97 Ill. 441.
Davis v. Insurance Co., 135 Mass. 251.
Eddy v. Assurance Corp., 143 N. Y. 311, 38 N. E. 307.
Phenix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834, 60 N. W. 133.

(c) ASSIGNMENT AFTER LOSS.

After loss the debt may be assigned without the consent of the insurer. It is then merely the assignment of a chose in action, and the assignee takes subject to all offsets and equities which existed against the assignor.

Benefant v. Insurance Co., 76 Mich. 654, 43 N. W. 682.
East Texas Fire Ins. Co. v. Coffee, 61 Tex. 287.
Archer v. Insurance Co., 43 Mo. 434.
2 May, § 386.

§ 68. LIFE AND MARINE POLICIES.

(a) ASSIGNABLE.

Life and marine contracts are assignable without the consent of the insurer.

Bliss, § 328.
1 Biddle, § 268.
1 Arnould, p. 107.

(b) INTEREST OF ASSIGNEE.

As to the necessity for an insurable interest in the assignee, see

"Insurable Interest," tit. IV. § 18d.

(c) VESTED INTEREST OF BENEFICIARY.

When the insured is not also the beneficiary, there cannot be an assignment without the consent of the beneficiary.

As said in Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41:

"It is the general rule that a policy and the money due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named."

Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771.

Allis v. Ware, 28 Minn. 166, 9 N. W. 666.

Pingrey v. National Life Ins. Co., 144 Mass. 374, 11 N. E. 562.

Holland v. Taylor, 111 Ind. 121, 12 N. E. 116.

Splawn v. Chew, 60 Tex. 532.

Weisert v. Muehl, 81 Ky. 336.

Fowler v. Butterly, 78 N. Y. 68.

Aetna Ins. Co. v. Mason, 14 R. I. 583.

Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919.

Cooke, § 74.

2 May, § 399L.

Right of an insolvent debtor to insure his life for the benefit of his wife. See:

Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, and article in 25 Am. Law. Rev. 185.

Cooke, § 74.

(d) RESERVATION OF RIGHT TO ASSIGN.

The right to assign the policy or change the beneficiary without the consent of the beneficiary may be reserved by statute, by law, or by a provision in the policy.

Weisert v. Muehl, 81 Ky. 336.

Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657.

Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094.
Union Mut. Life Ass'n of Battle Creek v. Montgomery, 70 Mich. 587, 38 N. W. 588.
Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524.
Cooke, § 75.
2 May, § 399M.

*

APPENDIX.

THE STANDARD POLICY.

The Minnesota Law of 1895, contains the following provisions relative to the form and conditions of a fire policy:

No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form herein set forth except as follows, to wit:

First—A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at ——."

Second—A company may print or use in its policies printed forms of description and specification of the property insured.

Third—A company insuring against damage by lightning may print, in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance the words "whether by fire, lightning, or both."

Fourth—A company incorporated or formed in this state may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this state, provided that the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such a way as to affect the question of loss to be appended to the policy by a slip or rider, as hereinafter provided.

Fifth—The blanks in said standard form may be filled in print or in writing.

Sixth—A company may print upon policies issued in compliance with the preceding provisions of this section the words "Minnesota standard policy."

Seventh—A company may write upon the margin or across the face of the policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; provided, that no provision shall be attached to or included in said policy limiting the amount to be paid in case of total loss on buildings to less than the amount of insurance on the same, and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to-wit:

[*Minnesota Standard Policy.*]

No. ——. $——.

(Corporate name of the company or association: Its principal place or places of business.)

In consideration of —— dollars to be paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure —— and —— legal representatives against loss or damage by fire, to the amount of —— dollars

(Description of property insured.)

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of ——, beginning on the —— day of ——, in the year eighteen hundred and —— at noon, and continuing until the —— day of ——, in the year eighteen hundred and ——, at noon, against all loss or damage by fire originating from any cause except invasion foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens except in case of total loss on buildings, but not to include loss or damage caused by explosion of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if the assured now has or shall hereafter make any other insurance on the said property without the assent of the company, or if without such assent the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, or if, without such assent, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the property shall be sold or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment running in whole or in part extra

time, except that such establishment may run in whole or in part extra hours not later than nine o'clock p. m., or if such establishment shall cease operation for more than thirty days without permission in writing endorsed hereon, or if the insured shall make any attempt to defraud the company, either before or after the loss, or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, or if camphene, benzine, naphtha or other chemical oils or burning fluids shall be kept or issued by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes, to be filled when cold, by daylight, and with oil of lawful fire test only.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, except in case of total loss on buildings the value of said buildings need not be stated, the interest of the insured therein, all other insurance thereon in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided, or replace the property with other of the same kind and goodness, or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition.

It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater premium of loss, except in case of total loss on buildings, sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it to the extent of the amount so paid all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss

on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured. And whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debts thereby secured.

This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this state unless commenced within two years from the time the loss occurs.

In witness whereof, the said —— company has caused this policy to be signed by the president and attested by its secretary (or by such proper officers as may be designated), at their office in ——.

Date, ——.

When two or more companies (each having previously complied with the laws of this state) unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premium to be paid to each company, and the proportion of liability which each company agrees to assume. And in the printed conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to the companies issuing such policy.

The law also contains the following provisions and restrictions:

[1.] No fire or fire and marine insurance company shall make any conditions or stipulations in its insurance contract concerning the

court of jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than one year after the cause of action accrues.

[2.] Any provision, contract or stipulation contained in any contract or policy of insurance issued or made by any fire insurance company, association, syndicate or corporation, insuring any property within this state, except risks equipped by automatic sprinklers, whereby it is provided or stipulated that the assured shall maintain insurance on any property covered by the policy to the extent of eighty per cent on the value thereof, or to any extent whatever, and any provision or stipulation in any contract or policy of insurance, that the insured shall be an insurer of the property insured to any extent, and any provision or stipulation in any such contract or policy to the effect that the insured shall bear any portion of the loss on the property insured, are hereby declared to be null and void, and the liability of the company, syndicate, association or corporation issuing the policy shall be the same as if no such agreement, stipulation or contract were contained in such policy.

[3.] Nor shall any such insurance company insert any condition, stipulation or agreement in any policy of insurance requiring a certificate from any notary public, justice of the peace, or other magistrate or person, as to anything whatever connected with such insurance or loss, and any such condition or stipulation shall be void.

[4.] Any person, company or association hereafter insuring any building or structure against loss or damage by fire, lightning or other hazard by a renewal of a policy heretofore issued or otherwise, shall cause such building or structure to be examined by the insurer or his agent, and a full description thereof to be made, and the insurable value thereof to be fixed by the insurer or his agent, the amount of which shall be stated in the policy of insurance.

[5.] In the absence of any change increasing the risk, without the consent of the insurer, and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid; and in case of a partial loss the full amount of the partial loss shall be paid, and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy, but in no case shall the insurer be required to pay more than the amount mentioned in the policy;

[6.] Provided, that, in the absence of fraud, the burden of proof to show an increase of risk by any change in the ownership or con-

dition of the structure or building upon which insurance is effected, either before or after loss arises, shall be upon the insurer, anything in the application or the policy of insurance to the contrary notwithstanding.

TABLE OF CASES CITED.

[The References in the Right-Hand Column Are to the Sections.]

A

[The references in the right-hand column are to the sections.]

B

[The references in the right-hand column are to the sections.]

C

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[The references in the right-hand column are to the sections.]

D

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E

F

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G

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H

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[The references in the right-hand column are to the sections.]

I

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J

K

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L

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M

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N

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O

P

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Q

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R

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S

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T

[The references in the right-hand column are to the sections.]

U

V

[The references in the right-hand column are to the sections.]

W

[The references in the right-hand column are to the sections.]

Z

TEXT BOOKS CITED.

May. The Law of Insurance. 2 vols. (3d Ed.) 1891.
Biddle. The Law of Insurance. 2 vols. 1893.
Beach. The Law of Insurance. 2 vols. 1895.
Barber. The Principles of Insurance. 1882.
Wood. The Law of Insurance. 2 vols. 1886.
Bliss. The Law of Life Insurance. (2d Ed.) 1874.
Cooke. The Law of Life Insurance. 1891.
Arnould. The Law of Marine Insurance. 2 vols. (6th Ed.) 1887.
Duer. The Law of Marine Insurance. 2 vols. 1845.
Phillips. The Law of Insurance. 2 vols. (5th Ed.) 1867.
Richards. The Law of Insurance. 1892.
Angell. The Law of Insurance. (2d Ed.) 1855.
Marshall. The Law of Insurance. 2 vols. 1805.
Emerigon. Traité des Assurances. 2 vols. 1827.
Couteau. Traité des Assurances sur la Vie. 2 vols. 1881.
Cauvet. Traité des Assurances Maritime. 2 vols. 1879.

INDEX.

[THE REFERENCES ARE TO PAGES.]

A

(References to pages.)

B

(References to pages.)

C

(References to pages.)

(References to pages.)

D

(References to pages.)

E

F

G

(References to pages.)

H

I

(References to pages.)

K

L

(References to pages.)

M

(References to pages.)

(References to pages.)

P

(References to pages.)

R

(References to pages.)

(References to pages.)

T

U

V

W

(References to pages.)

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ILLUSTRATIVE CASES

ON THE

LAW OF INSURANCE

ARRANGED WITH REFERENCE TO ELLIOTT'S OUTLINES OF THE LAW OF INSURANCE (2d ED.)

SELECTED BY

CHARLES B. ELLIOTT, PH. D., LL. D.

Judge of the District Court of Minnesota, and Head of the Department of Corporation and International Law in the College of Law of the University of Minnesota

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TABLE OF CONTENTS.

CASES REPORTED.

ILLUSTRATIVE CASES

ON

LAW OF INSURANCE

NEW HAMPSHIRE MUT. FIRE INS. CO. v. NOYES.

(32 N. H. 345.)

Supreme Court of New Hampshire. Merrimack. December Term, 1855.

Assumpsit on the premium note of the defendant. The plea was infancy, to which the plaintiff replied—First, that the defendant, after he became of age, ratified and confirmed his promise; and, secondly, that the note declared on was given for necessaries. Issue was joined upon both.

H. A. Bellows, for plaintiff. Mr. Tappan, for defendant.

FOWLER, J. The pleadings and agreed statement of facts present two distinct questions for consideration: First, was there, in the circumstances stated, such a ratification by the defendant, after he became of age, of his premium note, or the contract of insurance, as amounted to a new promise to pay it; and, secondly, is a contract for a policy of insurance a contract for necessaries, such as will bind the infant absolutely?

The subject of the ratification of his contract by an infant after arriving at maturity, has heretofore been pretty fully considered in this state, in the cases of Hale v. Gerrish, 8 N. H. 374, and Aldrich v. Grimes, 10 N. H. 197, cited by the defendant's counsel. It seems to be the doctrine of these, and the tendency of most of the later, decisions, that the contract of an infant, where it might be for his benefit, is not absolutely void, but voidable at the election of the infant, and that it may be ratified and made valid by the acts of the infant after attaining full age.

As to what acts will amount to a ratification of the contract in this class of cases, Upham, J., in delivering the opinion of the court in Hale v. Gerrish, 8 N. H. 376, says: "This ratification must either be a direct promise, as by saying, 'I ratify and confirm,' or, 'I agree to pay the debt,' or by positive acts of the infant, after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise."

This seems the true rule on this subject, clearly and unequivocally expressed, and by it the first question in this case is decisively settled in the negative. There is nothing in the agreed statement of facts as to the conduct of the defendant, after he became of age, in relation to his insurance by the plaintiff, which approximates to what is necessary to bring this case within the rule. There is no claim of any express promise, and the alleged acts of ratification are entirely of a negative character. There is no positive act in favor of the contract, much less any of that express and decided character which would constitute perfect evidence of a ratification, such as would be equal to an express and unequivocal promise. The defendant has done nothing in relation to his contract. He seems to have remained entirely passive until called upon in this suit, when he availed himself of the plea of infancy in avoidance of his assumed liability. This is as far as possible removed from that positive action in favor of his contract, indispensable to make it valid and binding.

But the plaintiff contends that the defendant was bound, on coming of age, to give notice of his disaffirmance of the contract in a reasonable time; otherwise he is to be considered as having affirmed it. If there be any such general rule as that for which the counsel contends, it can be applicable only in those cases where the infant, after coming of age, is in possession, by virtue of the contract of his minority, of something of value to him, the retaining of which might justly be construed as an election to appropriate the fruits of that contract to his own personal and pecuniary advantage. Such is not the condition of things under consideration. Long before arriving at maturity, the defendant transferred and sold the property insured, so that, by its own terms, the policy became absolutely null and void, of no possible value to him, or validity against the plaintiff. He did not attempt in any way to avail himself of it, as he might have done by assigning it to the purchaser of his goods.

We are, therefore, clearly of opinion that there is nothing in the acts of the defendant after he became of age which can properly be regarded as such an affirmance of the contract of insurance as to make it legally binding upon him.

The remaining question we have carefully considered. For, as has been well suggested by the plaintiff's counsel, although an infant might not be liable to pay for the goods constituting his stock in trade, yet, having the goods, and being so engaged in trade, it would manifestly be for his interest, and would seem almost necessary for the security of his property, that it should be insured against loss or damage by fire. But it is evident from the most cursory examination, that the contract, being advantageous or disadvantageous to the infant or his estate, furnishes no reliable test on the point as to whether or not the subject-matter of such contract is properly included within the term "necessaries." Very many things can be mentioned the acquisition of which must undoubtedly have been beneficial to the infant or his estate, contracts for which have been repeatedly and uniformly holden voidable, at the election of the infant.

In Phelps v. Worcester, 11 N. H. 51, it was holden that the services and expenses of counsel in carrying on a suit to protect the infant's title to his estate could not be regarded as necessaries, and that the infant's liability for them might be avoided, even under an express promise to pay for them. Upham, J., in pronouncing the opinion of the

court, remarked: "The inquiry has been made, if there had been no guardian, and the infant were without aid, whether he might not employ others to protect his rights to his property, and be legally holden, notwithstanding the interposition of his minority. We think clearly not. Though such services may promote the sound interests of the ward [infant], they are not such assistance as comes within the term "necessaries." Lord Coke considers the necessaries of the infant to include victuals, clothing, medical aid, and good teaching or instruction, whereby he may profit himself afterwards. Co. Litt. 172a. Such aid concerns the person, and not the estate, and we know of no authority which goes beyond this."

Now, if the services and expenses of counsel in protecting the property of an infant are not necessaries, on what principle can it be contended that the insurance of that property against loss by fire can be? The object is the same in both cases—the protection and security of the infant's property; and instances can readily be conceived where the services of learned and experienced counsel might be quite as valuable and important as any contract of insurance. The test of beneficiality, then, cannot be relied on as determining whether or not a thing is to be reckoned among necessaries.

But it seems to us the suggestion in the case last cited, that necessaries concern the person and not the estate, furnishes the true test on this subject. Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be, that those things, and those only, are properly to be deemed necessaries, which pertain to the becoming and suitable maintenance, support, clothing, health, education and appearance of the infant, according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances under which he may be placed as to profession or position. Co. Litt. 172a; Whittingham v. Hill, Cro. Jac. 494; Ive v. Chester, Cro. Jac. 560.

If this be so, then matters which pertain only to the preservation, protection, or security of the infant's property are excluded from the list of necessaries, however beneficial. Whatever relates to his property is the legitimate business of a guardian, and, if transacted by the infant, may be avoided at his election.

Such are our convictions of the proper limit of the validity of the contracts of infants. Any other limitation would, it seems to us, lead to an almost interminable variety of decisions on this subject, and tend to destroy those safeguards which the wisdom of the law has established to protect the inexperience and credulity of youth against the wiles and machinations of designing men. We are satisfied that the principle of the adjudged cases does not require, nor would sound policy justify our holding, that a contract made by a minor for the protection or preservation of his property by insurance against fire is a contract for "necessaries," within the legal acceptation of that term, however judicious or beneficial such contract might ordinarily be regarded.

Had we arrived at a different conclusion on the last point, the question might have arisen, whether this action could be maintained on the present declaration, the only count in the writ, so far as appears, being upon the note, which is avoided by the plea of infancy, the same not having been ratified by the defendant after he became of age. The result to which we have come, however, renders it unnecessary to enter upon this inquiry.

According to the provisions of the agreed case, there must be judgment for the defendant.

JOHNSON v. NORTHWESTERN MUT. LIFE INS. CO.[1]

(59 N. W. 992, 56 Minn. 365.)

Supreme Court of Minnesota. July 10, 1894.

Appeal by the defendant, the Northwestern Mutual Life Insurance Company, from an order of the district court of Hennepin county, Seagrave Smith, J., made August 16, 1893, overruling its demurrer to the complaint.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson, then of Stoughton, Wis., in the sum of $1,000. By its policy it agreed to pay him that sum 20 years thereafter, or, in case of his death meantime, to pay it to his representatives or assigns 60 days after due proof of his decease. After 10 years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid, he was entitled to a paid-up, nonparticipating policy for as many twentieth parts of the $1,000 as he had paid annual premiums. He paid $23.29 on that date, and agreed to pay a like sum every six months thereafter. He was then but 17 years of age. He paid seven of these semiannual installments; in all, $186.32. On December 19, 1892, immediately after he became of age, he served written notice on the insurance company that he elected to avoid the policy, and offered to return it, and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts, and a copy of the policy was attached. Defendant demurred on the ground that the complainant did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

Lusk, Bunn & Hadley, for appellant. F. P. Lane and W. H. Briggs, for respondent.

MITCHELL, J. This case was argued and decided at the last term of this court. 57 N. W. 934. A reargument was granted for the reasons that although the amount was small the legal principles involved were very important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant. It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of $5,000, should, from time to time, buy and pay for $100,000 worth of goods, in the aggregate, which he had sold, and got his pay. According to this doctrine, he could recover back the $100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting. But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessaries. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he

[1] Opinion of Buck, J., and dissenting opinion of Gilfillan, C. J., omitted.

might have, he could do absolutely nothing, except to buy necessaries, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries: First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield. Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor therefore having received no benefits from it, he may recover back what he has paid or parted with. Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received. Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider. Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie. Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of Holmes v. Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini v. Canali, 24 Q. B. Div. 166. Some obiter remarks of the chief justice in Holmes v. Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corke v. Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in Holmes v. Blogg. Leake,—a most accurate writer,—in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it." At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53, 8 Atl. 664; Breed v. Judd, 1 Gray, 455. But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in

the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessaries. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendency which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction. If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury v. Watrous, 7 Hill, 110; Sparman v. Keim, 83 N. Y. 245; and Heath v. Stevens, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy. But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured ($1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy

for $200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds. Order affirmed.

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GREEN v. LIVERPOOL & LONDON & GLOBE INS. CO.

(60 N. W. 189, 91 Iowa, 615.)

Supreme Court of Iowa. Oct. 5, 1894.

Appeal from superior court of Cedar Rapids; John T. Stoneman, Judge.

Action at law on a contract for insurance. The cause was tried without a jury, and the court found the following facts and conclusions: "(1) That on the 7th day of November, 1891, the parties orally negotiated a contract of insurance, by the terms of which, in consideration of thirty dollars, then paid by the plaintiff to the defendant, the defendant promised and agreed to insure the plaintiff against damage or loss by fire to an amount not exceeding $2,500, plaintiff's household furniture, useful and ornamental, beds, bedding, linen, family wearing apparel, printed books and music, silver plate and plated ware, pictures, paintings, engravings, and mirrors and their frames, piano-forte or organ, stool and cover, sewing machine, fuel and family stoves, watches and jewelry in use, and all other family goods not otherwise named, including pamphlets, magazines, sermons, and other writings, at not exceeding actual value, for the term of three years from November 7, 1891, at noon, to the 7th day of November, 1894, at noon, and plaintiff paid to defendant the sum of thirty dollars, which the defendant received in full as consideration and compensation for said insurance, which defendant still retains. (2) That at the time of negotiating said contract the plaintiff was a minister of the gospel, and rector of Grace Church, in Cedar Rapids, Iowa, and resided at No. 133 A avenue, in said city, said residence being a few feet distant from said Grace Church. (3) That the property described, being Schedule A of plaintiff's petition, was, as to each article, covered by said contract of insurance with defendant, and each article was at the date of loss of the value set out in said schedule, aggregating in value $727. (4) That said property so described was by the plaintiff, in the ordinary, usual, and necessary use of the same at the time it was destroyed by fire, kept by plaintiff in said chapel of Grace Church for its ordinary, necessary, and convenient use as rector of said church. (5) That on January 24, 1892, while said property was so kept in said chapel of said church, said chapel took fire, and from said fire in said chapel all of said property was thereby destroyed, of the value of $727. (6) That afterwards, February 15, 1892, plaintiff served on defendant an affidavit showing said loss, of which Schedule A of the petition is a copy, and demanded of defendant payment of said loss, which defendant refused to make, and still refuses. (7) That at the time of said verbal negotiations for insurance it was understood between the plaintiff and the defendant that a written policy of insurance was to be made out by defendant and delivered to the plaintiff, and the same was so executed by the agent of defendant on the 7th day of November, 1891, and mailed at Cedar Rapids to the plaintiff the same night, which is Exhibit B of plaintiff's petition, which the plaintiff received before loss, and has since retained, without objection, up to date of loss, and still holds said policy. (8) Prior to the execution of policy (said Exhibit B) the plaintiff held a policy issued by said defendant, which is Exhibit No. 1 of the evidence. (9) That during all the times mentioned in plaintiff's petition the defendant was an insurance corporation for pecuniary profit, organized under the laws of Great Britain as a stock insurance company, and doing business as such within the state of Iowa, under license issued by the auditor of Iowa, said permit being Exhibit No. 5 of the evidence, doing business in the state of Iowa as a cash stock insurance company, and not as a mutual insurance company. (10) From the foregoing facts I find as a conclusion of law that said written policy (Exhibit B of plaintiff's petition) was issued in violation of the law of the state of Iowa, and is therefore void, for the reason that said policy does not set forth whether the defendant is a mutual or stock company, as required by law. That plaintiff is entitled to recover on the oral agreement. Plaintiff is entitled to judgment in the sum of $727, with interest on said amount at the rate of six per cent. per annum from February 15, 1892, and costs. John T. Stoneman, Judge." From the judgment the defendant appealed. Reversed.

Mills & Keeler, for appellant. Chas. A. Clark, for appellee.

GRANGER, C. J. As to the facts of the case there is no substantial dispute. In January, 1889, the defendant company issued to the plaintiff a policy on the property specified in the first finding of fact by the court, with slight exceptions, among which is the item of "printed books." The aggregate amount of the policy was $2,000, and it was specific in this: that $500 of the amount was on a "library of books, pamphlets, magazines, sermons, and other writings," and the remaining $1,500 on other items. November 7, 1891, the plaintiff applied to the agent of the company at Cedar Rapids, Iowa, for some additional insurance, saying he had been buying a number of new books, among other things, which he wanted insured, and he asked to have the amount of his insurance increased $500. At the suggestion of the agent it was agreed that the former policy should be canceled, and a new one issued for the full amount of the insurance wanted, namely, $2,500, and in "blanket form," instead of being specific. In pursuance of this agreement the new policy issued, in form as agreed upon, and was sent to and retained by plaintiff till the loss in question occurred.

These facts, with perhaps others, appear from the record, and are proper to be considered with those found by the court in passing upon the assignments of error argued.

It will be remembered that this action is upon the oral contract for insurance, and not upon the policy. The property for which recovery was sought was burned in Grace Chapel. Both of the policies referred to limited the liability of the company to loss for the property described "while contained in the two-story brick and frame dwelling house, with a shingle roof, situated on No. 133 A avenue, Cedar Rapids, Iowa." Because of this limitation there could be no recovery on the policy, for the building described was not Grace Chapel, but separate, and some feet from it. To justify a recovery on the oral contract for insurance it is averred in the petition that the policy is void for the reason that it "does not set forth whether the company is a mutual or stock company, as required by law." It is true that neither of the policies conformed to the provisions of Code, § 1703, to show whether the company issuing the policy was a mutual or stock company, and much attention is given in argument to the propositions whether or not the section is applicable to foreign insurance companies, and, if it is, whether the omission renders the policy void so as to justify an action on the oral agreement. We do not find it necessary to determine either of these questions, for, if it be conceded that the action on the oral contract may be maintained, the undisputed facts are against plaintiff's right of recovery. The contract, whatever may be its terms, was made on the 7th day of November, 1891, and that is the date of the last policy. The policy, though void as such, as an instrument of writing contains the terms and conditions upon which the insurance was obtained. When plaintiff went to the agent for additional insurance it was to be additional to what he then held, and it is a fact not to be questioned that the first policy then contained the understanding of the parties as to the terms of insurance. It had been delivered to plaintiff, and accepted and retained by him as embodying the contract or understanding. On the 7th day of November, 1891, he simply asked for additional insurance, and it was agreed that another policy should issue, and the changes to be made were clearly understood. Both parties then knew the conditions of the policy as to the location of property insured, and no change in that respect was in any way suggested or considered. It was then clearly understood that a policy, with the terms as changed, was to issue, and it did issue, and was accepted. Had the policy shown on its face that it was a "cash stock company," it would have constituted the contract of the parties. And why? Because it contained the terms agreed upon by the parties. The terms expressed in the policy are just as clearly those agreed upon by the parties as if the instrument had shown that it was a stock company. There is no pretense in the record of any other understanding than as expressed in the policy.

There is no finding by the superior court that the oral contract was in any way different from the policy, and, if the oral agreement contained the same limitation as to the location of the property, the liability for loss would have been the same as if the policy had been valid. The case of Barre v. Insurance Co., 76 Iowa, 609, 41 N. W. 373, is quite in point. In that case there was a breach of a contract to issue a policy. A loss occurred, and an action was brought on the agreement to issue one. It is there held that the parties were bound by the terms the policy would have contained had it issued. Under plaintiff's contention in this case, that the policy is void, it is as if none had issued; and there is not a word of testimony in this record, outside of the policy itself, except of an agreement to issue a policy of insurance. The right of action upon the oral promise is because of a failure to issue a valid policy. The terms of the oral agreement are the same as if the policy had been valid. The minds of the parties met on the terms and conditions as expressed in the policy. The Barre Case goes even further, and says: "The law will presume that the minds of the contracting parties met upon a contract containing the terms and conditions of the policy usually issued by defendant covering the risks." See Smith v. Insurance Co., 64 Iowa, 716, 21 N. W. 145. In this case the parties actually put in writing the terms and conditions of their agreement. The writing, when unquestioned, as in this case, as to its containing the terms as agreed upon, is conclusive upon the question.

Appellee urges that the restriction as to the place is a mere matter of description, and that the company is liable, notwithstanding, if the property is destroyed at another place "in its ordinary, necessary, and convenient use," and the case of Longueville v. Assurance Co., 51 Iowa, 553, 2 N. W. 394, with other like cases, are cited in support of the rule. In the Longueville Case certain wearing apparel and household goods were insured, "all contained in a two-story frame dwelling." Some of the wearing apparel was worn away, and burned while in such use, and the words, "contained in * * * a frame dwelling," were held to be words of description, and that the parties used them as indicating the place of deposit when not in use. This policy is different, and limits the liability of the company for loss on the property "while contained in the two-story brick and frame dwelling house," etc. This contract is widely different from those in the cases cited. The evidence shows that the property was kept sometimes in the chapel and sometimes in the house, and parts of it

used in both places; and if we assume that the parties, when making the contract, knew of this, we have additional reason for limiting the liability to losses while in the house. It is sufficient to say that the liability is thus limited, and the courts have no right to extend it. We think, under the undisputed facts of the case, there should have been a judgment for defendant, and that entered for the plaintiff is reversed.

NEWARK MACH. CO. v. KENTON INS. CO.

(35 N. E. 1060, 50 Ohio St. 549.)

Supreme Court of Ohio. Oct. 31, 1893.

Error to circuit court, Licking county.

Action on a policy of insurance by the Newark Machine Company against the Kenton Insurance Company of Kentucky. A verdict and judgment for plaintiff having been reversed, it brings error. Reversed.

The action below was brought by the Newark Machine Company against the Kenton Insurance Company of Kentucky to recover the amount of a policy of fire insurance. The issue tried was whether the contract of insurance had been consummated by the parties. The plaintiff prevailed in the court of common pleas, but the judgment there obtained was reversed by the circuit court, and error is prosecuted here to the judgment of that court. A further statement of the facts that are pertinent to the questions involved is contained in the opinion.

Kibler & Kibler, for plaintiff in error. R. D. Marshall, for defendant in error.

WILLIAMS, J. The facts of the case, as shown by the record, and about which there is no controversy, are substantially as follows: On the 30th day of June, 1884, the plaintiff, a corporation, owned and was operating a large manufacturing plant in the city of Newark, and had been the owner and operator of it for several years. The defendant, a fire insurance company, then had an established agency in Newark, in the charge of H. D. Murphy, who was also the agent of a number of other fire insurance companies, among them the Norwich Union Company. He was a regularly commissioned agent of these companies, and was provided by them with blank applications, and policies duly signed by the proper officers, to be filled up and countersigned by him as agent, and delivered in the course of the business of his agency; and also with registers in which to keep a record of the business, and blanks for making reports of the same to the respective companies. He had, during the existence of his agency, issued a large number of policies of different companies represented by him to the plaintiff, insuring its buildings, machinery, and stock against loss or damage by fire, one of which was a policy on the stock for $5,000 in the Norwich Union, issued a short time prior to June 30, 1884. There was an understanding between the managing officer of the plaintiff and Murphy that the latter should keep the insurance of the plaintiff up to a certain amount, either by renewals or new policies in good companies represented by him; and his course of dealing with the plaintiff under that understanding was to charge up the amount of the premiums to the plaintiff when policies were issued or renewed, and have periodical settlements, usually once a month, when the premiums would be paid. The Norwich Union, not desiring to carry so large an insurance on the plaintiff's stock, a few days prior to the 30th of June, 1884, directed Murphy to reduce its risk to $2,500. He thereupon, on the 30th day of June, 1884, filled up for that amount one of the blank policies which that company had furnished him, duly signed by its proper officers, and countersigned it as agent, and at the same time filled up, for the same amount, one of the blank forms of policy with which the defendant company had supplied him, duly signed by its officers, and countersigned the same as its agent, ready for delivery. He made the customary entries of the issuing of the policies in the registers of the respective companies, and in that of the Norwich Union an entry also of the cancellation of the $5,000 policy, in place of which the two policies he had so filled up were intended to be substituted. On the 2d day of July, 1884, he forwarded to the defendant, at its home office, in Covington, Ky., what is called a "daily report," in which he gave the number of the policy he had written for the plaintiff, its date, amount, and duration, the rate and amount of the premium, a description of the property insured, and other particulars of the risk. This report was received at the home office July 3, 1884. The premium on the $5,000 policy had been fully paid by the plaintiff, and when the entry of its cancellation was made the policy had run but a short time. The unearned or return premium was carried to the credit of the plaintiff on the books of the agent, and the amount of the premiums due on the two new policies was charged to the plaintiff by the agent in accordance with his previous custom. At the next regular settlement between the plaintiff and the agent, which was made July 7, 1884, there was due him from the plaintiff, on account of premiums on various policies, the sum of $438.55, which amount included the balance due on the policy of the defendant. The amount due on the account was then paid by the plaintiff. When the policy of the defendant was written, and the cancellation entered of the Norwich Union policy, the latter was in the possession of F. S. Wright, cashier of the First National Bank of Newark, as collateral. Wright was also vice president of the plaintiff, and looked after its insurance. On the 30th day of June, 1884, after writing and executing the two new policies, and entering the cancellation of the one for which they were intended to be substituted, the agent called at the bank to see Mr. Wright, take up the policy so held by him, and deliver the new ones in its place. Wright was absent, and the agent failed to see him. He called several times within the next day or two with like results, and did not see Wright until the evening of July 3, 1884, after the bank had closed. The agent then informed Wright that at the request of the Norwich Union Company he had canceled its policy for $5,000 which Wright then held, and issued to the plaintiff in its place two other

policies for $2,500 each, which he proposed to deliver, and take up the canceled policy. Wright replied that was all right; all he wanted was to have it so that the amount was the same; and he (the agent) could call at the bank any time when it was open, and make the exchange, and if he (Wright) was not in, the person in charge would make the exchange for him. There appears to have been no reason why the exchange was not made at the time of the interview on the evening of July 3d, except that the bank was then closed. No claim was thereafter made by the plaintiff to the canceled policy; nor was there any question, at the trial, of Wright's authority to act for the plaintiff, or of that of the agent, Murphy, to act for the defendant. The property was totally destroyed by fire on the 5th day of July, 1880. At that time the new policies had not been actually delivered, or the old one taken up. Immediately after the fire, the defendant was notified of it by telegram from the agent, who received from the defendant the following response: "Yours received. Have telegraphed you for list of companies on stock with us. The list sent to Cincinnati made no mention of Kenton, and we were willing to be ignored. George C. Coker, Secretary." It was admitted on the trial that proof of the loss was duly made and filed with the defendant; that Wright then had no interest in the claim; and, if the plaintiff was entitled to recover, the amount of the recovery should be $2,500, with interest from September 30, 1884.

It does not appear that the names of the companies in which the new policies had been written were mentioned in the interview between Wright and the defendant's agent, nor the rate or amount of the premium, nor the duration or conditions of the policies; and it is claimed by the defendant that there was, therefore, no mutual assent of the parties to either of those terms, and so no completed contract of insurance between them. It is undoubtedly true that those are essential elements of a contract of insurance, and, if there was not a meeting of the minds of the parties upon them, the contract was not consummated, and no risk attached. But it is equally true that the agreement need not be expressed in words; it may be implied from the circumstances, and conduct of the parties. If the case of Cockerill v. Insurance Co., 16 Ohio, 148, in which it was held that a policy of insurance, to be valid, must be in writing, was not virtually overruled by the case of Insurance Co. v. Kelly, 24 Ohio St. 345, as it was said to have been by Okey, J., in the case of Insurance Co. v. Wall, 31 Ohio St. 633, it has been so qualified by these subsequent cases as to limit the rule it announced to policies in their strict technical sense, and leave unaffected by it parol contracts of insurance. It is now well settled that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute or a provision of the company's charter which is brought to the notice of the other contracting party, (Ostr. Ins. §§ 13, 14; Richards, Ins. § 140; Insurance Co. v. Shaw, 94 U. S. 574; Insurance Co. v. Kelly, supra; Palm v. Insurance Co., 20 Ohio, 529, 537;) and, as in other cases of parol contracts, the terms of the agreement, and the assent of the parties to them, may be shown by their acts and the attending circumstances, as well as the words they have employed. There was, in this case, no express agreement in regard to the property to be insured by the new policies. The property was not mentioned in the interview between the defendant's agent and Wright. But, as it was agreed the new policies were to be exchanged for the canceled policy, it must have been as clearly understood as if it had been expressly stated that they were to cover the property included in the canceled policy. So, in regard to the rate and amount of the premium, and form and conditions of the policy. It is not claimed that the conditions of the defendant's policies, or its rate of insurance, are different from those of like companies; and it is generally known that the form and conditions of fire policies in use by good companies do not differ substantially, and the rates of insurance are established and uniform on the same classes of property. And, where nothing is said, in the negotiation for insurance, about special rates or conditions, it may be presumed that those which were usual and customary were intended. In Richards on Insurance (2d Ed., § 42) it is laid down as a general rule that, "whether the contract of insurance is closed by parol or by a preliminary binding receipt, the legal presumption is that the usual policy is to follow." And in the preceding section the same author says that it is not necessary that all the particulars of a contract should be made the subject of express stipulation, "for it may well be understood, in the absence of express declaration to the contrary, that the usual form of policy is acceptable to both parties." It was held by the supreme court of Minnesota, in Salisbury v. Insurance Co., 32 Minn. 460, 21 N. W. 552, that "upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases." And in Eames v. Insurance Co., 94 U. S. 629, Mr. Justice Bradley says: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations, as are usual in such cases, or have been used before between the parties. This is the sense

and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

Upon the facts of the present case there can be but little doubt that the contract of insurance made by the defendant, through its agent, with the plaintiff, was complete in all its terms. The plaintiff had previously arranged with the agent to keep its insurance up to a certain amount in good companies, for which he was authorized to act. This arrangement virtually left the selection of the companies to the discretion of the agent; and, acting under it, he had written the policy of the defendant and the new policy of the Norwich Union Company, each for $2,500, and duly countersigned both, ready for delivery to the plaintiff, and entered the cancellation of the policy which Wright had in his possession before the interview of July 3d. The policy of the defendant was then complete, containing a description of the property, the amount, commencement and duration of the risk, the rate and amount of the premium, and all the terms and conditions usual in such policies. This policy, and the new policy of the Norwich Union, the agent proposed to Wright to exchange for the canceled policy, without condition or qualification. The proposition was immediately assented to and accepted without any qualification or condition whatever. The terms of the contract of insurance thus proposed by the defendant, through its agent, were definite and certain in every particular. They were those set forth in the policy. The acceptance was as broad as the proposition, and was, therefore, an acceptance of all the terms and conditions of the policy as it was written. That the plaintiff chose to accept the proposition unqualifiedly without further inquiry or examination affords the defendant no ground for claiming the contract was, on that account, incomplete. The only reason the exchange was not then made was that the canceled policy was locked up in the bank. The parties evidently regarded the exchange as complete, and thereafter the agent was a mere custodian of the policy in question for the plaintiff, and the actual handing of it over was not essential to the risk. Effect will be given to the intention of the parties, and what their conduct shows they considered a delivery must control in determining whether it was made. Bid. Ins. § 149; Dibble v. Assurance Co., 70 Mich. 1, 37 N. W. 704; Bodine v. Insurance Co., 51 N. Y. 117; 11 Amer. & Eng. Enc. Law, p. 285. It is quite evident the agent considered the policy of the defendant in full force. He reported it as such to the company; and that the latter so treated it, even after the fire, is shown by its telegram to the agent, inquiring what companies were "on stock with us." The policy was on the stock of the plaintiff in its manufactory. The manual surrender by Wright of the policy in his possession was not, we think, necessary to effect its cancellation. His assent to the cancellation made by the agent was sufficient. It then ceased to be of any force, and was so treated by the parties.

The only other ground upon which it is claimed the defendant is not liable is that the premium was not paid until after the loss occurred. Murphy was the duly-commissioned agent of the defendant, authorized to make contracts of insurance, collect premiums, and issue and renew policies; and to that end was furnished by the defendant with printed forms of policies, signed in blank by the president and secretary of the company, to enable him, without conference with them, to countersign and issue the policies in behalf of the company. It is well settled that such an agent is the general agent of the company, and may, in his dealings with those he insures, waive payment in cash of the premiums, and, indeed, any of the conditions of the policy, except when a restriction upon his authority is in some way brought to the knowledge of the insured. In a recent and valuable work on insurance it is said that a fire policy "does not ordinarily make the payment of the premium a condition precedent to the validity of the contract, and a general agent may, of course, extend credit to the insured or not, as he chooses. The general custom, where credit is given, is for the agent to do so on his own responsibility. But, in case the agent should make default in accounting to the company, the policy will nevertheless be valid. And though the policy provide that it shall not take effect until the premium is paid in cash, the general agent has power to waive the premium, and will be held to have waived it if he delivers the policy without enforcing payment." Richards, Ins. (2d Ed.) § 95. And in section 93 of the same work that author says: "An agent of a life company, who is intrusted with the business of closing the contract by delivering the policy, is held to have an implied authority to determine how the premium then due shall be paid, whether by cash, or, as is sometimes done, by giving credit; in which case the agent becomes the creditor of the insured, and the debtor of insurer. In that event, though the agent subsequently defaulted, and the money never reached the company, the policy would still be binding. By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it. But this is based upon his possession of the document for purposes of delivery, and his instructions to deliver it; and consequently his power does not extend to subsequent premiums or premium notes." Bodine v. Insurance Co., 51 N. Y. 117. The authorities on this subject are extensively collected in that very convenient, and almost indispensable, work, the American & English Encyclopedia of Law, (volume 11, p. 333.) The waiver of the payment of the premium in

cash is an act within the exercise of the agent's general authority to issue policies and collect the premiums, and such waiver may be either express or implied; and when, as in the case before us, it has been the custom of the agent, under an arrangement with the insured by which the latter's insurance should be kept up to a certain amount by renewals or new policies, to charge the insured with the premiums as policies were issued or renewed, and have periodical settlements, when the premiums would be paid, a credit for a premium so charged to the next period of settlement may be fairly implied. We see no reason, upon the facts of this case, why the plaintiff should not recover, as it did in the court of common pleas. The judgment of the circuit court is therefore reversed, and that of the common pleas affirmed.

SALISBURY et al. v. HEKLA FIRE INS. CO. OF MADISON, WIS.

(21 N. W. 552, 32 Minn. 458.)

Supreme Court of Minnesota. Nov. 29, 1884.

Appeal from an order of the district court, Hennepin county, denying motion for a new trial.

Atwater & Hill, for appellant. J. S. Root, for respondents.

GILFILLAN, C. J. Defendant, by its agent at Minneapolis, made orally a contract with plaintiffs, acting by their agent, insuring plaintiffs' building used as a manufactory in the sum of $150, and the stock and machinery therein in the sum of $350, against loss by fire, for a premium at the rate of 6 per cent. on the amount of insurance for one year, the risk to commence at once,to-wit, February 17, 1883; a written policy to be made and delivered as soon as could be done. The premium was not then paid, and nothing was said as to when it should be. On the night of February 18th, the manufactory then running, the property insured was destroyed by fire. On the morning of the 19th, after the fire, defendant's agent delivered to plaintiffs' agent a policy of insurance. February 23d, plaintiffs paid the premium. In the oral agreement nothing was said about any conditions or restrictions of insurance. In the policy delivered there was a condition that it should be void if the manufactory should run at night or overtime, or cease to be operated, without the consent of defendant indorsed on the policy.

The controversy is as to whether that condition attached to the contract of insurance under which the loss occurred. Was that condition a part of the contract existing at the time of the fire? Unless it was, it has no influence on the rights of the parties. Whether it was or not must be determined by what was said between them or agents when the insurance was effected. The written policy made out by the defendant after the fire, of course, cannot be conclusive. Indeed, having been made after the liability accrued, it would be no evidence of the contract at all, were it not for its delivery to and retention by plaintiffs. Such delivery and retention may be taken as an admission by plaintiffs that it set forth the terms of the contract as agreed on, which might be rebutted by proof of what the contract actually was. And in view of the fact indicated by the evidence, that the plaintiffs did not read it, it would not be very strong evidence as an admission. It stands on an entirely different footing from a policy delivered and accepted before the loss. For in that case, if there be no fraud or mistake, the policy is the contract, (from the time of its delivery, at any rate,) no matter what may have been the negotiations which led to it, and proof of such negotiations is not admissible to contradict its terms.

This policy did not exist and was not the contract at the time of the fire, when defendant's liability accrued. The only contract then in force was oral, and the rights of the parties must be measured by it. Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative. There was no evidence that such a condition as this is usual. Order affirmed.

WIEBELER v. MILWAUKEE MECHANICS' MUT. INS. CO.

(16 N. W. 363, 30 Minn. 464.)

Supreme Court of Minnesota. June 14, 1883.

Appeal from a judgment of the district court, Scott county.

O'Brien & Wilson, for appellant. R. A. Irwin, for respondent.

GILFILLAN, C. J. Action on a contract to insure. From the admissions in the pleadings and on the trial, and from the evidence, the referee was justified in finding, as he did find, that plaintiff held defendant's policy (about to expire) insuring his dwelling for three years for the sum of $250, and that before it expired the agent of defendant, on its behalf, agreed orally with plaintiff to renew it, increasing the amount on the dwelling to $400, and extending it so as to cover the furniture in the amount of $250, and the barn to the amount of $100. Nothing being said to the contrary, the presumption would be that the renewal was to be for the same length of time and the same rate of premium as in the original policy, and the referee found the fact accordingly. This makes a good contract to insure for the term of three years. Defendant claims that the contract was within the statute of frauds and void. There is included in the statute "every agreement that by its terms is not to be performed within one year from the making thereof." This, of course, does not include an agreement that may, in accordance with its terms, be fully performed and ended within the year; as where the thing to be done depends on a contingency that may happen within the time. This is the case with a contract to insure where the insurance is to commence within the year.

Judgment affirmed.

INSURANCE CO. v. BUTLER.

(38 Ohio St. 128.)

Supreme Court of Ohio. Jan. Term, 1882.

Error to district court, Holmes county.

Critchfield & Graham, for plaintiff in error. Stilwell & Hoogland, for defendant in error.

McILVAINE, J. Whether the policy of insurance in this suit is valued or open, is the sole question in this case.

A policy of insurance is essentially a contract for indemnity in case of loss. Wager policies are contrary to public policy. The insured must have an interest in the subject of the insurance,—an interest in its preservation. In case of loss, his contract rightfully entitles him to compensation,—nothing more. The reason upon which this principle rests, is the prevention of fraud and crime, by removing all inducement and temptation to commit them, which would naturally arise from the great disparity between the consideration paid and the indemnity received by the insured. This disparity, however, does not amount to inadequacy, or even a suspicion of fraud, because of the supposed remoteness of the contingency of loss; nevertheless its existence requires the utmost good faith on the part of the insured. While these considerations do not, in the least, exempt the insurer from liability on his contract, they do show that, in the absence of a contract to the contrary, the amount of recovery on a policy of insurance should be limited to the actual loss sustained by the insured on account of the risk against which the policy was taken. In other words, a policy of insurance must be regarded as an open one, unless it appears to have been the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss, and thereby fix, by contract, the amount of recovery.

Mr. Wood, in his treatise on Fire Insurance (section 41), says: "Valued policies are those in which both the property insured and the loss are valued, and which bind the insurer to pay the whole sum insured, in case of total loss. They may be said to be policies in which the insurer himself, at the time of making the policy, assesses the damages in case of total loss, unless fraud, inducing an overvaluation on the part of the assured, is established." And further along in the same section he says: "If there is anything in the policy that clearly indicates an intention on the part of the insurer to value the risk and the loss, in whatever words expressed, the policy is valued, otherwise it is open." Again: "No particular form of expression is necessary; the intention of the parties, gathered from the whole instrument, must determine the matter." Fuller v. Insurance Co., 18 Pick. 523.

It has been decided that a policy of a company whose charter limited its liability to a certain proportion of the actual value of the property insured, which refers to the value of the property as stated in the application of the insured, is a valued policy. Phillips v. Insurance Co., 10 Cush. 351. Other cases go so far as to hold, generally, that a policy which refers to the valuation of the property as it appears in the application, which is made a part of the policy, is a valued one. Nichols v. Insurance Co., 1 Allen, 63; Phœnix Ins. Co. v. McLoon, 100 Mass. 475.

Without expressing an opinion as to the soundness of such construction when nothing further appears in the policy, we are satisfied that the policy before us, which contains the further stipulation, that "said Farmers' Insurance Company hereby agrees to make good unto the said assured, his heirs, executors, administrators, or assigns, all such loss or damage, not exceeding in amount the several sums insured, as shall happen by fire or lightning to any of the aforesaid property, from the 28th day of March, 1873, at 12 o'clock at noon, to the 28th day of March, 1878, at 12 o'clock at noon, and to be paid ninety days after due notice and proofs of the same shall have been made by the assured and received at this office, with the terms and provisions of this policy," shows that it was not intended by the insurer to make the sum assured the measure or value of the damages, although the loss might be total. Proofs of loss or damage here required as a condition precedent to the payment, refer to cases of total as well as partial losses. The amount of liability on the policy was thus left open to inquiry, limited, however, by the amount of insurance named in the policy.

The court of common pleas, therefore, erred in rejecting testimony offered by the defendant below as to the amount of actual loss. And the district court erred in affirming the judgment of the common pleas.

Judgments reversed and cause remanded.

FULLER v. BOSTON MUTUAL FIRE INS. CO.

(4 Metc. 206.)

Supreme Judicial Court of Massachusetts.

Suffolk and Nantucket. March Term, 1842.

This was an action of assumpsit, in which the plaintiff declared on the two policies of insurance and the award hereinafter mentioned. The case was submitted to the court on the following facts agreed by the parties:

The defendants are a corporation established by St. 1838, c. 192, and are subject to the provisions of Rev. St. c. 37, §§ 24–39, with authority to "insure, for a term not exceeding seven years, upon any building within this state, any amount not exceeding three fourths of the value thereof."

On the 8th of December, 1838, Peter C. Jones was the owner of a paper mill and the water wheels attached thereto, situate in Watertown, and on that day the defendants executed to said Jones (who was then one of their directors) the policy which is the subject of this action; whereby, in consideration of his paying a premium of $35, and of his premium note for the same sum, and of his binding himself to pay, in addition, such farther sum or sums as might be assessed on him by the defendants, pursuant to their by-laws, but not exceeding $140, they insured said Jones $2,000 upon said paper mill and water wheels, for one year. The policy stated that said $2,000 was "not more than three fourths of the value of said building and wheels, as appears by the proposal of said Jones, lodged with the secretary of this company;" and said Jones, in his proposal for insurance, did state the estimated value of said mill and wheels, exclusive of the land, to be $3,000. The policy was made on said estimate; a committee of said insurance company having previously visited and examined the mill and wheels, in company with said Jones.

Upon the face of the policy, and executed at the same time, was the following assignment to the plaintiff: "In case of loss, pay to Alexander Fuller, mortgagee. Peter C. Jones. Approved: Lemuel Blake, President." The plaintiff, at the time of said assignment, and at the time of the loss, was interested in said insured property, to the amount of $2,500, as mortgagee.

The by-laws of said insurance company were printed on the sheet that contained the policy. By the seventh article of these by-laws, "the president shall examine alone, or jointly with the monthly or any other director, all the buildings or other property in the city of Boston, which may be proposed to be insured, and fix the sum to be taken thereon, and the rates of insurance."

On the 2d of May, 1839, a loss of the insured property occurred by fire, of which the defendants had due notice in writing; and on the 11th of said May, the question of damages upon this policy (and also upon another policy of $3,300, upon the machinery, stock, &c. in said mill) was submitted, by said Jones and the defendants, to referees, by a written agreement, by which the award of the referees was to be made in writing, and to be final and binding on both parties. The referees gave notice to the parties, and on the 13th of said May, examined the premises, and returned their award in writing, as follows: "To the President of the Boston Mutual Fire Insurance Co.: Sir: The undersigned, having viewed the premises at Watertown, owned by Peter C. Jones, lately destroyed by fire, and insured at your office, for the sum of $2,000 on the building and water wheels, and $3,300 on the machinery, &c. find that the fire was very destructive to the property, amounting to about a total loss of the whole insured; and from the experience we have had in building and operating paper machinery, and the cost and actual value of such buildings to the owner, we think that the building could not have been worth less than $2,800 to Mr. Jones, to operate the machinery in. Therefore we make an award, that Mr. Jones is entitled to the whole amount insured." A copy of this award was delivered to said Jones, by the defendants, at his request, immediately upon its being returned by the referees. As the defendants refused to abide by the award, the plaintiff commenced the present action, on the 9th of July, 1839. The parties afterwards made a settlement of the policy upon the machinery and stock.

The judge who presided at the trial, at March term, 1841, ruled that the award aforesaid was obligatory on the defendants, and that the estimate of the value of the insured property, in the proposal and policy, was conclusive, and must be taken to be the true value. Whereupon the case was taken from the jury, under an agreement, that if the whole court should determine that the award is binding on the defendants, in this action, or that the valuation in the policy is conclusive, then the plaintiff should have judgment; otherwise, that the action should stand for trial.

Goodrich & Barrett, for plaintiff. C. P. Curtis, for defendants.

SHAW, C. J. Assumpsit on a policy of insurance against fire, in which the plaintiff relies upon the original cause of action, and also on an award. The plaintiff sues, in effect, as assignee; but as the assignment was made with the consent of the defendants, and as a part of the original contract, and as it is found that the plaintiff was interested, as mortgagee, to the amount of the whole sum insured, we see no reason why he cannot maintain the action in his own name; and his right so to do has not been contested on that ground.

Several questions have been argued; one

of them, and a principal one, is whether the valuation of the property, as stated in the policy, under the circumstances, is to be deemed conclusive evidence of the actual value, for the purpose of adjusting the loss.

It is not contended that there was any designed or fraudulent over-valuation, or any collusive valuation, or any wilful misrepresentation of the value. The case arises upon a policy made by a mutual insurance company, that had no authority to insure over three fourths of the value of the buildings. In regard to all property lying out of the city of Boston, the mode taken to ascertain the value was this: the assured made a statement in writing—in answer to certain standing questions, in compliance with the by-laws of the company—of the situation, circumstances, and value of the buildings proposed to be insured, which was filed and remained with the company. By the 7th article of the by-laws, it would be the duty of the president to visit and examine the buildings, alone or jointly with a director, and fix the sum to be taken thereon, and the rates of insurance. As this company was established at Boston, it was to be expected that the greater proportion of risks would be taken in Boston; and the by-laws were adapted to meet that expected state of things; but they made no special provision for examining buildings out of the city. But this indicates the general policy of the company; and in point of fact, it appears, in the present case, that a like examination was made by a committee of the directors, and for the like purpose.

In determining what amount shall be insured, the company necessarily determine the value of the building, or rather they fix a valuation, over which it shall not be rated, for the purpose of insurance. Being limited to insure not exceeding three fourths of the value, in determining the sum to be insured, they by necessary consequence fix a valuation at such a sum, that the sum insured shall not exceed three fourths of it. The result is, that as the valuation is thus proposed on the one side, and after the proposition is considered and modified, it is acceded to on the other, and the amount insured, and the rate of premium, assessment and liability, established on the same basis, it is, in the highest sense, a valuation by mutual agreement.

Then the question is, whether a valuation thus deliberately and carefully made by mutual agreement, as a part of the original negotiation—when each party is independent of the other, and at liberty to contract or not, as they are or are not respectively satisfied with the terms—shall, in the absence of all fraud, collusion and misrepresentation, be taken as the best evidence of the actual value of the premises insured. See Borden v. Insurance Co., 18 Pick. 523.

The same reason, which applies to other cases of contract, applies to this; and the general rule is, that parties capable of contracting, and who enter into a contract, without fraud or imposition, are bound by law to abide by it.

One of the principal objections is, that the defendants are a corporation, and that a corporation can only act within the scope of the authority conferred upon them; and that by their act of incorporation, this company can only insure three fourths of the value of the property; and if they can show that a contract, in its terms proposes to bind them to a responsibility for a greater amount, they may show it in defence, and reduce the amount to that, for which alone they can make themselves liable. This, as I understand it, is the strength of the argument. But admitting its full force, we think it does not shake the position, that a valuation, fairly and deliberately made, is binding on them. The defendants were incorporated for the express and indeed for the sole purpose of insuring each other against loss by fire. Like all other trading or negotiating corporations, being invested with power to make a particular class of contracts, they are invested with all the incidental powers necessary to carry into effect the objects and purposes for which the corporation was created. In giving them power to insure a certain proportion of the value of buildings, the legislature necessarily clothed them with the power, at some time and in some mode, to determine such value, or to enter into suitable and proper arrangements for fixing it. Whether this shall be done by their own officers, or by referees mutually agreed on; whether before or after the contract entered into; is a question of expediency, not of power. If they had not power, in some mode, to fix the value, they never could make an adjustment which might not be overreached by a suit, in which the question of value must be submitted to a jury. Such valuation by the appraisement of indifferent men, or such adjustment after a loss, would always be open to the same objection as this valuation; which is, that though the officers of the corporation have assented to the valuation, yet if it is au over-valuation, or if, in other words, it can be shown, to the satisfaction of a jury, to be an over-valuation, it is void as against the corporation. But we think the true answer is this: that a valuation deliberately and honestly fixed by agreement, a valuation by which the premium and assessments to be paid by the assured are fixed, as well as the amount to be paid by the company in case of loss, is the best evidence of the actual value. Suppose a claim on a policy for a loss, and that the company might perhaps have successfully defended, on the ground that the loss was one for which they were not liable—as by fire caused by civil war, or insurrection—and the parties should agree to an adjustment by compromise or arbitration: Such adjustment would, we think, be binding; and yet its binding

force would be derived wholly from the agreement. It being once admitted that they are a body having the faculty to contract, we think it follows, that they have power, by their regular agents and officers, to make all such subsidiary and incidental contracts and agreements, both in making the principal contract, and afterwards in adjusting and executing it, as are necessary to accomplish the main purpose and object of their incorporation. Being of opinion, that the valuation, under the circumstances, was conclusive, it becomes unnecessary to consider the other branch of the case, or the effect of the award. The fact, that the present plaintiff was no party to the submission, would seem to be a formidable objection to his recovering upon it; but for the reason stated, we give no opinion on that point, and only make this remark, to show that we place no reliance on that award, in rendering judgment for the plaintiff.

FAUNCE v. STATE MUT. LIFE ASSUR. CO.

(101 Mass. 279.)

Supreme Judicial Court of Massachusetts. Suffolk. March, 1869.

H. G. Hutchins, for plaintiff. B. F. Thomas, for defendants.

HOAR, J. This case is very simple. It is an action on a policy of life insurance. The plaintiff has no such policy. She undertook to show that the defendants agreed to issue such a policy, and that the terms on which it was to be issued were fully complied with; that the policy was written and executed, and thereby became a valid contract; and therefore, though the paper was not delivered, and remained in the hands of the defendants or their agents, that it is her property, and will support her action.

To meet this case, the defendants proved by parol that it was agreed between the parties that the policy should issue, not in addition to, but as a substitute for, a policy previously made, which was to be surrendered; that the earlier policy was not surrendered, but has been enforced and paid. This is a perfect defence to the action. The plaintiff contends that the application and policy together constitute the contract; and that it is not competent to show by parol any variance from the terms of the contract contained in the writing. But this doctrine has no application to the case. The writing remained under the control of the defendants. There was no delivery of it, as a complete and perfected agreement. And if it were true that, without delivery, a complete execution of all the terms agreed on to constitute the contract would be sufficient to make it binding, it is first to be determined whether all these terms were complied with. This may be shown by parol testimony, because the evidence is not to vary the contract, but to prove whether any contract was made. No written contract passed from one party to the other; and the point in controversy is, whether the parties agreed that a certain paper, without more, should be the contract. This must, of course, be proved by parol. The defendants voted to issue the policy; but they did so upon the agreement that the former policy was to be surrendered. This condition was not embraced in their vote, but it was understood and agreed to by both parties, and the policy retained until the condition should be performed. No vote or assent of the defendants to the contract was communicated to the other party, except with this condition.

The plaintiff has not a delivered instrument, the evidence of a complete agreement, not to be qualified or varied in its legal effect by parol testimony; and it does not appear that the parties have ever agreed that the written paper should become a contract, except upon a condition which has not been performed.

Exceptions overruled.

DAILEY v. PREFERRED MASONIC MUT. ACC. ASS'N OF AMERICA.

(57 N. W. 184, 102 Mich. 289.)

Supreme Court of Michigan. Jan. 5, 1894.

Error to circuit court, Wayne county; Henry N. Brevoort, Judge.

Action by Asa C. Dailey against the Preferred Masonic Mutual Accident Association of America on an accident policy. Judgment for plaintiff. Defendant brings error. Reversed.

Frank T. Lodge, (Edwin F. Conely, of counsel,) for appellant. Wm. E. Baubie, (Russel & Campbell, of counsel,) for appellee.

LONG, J. This action is brought upon a benefit and indemnity certificate of $5,000, issued by the defendant upon the life of Arthur H. Dailey, a conductor on the Michigan Central Railroad, and a brother of the plaintiff, who was named as beneficiary therein. The maximum indemnity in case of injury was $25 per week. The cause was tried before a jury, resulting in a verdict and judgment for plaintiff for the amount of the policy and interest. The record shows that the deceased made an application for the insurance in writing on January 16, 1891. It was filled out by Mr. McBride, a solicitor for the defendant, upon a blank form provided and furnished for that purpose. In answer to the question contained in the application: "Have you other accident insurance covering weekly indemnity? If so, give names of companies, and amount of weekly indemnity in each," —McBride filled in the answer, "No." And in answer to the question: "Does the weekly indemnity you now carry, and the amount you now apply for, exceed your weekly salary, wages, or income? If so, how much? Answer fully,"—McBride filled in the answer, "No." The testimony tends to show that, at the time of signing the application, Dailey explained to McBride that he had other insurance, which, with that proposed to be taken in the defendant company, would make the weekly indemnity exceed his wages. McBride induced him to agree to drop this other insurance when it expired, upon the 1st of March following, and assured him that the statements in the application would make no difference as to the validity of the insurance he would give him; that he agreed also to give Dailey credit for the premium until February 1st. Mr. McBride testified that Mr. Miller, the secretary of the company, was advised of the fact that Dailey had other insurance, and that he did not desire to pay until the end of the month. January 19th, Mr. Miller, as secretary, indorsed an acceptance upon the application. January 24th a policy was filled out, and properly executed by the president and secretary, under the seal of the company, and mailed to Dailey. The same date, about two or three hours after the policy was mailed to him, Dailey was run over by his train, and injured, so that he died the following day. He never saw the policy, which was delivered at his residence in the regular course of mail. The premium required by the company was afterwards tendered and refused. Mr. McBride testified on the trial that he informed Miller, the secretary, of all the facts, and that Miller agreed to charge him with the premium, and issue the policy at once. McBride says: "I had told Miller that Dailey was going to let his other insurance run out, and he has promised to let me write him up as soon as his other insurance runs out." Miller said: "You get it as soon as you can. We want it, and he may not see you when it runs out, and get another year's insurance in some other company." Mr. Miller does not deny that he was informed of the other insurance, and of Dailey's wish not to pay the premium at once. He says, however, that he did not agree to issue the policy and give credit for the premium. He did fill out the policy, however, and dated it back to the date of the application, January 16th, but claims that he instructed his cashier not to deliver it until March 1st, when the premium would be collected.

1. The defense claims that the policy was not operative at the time of Dailey's death, for the reason that it had not been delivered; that it was sent to applicant's house by mistake; that the advance premium had not been paid; and that it was agreed that it should not be operative until March 1, 1891. The court instructed the jury substantially that if the policy was filled out by the secretary with intent to have it take immediate effect, he knowing of the other insurance and of the agreement to give credit for the premium, and that it was mailed to the deceased with intent to have it take immediate effect, the plaintiff could recover; but, on the other hand, if the secretary indorsed it to take effect on the 1st of March, when the other policy expired, and the secretary did not agree to extend credit for the premium, and the policy was mailed to the deceased by mistake of the cashier, and against the instructions of the secretary, the plaintiff would not be entitled to recover. The court further charged the jury "if they believed the statements as to the other insurance contained in the application were made under the direction of McBride, after he had been fully informed of the facts, and the answers were written in by McBride, after being so informed, the defendant would be bound by the acts of McBride, as he was the agent of the company." We think there was testimony in the case to sustain those instructions. McBride says he knew of the other insurance, and the amount of it, and when it would expire. He testifies that he advised the secretary of it, and in fact solicited the insurance under the advice of

the secretary. If so, then, notwithstanding the answers in the application were not truthfully made, the company could not avoid the policy. The knowledge of McBride and the secretary was the knowledge of the company, and the company must be held to have waived the right to insist upon the other insurance as a forfeiture. Under such circumstances it is not in a position to assert that the answers are untrue. Pudritsky v. Lodge, 76 Mich. 428, 43 N. W. 373. The court was not in error in the charge as to the extension of time to pay the premium, and the delivery of the policy, to take immediate effect. If the secretary, knowing all the facts, filled out the policy with intent to have it take immediate effect, and caused it to be mailed to the deceased as of force and effect at that time, the company cannot now be heard to say that there was no delivery, though it did not reach its destination until after the death of the insured. If these facts were true, the beneficiary could have enforced a delivery of the policy if delivery had been refused. The contract was complete when the application was accepted and credit given for the premium. May, Ins. § 46. It is contended that the court was in error in directing the jury that Mr. McBride was the agent of the company, and that the company would be bound by his acts in writing in the answers to the questions in the application. We think the court was not in error in this part of the charge. Mr. McBride was given authority to take the application, and it appears that he was sent by the secretary for the very purpose of obtaining the application, the secretary knowing at that time that Dailey had other insurance.

2. Another question in the case relates to a certain condition in the policy. The policy recites: "The conditions under which this certificate is issued, and to which the insured, by his acceptance hereof, agrees, are as follows: Standing or walking on the roadbed or bridge of any railway, or attempting to enter or leave moving conveyances using steam, electricity, water, or compressed air as a motive power, are hazards not covered by this insurance, and no sum will be paid for injuries or death in consequence of such exposure, or while the insured is thus exposed." The application upon which this policy was issued is set out in the record, and is entitled "Application for Membership in the Preferred Masonic Mutual Association of America," and states: "I hereby apply for membership in the above association, membership to be based upon the following statement of facts, which I hereby warrant to be true, and agree to accept certificate of membership subject to all its conditions and provisions." The blank form of application is numbered with questions and answers, from 1 to 20, inclusive. No. 4 is as follows, in question and answer: Question: "Place of business." Answer: "M. C. Ry. Co., Detroit." No. 6: "Occupation." Answer: "Passenger conductor M. C. Ry." No. 7: "What are the duties required of you in these occupations? Answer fully." Answer: "Running passenger train." No. 8: "Name and line of business of firm of which you are a member, or by whom you are employed." Answer: "M. C. Ry. Co." No. 15: "Have you in contemplation any special journey or hazardous undertaking, not stated in this application for indemnity?" Answer. "No." No. 16: "Are you aware that the benefits from this association will not extend to nor cover hernia, orchitis, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or disease, or by the taking of poison in any form or manner, or by any surgical operation or medical or mechanical treatment, nor to any cause except when the accidental injury shall be caused by external and accidental violence, and that these shall be the proximate and sole cause of disability or death?" Answer: "Yes." No. 17: "Are your habits of life correct and temperate, and do you understand that the certificate of insurance will not cover any injury which may happen to you while under the influence of intoxicating drinks, or in consequence of having been under the influence thereof?" Answer: "Yes." No. 18: "Are you aware that any misstatement or concealment of facts by you, or the omission or neglect to pay within thirty days from the date of notice, the quarter annual fee, or any of the assessments made by the association upon you, will work a forfeiture of all the claims you or your heirs or legal representatives may have to any benefits arising from your connection with this association?" Answer: "Yes." "Applications for certificates are not binding until accepted by the secretary. No other person is authorized to bind the association. [Signed] A. H. Dailey. Accepted Jan. 19, 1891, 12 o'clock noon. A. C. M. Secretary. 3-1-91." Aside from the questions of other insurance, which have been before discussed, the foregoing contains substantially all there is in the application which Dailey signed.

It is contended that no recovery can be had under this policy, for the reason that the proofs show conclusively that Mr. Dailey came to his death while attempting to alight from his train when it was in motion, and that the direct cause of his injury and death, resulting therefrom, was in attempting to alight from his train while in motion. The declaration avers that, "at the time said injuries were incurred by said Arthur H. Dailey as aforesaid, he, the said Arthur H. Dailey, was not attempting to enter or leave a moving conveyance, as defined by said policy." It is contended by plaintiff (1) that there was some evidence from which the jury might find that the deceased did not meet his death from attempting to leave the

train while in motion; (2) that, under the application, the insured was entitled to have a policy issued to him which did not contain these restrictions; (3) that, under the application, it is fairly to be inferred that an accident such as caused the death of Dailey was within the express risk against which it was assumed to insure; (4) that the restriction in the policy cuts out the probable accidental violence which, in the minds of both parties, Mr. Dailey, a railway passenger conductor, was insuring himself against; that the restriction would practically render the insurance nugatory and valueless; and that it must therefore be held inoperative so far as this insurance is concerned. There can be no doubt about the correctness of plaintiff's position when we take into account the answers given to the questions in the application, and, had the action been brought upon the contract made by the acceptance of the application, no doubt could arise as to the plaintiff's right of recovery; but the declaration avers that the deceased did not come to his death by the attempt to leave the moving train. Failing to establish that fact, and it being shown by defendant that the proximate cause of the injury and death was the attempt to leave the train while in motion, it is now asserted that that was one of the very risks insured against, and plaintiff should be permitted to recover for that reason. We think there was no evidence from which the jury would have been warranted in finding that Dailey came to his death by any other means than in an attempt to leave the train while in motion. We are also satisfied from the application and the information which that gave to the defendant company that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all railroads must, in the very nature of their business, not only enter, but leave, their trains before they come to a full stop. It is common knowledge that conductors of passenger trains have full charge of their trains. They give the signal to start, and, after the train starts, they get on board. At stations when the train pulls up, and before it stops, the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment; and so general is this knowledge that the defendant company, when it took and approved the application, must have had knowledge of it. In view of this, the above restriction in the policy cannot be insisted upon by the defendant company, and, if the declaration had been based upon the contract actually made, the questions here raised by plaintiff might be of avail. As before stated, the contract was complete when the application was accepted and credit given by the secretary for the premium. The insurance which the parties agreed upon is substantially set out in the application, and the insured had no reason to believe from it that there was to be any such restriction as to entering or leaving moving trains as contained in this policy. He was entitled to have a policy issued to him in conformity to the application, and if the suit had been planted on the contract of insurance such as the minds of the parties met upon, and the other facts were as found by the jury, there could be no doubt about the right of recovery. If it was the intent of the parties that the policy should issue at once when the application was accepted, and the application was accepted to take effect as of January 19th, so as to give the insured the same legal remedy which he would have had had the policy been delivered on that day, and that was the intent of the parties, the law will give effect to such intention. Davenport v. Insurance Co., 17 Iowa, 276; Perkins v. Insurance Co., 4 Cow. 646; Tayloe v. Insurance Co., 9 How. 390. But as the declaration counts on the policy as the contract between the parties, and negatives the restrictive clause, and this not being proved, the action cannot, in its present form, be maintained, and the judgment of the court below must be reversed. New trial granted, with costs. The other justices concurred.

QUARLES v. CLAYTON.

(10 S. W. 505, 87 Tenn. 308.)

Supreme Court of Tennessee. February 12, 1889.

Appeal from chancery court, Rutherford county; W. S. Beardon, Chancellor.

Agreed case between Nancy M. Quarles and J. A. Clayton, administrator of her deceased husband's estate, to determine the rights of the parties to the proceeds of a policy of fire insurance issued to the deceased. Decree for the administrator, and Mrs. Quarles appeals.

J. E. Richardson, for appellant. Palmer & Palmer, for appellee.

LURTON, J. The deceased husband of appellant took out a policy of fire insurance upon his dwelling; loss payable to the assured, his executors or administrators. Before the expiration of the policy by time, but after the death of the assured, the house was accidentally burned. The insurance company, by consent of the claimants, paid the loss into the hands of the defendant, under an agreement that the fund should be held subject to the legal rights of complainant, if any she had, to be thereafter determined by the courts. An agreed case was made up, and submitted to the chancery court, and from the decree of the chancellor Mrs. Quarles has appealed.

Appellant is the widow of the assured, and claims a life-estate in the fund, upon the following state of facts: Before her marriage to the assured, a marriage contract was entered into, and duly executed, and registered in the county of their residence, by which, among other things not material to be here mentioned, it was agreed "that all the property and estate, both real and personal, now owned or hereafter acquired by said John W. Quarles, shall continue to be his, and shall remain wholly unaffected by said contemplated marriage with said Mrs. Nancy M. Kirk, in favor of whom no marital or other rights on his said property and estate shall attach or inure by reason of said contemplated marriage relation, further, or otherwise, than is expressed and provided in this instrument; and he hereby reserves the right and privilege of making such suitable provision for her out of his estate as he may at any time desire, either by deed of gift, last will and testament, or otherwise. If he die without making any such provision for her, then she shall out of his real estate, if she survive him, have a comfortable home, to consist of, say, about one hundred and forty acres of his lands, in which will be included his dwelling and outhouses; the same to be surveyed and laid off to her by proper metes and bounds, and in such manner as will be most useful and convenient to her, and with least injury to his estate. This home, so laid off to her, to be and remain to her own proper use, support, and benefit for and during the term of her natural life; and, after her death, to take such directions as he may give to it by his last will and testament, or other proper mode of disposing of real estate; and if he die without any will, and without disposing of the remainder interest in said 'home,' as above provided for and described, then the same shall descend to his proper heirs and distributees according to the laws of the state of Tennessee." After the marriage, the dwelling-house above described, which was then and after the residence of Mr. Quarles and his wife, was insured under a contract, as before stated, that the loss should be paid to the assured, the husband of appellant, his executors or administrators. Mr. Quarles died intestate, and without having, by deed or otherwise, made any provision for his widow other than that contained in the marriage contract. The widow continued to occupy the dwelling as her residence until it was destroyed by fire. The portion of the farm of the decedent which was to be assigned to her under the marriage agreement had not, at the time of the fire, been laid off by metes and bounds; but it was subsequently done to the satisfaction of all concerned. This estate was so laid off, as required by the contract, as to include the outhouses of the assured, and likewise the site of the burned mansion-house. The insurance policy was not taken out upon any agreement or contract, express or implied, with appellant, that she was to have any interest whatever therein.

Under this state of facts, has appellant any equitable or legal interest in the proceeds of this fire policy? That the precise boundaries of the 140 acres to be laid off to her had not been ascertained by survey at the time of the fire can cut no figure, because it was to be laid off, in all events, so as to include the mansion-house and the outhouses. It seems equally clear that she cannot hold the estate of her husband responsible for the value of the house, because, at his death, her contingent right to the house for her life ripened, and became a vested interest for her life; and at the moment her husband died intestate, and without having made any other provision for her, the house was standing, and her right to the use and possession at once accrued. Her interest became at once an insurable interest; and the destruction of the house by any means after her husband's death was not an injury for which his estate or his heirs would be responsible. Whatever right she has to any interest in this fund must arise from the contract of insurance. The person insured against loss in the policy issued upon the premises of Mr. Quarles was the owner himself. By all the authorities, a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the property, in the absence of some agreement or trust to the contrary.

The policy taken out by Mr. Quarles con-

tained the usual provision prohibiting any assignment of the policy without the consent of the insurer. It also contained the further stipulation that the policy should become void "in case any change shall take place in title or possession, except by succession by reason of the death of the assured." These provisions have been upheld by the courts as reasonable conditions, limiting and restricting the liability of the insured. That they are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one, by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain; and from this it follows that, if the assured has parted with his interest before the loss, he cannot ask to be indemnified, because he has sustained no loss. The provision against the change of title is therefore in precise harmony with the personal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void should such change of title be brought about by the death of the assured. The title, in such case, is no longer in the assured, but has by law passed to his heirs, or by will to his devisees; and a change of title so occurring has been held to defeat an action for a loss occurring after the death of the assured. Sherwood v. Insurance Co., 73 N. Y. 447; Hine v. Woolworth, 93 N. Y. 75. The contract is not, therefore, one which attaches to or follows the property, being one for the personal indemnity of the assured; and, where the insurer does not assent to the assignment of the policy to a grantee of the property, neither the assured nor his assignee of the property can recover upon the policy. Hobbs v. Insurance Co., 1 Sneed, 444.

But this policy was not avoided by the death of the assured. It expressly provides that a change of title shall defeat the policy, except when it occurs "by succession by reason of the death of the assured." The legal effect of this exception is to continue and extend the policy notwithstanding the change of title by death of the assured. In whose favor is this continuance? It has been ably argued that the effect of this continuance is in favor of those who by "succession" take the property covered by the risk, and that, though it may be payable to the executor or administrator of the assured, yet he will, in case the risk was upon real estate, take and hold in trust for those who by "succession" have taken the property, and who are therefore the persons damnified by the loss. This word "succession," in the connection in which it appears, is a word of technical meaning, and refers to those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract. This meaning is made most obvious when we consider that the contract provided against any change of title except by "succession;" and, to more directly affix a limited and technical meaning, the explanatory words are added, "by reason of the death of the assured."

There is much plausibility in the argument that, inasmuch as the policy is continued notwithstanding a change of title has occurred, in case the risk is upon real estate, the extension is, by intendment of the contract, to operate as an indemnity to those who by "succession" have become the owners of the property. In such a case, neither the administrator nor the distributee would have any interest to be insured, while the heir or devisee upon whom the title has been cast would be the legal and equitable owner, and the person to suffer by the loss. The root principle of insurance, that the loss is payable only to the extent that the assured has an insurable interest, would seem to preclude the administrator in such a case from any recovery, or make him a trustee for the heir of what he should recover when the loss occurred after the property had passed by "succession" to the heir This seems to be the holding of the courts, when the question has arisen, although the text-book writers seem not to have seized upon the distinction. Wyman v. Wyman, 26 N. Y. 253; Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177. But does the appellant take any interest in the insured property by succession? If she had taken as devisee or under the homestead law, she would be within the principle just discussed, and would be within the express holding of the two cases last cited. Unfortunately for her, appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract. She is not entitled to homestead or dower, for she expressly agreed to take, in lieu of all right which the law would have given her, the provision which she covenanted for by marriage contract. This interest was a contingent one. It depended upon two events: First, that she should survive her husband; and, second, that he should not by deed or will make any other provision for her. Both of these events occurred; and, instantly upon the death of her husband, she became seised of an estate for her life in the insured premises. She therefore took this mansion-house as the grantee of her husband, and did not take it by "succession."

But it is insisted that, however she acquired the estate, she has an equitable interest in a life-estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but

her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third persons who, in the character of grantee, mortgagee, or creditor, may have sustained loss, in the absence of some trust or contract to that effect. May, Ins. § 456; 3 Kent, Comm. (10th Ed.) 499. This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This court, in a well-considered case, held that the holder of a mechanic's lien upon a building had no equitable lien in a fire policy effected by the owner, and assigned to a mortgagee. Galyon v. Ketchen, 85 Tenn. 55, 1 S. W. 508. An equity will attach when the vendee or mortgagor was, by covenant or otherwise, bound to insure the property, for the better security of the creditor or vendor. In such a case the latter would have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken by the mortgagor or vendee or other debtor who had given a security upon the insured property; and this would be so, even though the policy stand in the name of the debtor, vendee, or mortgagor. But, in the absence of some such agreement, the mortgagor or vendee or grantor, having an insurable interest, might insure such interest for his own benefit; and no lien would attach thereto in favor of his creditor, secured by lien or mortgage or otherwise upon the insured property. Carter v. Rockett, 8 Paige, 436; Wheeler v. Insurance Co., 101 U. S. 439; Nordyke v. Gery, 112 Ind. 535, 13 N. E. 683; Sheld. Subr. §§ 233, 235. The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding that Mr. Quarles should insure this property for the benefit of appellant. The interest of appellant, after the death of her husband, was an insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the distributees being the same persons who take the real estate as heirs, no controversy arises as between the administrator and the remainder-men.

That the insurance company had the option to rebuild is urged as a reason why the insurer's election to pay, instead of rebuilding, ought not to operate to the disadvantage of complainant. This option is one common to all contracts of fire insurance; and the argument, if good in this case, would operate to overturn the well-settled rule that no equity attaches to the proceeds of a fire policy in favor of third persons who have suffered loss, in the absence of some agreement to that effect. If this option to pay or rebuild should be regarded as sufficient to found an equity upon in favor of third persons disappointed by the election of the insurer, the law of insurance would have to be rewritten. There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have.

The decree of the chancellor will be affirmed.

RAYNER v. PRESTON.

(18 Ch. Div. 1.)

Chancery Division. April 8, 1881.

Roxburgh, Q. C., and Ingle Joyce, for appellants. Chitty, Q. C., and Mr. Bardswell, for appellees.

COTTON, L. J. This is an appeal from a judgment of the master of the rolls dismissing action. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact, or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or toward reinstating the buildings injured. The master of the rolls decided against their claim, and from this decision the plaintiffs appealed.

It was contended by the appellants that they were entitled to the moneys (1) on general principles, irrespective of any special circumstances alleged to exist in the case; (2) under provisions of the Act 14 Geo. III. c. 78, either alone, or with the aid of the special circumstances of this case.

In the first point it was urged that, although the contract did not mention the policy, it gave the plaintiffs, as purchasers, a right to all contracts to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or improve the thing purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property (with certain exceptions, not including a purchaser) should not be entitled to the benefit of the insurance. But, independently of that objection, I am of opinion that the contention of the appellants cannot prevail. The contract passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts; and such, in my opinion, at least independently of the Act 14 Geo. III. c. 78, the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale, for it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the buildings, but a contract in that event to pay the vendors a sum of money, which, if received by them, they may apply in any way they think fit. It is a contract, not to repair the damage to the buildings, but to pay a sum not exceeding the sum insured, or the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass, without apt words, under a contract for sale of the thing insured.

But the appellants' case was put in another way. It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day fixed for completion. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

It remains to be considered whether the statute of 14 Geo. III. c. 78, can give the plaintiffs any right to the money. In my opinion, the statute does not of itself so connect the money with the land sold as to entitle the plaintiffs successfully to contend that, under the contract, they were entitled to the money. I give no opinion whether the plaintiffs, as purchasers who are liable to the vendor for the full amount of the purchase money, even though the buildings are burnt, are persons who can (possibly to the prejudice of the office) insist that the money is to be applied in rebuilding. Even if they were so entitled, the act only gives a right to insist on the money being so applied, and their claim to have this done is the foundation of and essential to the existence of their right. But it was urged that the vendors misled the plaintiffs, and thus prevented them from insisting on their rights under the statute. In my opinion, this has not been established by the plaintiffs. The evidence of the plaintiff, E. Rayner, the younger, who is not supported by the other plaintiff, though present when the conversation relied on took place, is contradicted by the defendants' solicitor, the person whose statements are said to have misled the plaintiffs, and the alleged misrepresentation is at the utmost a statement

of the law, which in my opinion, if made, was erroneous, but which the plaintiffs have contended to be correct. The plaintiffs were not entitled, as against the defendants, to rely on a statement of opinion made by the solicitor of the defendants as to the legal right of the parties, and, in my opinion, the plaintiffs cannot establish their claim by the special circumstances on which they rely.

The appellants, however, contended that there was authority in their favour, and it therefore becomes necessary to consider shortly the cases relied upon. The most important, and that which apparently is most in their favour, is Garden v. Ingram, 23 Law J. Ch. 478, a decision of Lord St. Leonards. He, affirming a decree of Vice-Chancellor Knight Bruce, declared that the purchaser from the mortgagee of a lessee was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the defendant, the lessee, to concur with the laudlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire; and this, in my opinion, was the ground on which the decision was based, and this is the view of the case expressed by Vice-Chancellor Kindersley in Lees v. Whiteley, L. R. 2 Eq. 148, 149. The appellants also relied on the case of Durrant v. Friend, 5 De Gex & S. 343, where Vice-Chancellor Parker, though he refused to give a legatee of specific chattels, which perished at the same time with the testator, the benefit of an insurance effected on the chattels by the testator, used expressions which shew that he thought the legatee would have been entitled to the policy if the chattels were shewn to have existed after the testator's death. But this was dictum only, not decision. In Garden v. Ingram, Lord St. Leonards refers to a case not quoted in argument, and of which he does not give the name, in which it had been decided that a remainderman was entitled to a policy effected by a tenant for life. No such case was quoted to us, and the only case of the sort which I have been able to find, is Norris v. Harrison, 2 Madd. 268, in which Lord St. Leonards was counsel, and of which he probably had an imperfect recollection. In that case it is true a remainderman did receive the balance of a fund received by a previous tenant for life on account of a policy effected by such tenant for life, but he did so because the executor and residuary legatee of the tenant for life had by his will treated the fund as appropriated for the benefit of the remainderman.

In my opinion, therefore, there is no decision in favour of the appellants. Against them there is the direct decision of Vice-Chancellor Kindersley in Poole v. Adams, 12 Wkly. Rep. 683. It is urged by the appellants that the vice-chancellor arrived at this decision from an erroneous view of Lord Eldon's judgment in Paine v. Meller, 6 Ves. 349. In my opinion, though the decision of Lord Eldon is not expressly in point, yet the part of his judgment quoted by the master of the rolls does to some extent support the view of the vice-chancellor in the case referred to. In my opinion the judgment of the master of the rolls was correct.

BRETT, L. J. For a reason which will presently appear, viz., the different opinion of Lord Justice JAMES, I give with some fear the result of the, I must say, very clear opinion which I have in this case.

This action is brought by the plaintiffs against the defendants to recover money which is in the hands of the defendants; and, therefore, if the action had been brought at common law, it would have been an action for money had and received. That action was always treated at common law as being founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the same whether it should be considered to be a decision at common law or in equity.

It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of the insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matters of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a

policy of insurance may, in equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But, if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract, ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and, unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it. My Brother COTTON has mentioned the cases in equity. As I have said, it seems to me that the case is the same in equity as at common law. At common law, with regard to marine policies, it has been always held that where there is a policy, and where the subject-matter of the insurance is sold during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, so that it would be considered in a court of equity as assigned. The leading case on the subject is the case of Powles v. Innes, 11 Mees. & W. 10, in which it is stated that "a person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy except as a trustee for the assignee in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit." Lord Abinger and Lord Wensleydale both said that the mere fact of making the contract of purchase and sale does not pass any interest in the policy; that there must be a bargain with regard to the policy in order to pass the interest. That is more clearly expressed by Mr. Justice Quain in the case of North of England Pure Oil Cake Co. v. Archangel Maritime Ins. Co., L. R. 10 Q. B. 249, where he lays down as settled law that "on the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly." That seems to me to have been the law always in courts of law, and it seems to me that Vice-Chancellor Kindersley, in the case which has been referred to, lays it down that that was the well-settled and recognized law in courts of equity just as much as in courts of common law.

I therefore, with deference, think that the plaintiffs here cannot recover from the defendants, on the ground that there was no relation of any kind or sort between the plaintiffs and the defendants with regard to the

policy, and therefore none with regard to any money received under the policy.

JAMES, L. J. I am unable to concur in affirming the judgment of the master of the rolls. According to my view of the case the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and cestui que trust. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a cestui que trust.

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract; it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is in terms and in effect a contract that, if the property is injured, then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership, and in respect solely of the injury done to that legal ownership, that the right to recover from the insurance company accrued to the insured. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was in fieri, the legal right to sue for the damage would be in the vendor, but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy, a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it. and, independently of that condition, the policy would or might probably be held not to run with the land, in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right,—legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy and there was such a right. The vendor could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security, as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred some years ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire, but by the explosion caused by a fire in another neighboring place. The insurance offices thought that it was for their interest to be very liberal, and treat the damage from the explosion as a damage by fire, within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit commercially to be liberal, and they were liberal accordingly. See Taunton v. Insurance Co., 2 Hen. & M. 135. I cannot myself doubt that

if a trustee, or a vendor who had become a trustee by the completion of his contract, had received this bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his cestui que trust or purchaser.

In my view of the case it is perhaps unnecessary to refer to the act of parliament as to fire insurance. But that act seems to me to shew that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house, within the meaning of the act. I believe that there is no case to be fouud in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age, or suffering from a mortal disease. In the case of Collingridge v. Assurance Corp., 3 Q. B. Div. 173, the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise, as trustee for such purchaser.

Of authority on the subject, there is, no doubt, the express decision of Vice-Chancellor Kindersley against the plaintiff, but against that there are to be set off the very distinct opinions of Lord St. Leonards and Vice-Chancellor Parker, men of great knowledge of equity, and of great accuracy even in their dicta.

But I prefer to rest my judgment on the fact that the relation between the vendor and the purchaser became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and cestui que trust, and that the trustee received the insurance money by reason of, and as the actual amount of, the damage done to the trust property. The plaintiff puts his case also on the ground of the representations made to him by the defendant's solicitor and agent. What took place appears to me to be this: The solicitor said to the purchaser, I don't know who is entitled, but the vendor is the only person who has a legal claim, and I will make the claim accordingly, whichever is entitled, and the purchaser left the matter in his hands. Now the purchaser could at that time have applied to the office to compel the money to be laid out in restoring the building. And I am of oplnion that when the money was under these circumstances obtained from the office, it reached the vendor's hands according to the then rights of the parties as between them and the insurance office; that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in.

BRETT, L. J. I should like to add to what I have said that I feel very great doubt whether, as between the defendants and the insurance company, the defendants can keep the money.

COTTON, L. J. I quite concur in that doubt.

CASTELLAIN v. PRESTON.

(11 Q. B. Div. 380.)

Court of Appeal. March 12, 1883.

Charles Russell, Q. C., and A. Aspinall Tobin, for plaintiff. Gully, Q. C., and W. R. Kennedy, for defendants.

Solicitors for plaintiff: Gregory, Rowcliffes & Co., for Laces, Bird, Newton & Richardson, Liverpool. Solicitors for defendants: Torr & Co., for Anthony & Imlach, Liverpool.

BRETT, L. J. In this case the action is brought by the plaintiff, as representing an insurance company, against the defendants, in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly, at all events, of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment, would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and, according to the peculiarity of such a sale and purchase of land or real property, the vendees would have to pay the purchase-money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract, and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire, the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he, in a very careful and elaborate judgment (8 Q. B. Div. 613, at page 615), has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits, which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favour of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle; it was introduced, rather as a matter of justice in favour of the underwriters, so as to prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical, that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of aban-

donment was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine, as applied in insurance law, can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shewn that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In Burnand v. Rodocanachi, 7 App. Cas. 333, the foundation of the judgment to my mind was, that what was paid by the United States government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English government invariably made the "gift," so invariably, that as a matter of business it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shews that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tort feasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment exist a right of action in favour of the assured, into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that

right. I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does not affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavoured to enunciate, I think it due to Chitty, J., to point out what passages in his judgment require some modification. 8 Q. B. Div., at page 617. I find him reading this passage: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." That is a quotation from Lord Cairns in Simpson v. Thomson. 3 App. Cas. 279, at page 284. The learned judge then goes on, "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this—"And if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant." I would add this—"And if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of Burnand v. Rodocanachi, 7 App. Cas. 333, the learned judge cites the opinion of Bramwell, L. J., 8 Q. B. Div. at page 618. He says that Bramwell, L. J., in his judgment held that it was not salvage, but "that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "Because there was no right in the assured to demand the compensation from the American government." There was no right to demand it, it was bestowed and received as a pure gift. Darrell v. Tibbitts, 5 Q. B. Div. 560, seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in Darrell v. Tibbitts, 5 Q. B. Div. 560, the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage (5 Q. B. Div. at page 563), "the doctrine is well established, that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured, which is not affected by the loss or safety of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term." 8 Q. B. Div., at page 625. There I agree with him, only my view of the full sense is larger than that which he adopt-

ed. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, "which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and labouring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of Darrell v. Tibbitts, 5 Q. B. Div. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

COTTON, L. J. In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way, namely, the company seek to obtain the benefit either wholly or partly of the amount paid by them out of the purchase-money which the defendants have received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention. I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against, which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of Darrell v. Tibbitts, 5 Q. B. Div. 560, that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money, or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account, and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money.

Now Lord Blackburn, in the case of Burnand v. Rodocanachi, 7 App. Cas. 333, at page 339, states the principle in these words: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." In Darrell v. Tibbitts, 5 Q. B. Div. 560, to which I have already referred, the question which we had to consider was whether the insurance office was entitled to the benefit produced in consequence of a covenant to repair if the building should be damaged by an explosion of gas. In my opinion it was not intended in any way to limit the right of the insurer, as an insurer, to cases where the contract in respect of which benefit had been received related to the same loss or damage as that against which the contract of indemnity was created by the policy. That was what was before this court in that case, and undoubtedly expressions do occur as to a contract relating to the loss or affecting the loss, but the principle was not limited to con-

tracts. The principle which I have enunciated goes further, and if there is a money or any other benefit received which ought to be taken into account in diminishing the loss, or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even although the benefit is not a contract or right of suit which arises and has its birth from the accident insured against. Of course the difficulty is to consider what ought to be taken into account in estimating that loss against which the insurer has agreed to indemnify, and we have been pressed in argument with many difficulties. One which possibly was put to us most strongly, was that the contract of sale has nothing to do with destruction by fire, and if any part of the purchase-money is to be taken into account, why is a gift not to be taken into account? That may be said to diminish the loss as well as a contract of sale. The answer is that when a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to shew an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person. That really was what was decided in Burnand v. Rodocanachi, 7 App. Cas. 333. There the money bestowed, not as a matter of right but as a gift, was intended to benefit the assured beyond the amount which they had got in consequence of any insurance. There is another ground which may possibly exclude gifts. It may be that the right of the insurer to have a sum brought into account in diminution of the loss, against which he has given a contract of indemnity, is confined to that which is a right or other incident belonging to the person insured, as an incident of the property at the time when the loss takes place. This definition would not include a sum subsequently bestowed on the assured by way of gift, for it can in no way be said to have been appertaining to him as owner of the property at the time when the loss took place. But, in the present case, what we have to consider is whether the contract of sale is not an incident of the property belonging to the owners at the time of the loss in such a way, that it ought to be brought into account in estimating the loss, against which the insurer has undertaken to indemnify. What was the position of the parties? The defendants' house was insured, and there was a loss from fire, the damage caused by the fire being estimated by the parties at £330. Ultimately, the property having been already agreed to be sold at a fixed price, the assured received the whole amount of that price. Now they did that in respect of a contract relating to the subject insured, the house, and, to my mind, if they received the whole amount of the price which they previously had fixed as the value of the house, that must of necessity be brought into account when it was received, for the purpose of ascertaining what was the ultimate loss against which they had concluded a contract of indemnity with the insurance office. Here the purchasers have paid the money in full, and as the property was valued between the vendors and the purchasers at £3100, the vendors got that sum in respect of that which had been burned, but which had not been burned at the time when the contract was entered into. They had fixed that to be the value, and then any money which they get from the purchasers, and which together with £330, the sum paid by the office, exceeds the value of the property as fixed by them under the contract to sell, must diminish, and in fact entirely extinguishes the loss occasioned to the vendors of the property by the fire. Therefore, though it cannot, to my mind, be said that the insurers are entitled, because the purchase is completed, to get back the money which they have paid, yet they are entitled to take into account the money subsequently received under a contract for the sale of the property existing at the time of the loss, in order to see what the ultimate loss was against which they gave their contract of indemnity. On the principle of Darrell v. Tibbitts, 5 Q. B. Div. 560, when the benefit afterwards accrued by the completion of the purchase, the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is, that if the purchase-money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them. In my opiuion, therefore, the decision below was erroneous. I think Chitty, J., based it upon this, that in this case there was no right of subrogation, no contract which the office could have insisted upon enforcing for their benefit. I think it immaterial to decide that question, because the vendors have exercised their right to insist upon the completion of the purchase.

Read as of this opinion.

BOWEN, L. J. I am of the same opinion. The answer to the question raised before us appears to me to follow as a deduction from the two propositions, first, that a fire insurance is a contract of indemnity; and secondly, that when there is a contract of indemnity no more can be recovered by the assured than the amount of his loss.

First of all, is a fire insurance a contract of indemnity? It appears to me it is quite as much a contract of indemnity as a marine insurance is. The differences between the two are caused by the diversity of the subject-matters. On a marine policy a ship may be insured which is at a distance and moveable, or goods may be insured on board of

vessels which are at a distance, and on a fire policy a house is insured which is fixed to the land; but both are contracts of indemnity. Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance, not the legal interest only, but the beneficial interest; and I do not know any reason why there should be a different definition of what is an insurable interest in fire policies from that which is well known as the established definition in marine policies, allowance being made for the differences of the subject-matter. It seems to me that it is an ocular illusion to suppose that under any circumstances more may be obtained by the assured than the amount of the loss. I think this illusion can be detected if it is recollected what are the ordinary business rules according to which insurances are made. It is well known in marine and in fire insurance that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Let us take a few of the cases which are most commonly known in commerce of persons who insure. There are persons who have a limited interest, and yet who insure for more than a limited interest, who insure for the total value of the subject-matter. There is the case, which is I suppose the most common, of carriers and wharfingers and commercial agents, who have an interest in the adventure. It is well known what their rights are. Then, to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership he is entitled to insure prima facie for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest. Suppose for a moment the case of a ship and a mortgagee who has lent £500 on the ship. The ship is worth £10,000. If he insures for £10,000, meaning only to cover his own interest, and not the interest of anybody besides, can it for a moment be supposed that the mortgagee who insures under those circumstances can hold the £10,000? That would be an over insurance, and to treat it in any other way would be to make a marine policy not a contract of indemnity, but a wager, a speculation for gain. Suppose, again, there are several mortgagees for small sums, can they all recover and hold (having ex hypothesi insured their separate interests only) the entire value of the ship? It seems to me they cannot. They can recover only what they have lost. That being, as I apprehend, the law about mortgages of ships, is there any real distinction between that and the mortgagee of a house? I can see none. It seems to me that the same principle applies, and here as in many other problems of insurance law, the problem will be solved by going back and resting upon the doctrine of indemnity.

Let us take another instance which has been much pressed upon us in the course of the argument, the case of a tenant for years or a tenant from year to year. We have been asked to hold that a tenant from year to year can always recover the full value of the house from the insurance company, although he has intended to insure only his limited interest in it. There is some justification for that in the language of James, L. J., in Rayner v. Preston, 18 Ch. Div. 1, at page 15. He says this: "In my view of the case it is perhaps unnecessary to refer to the act of parliament as to fire insurance. But that act seems to me to shew that a policy of insurance on a house was considered by the legislature as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the

house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease." Now, with the greatest possible respect and reverence for all that is left to us of the judgments of a great judge like James, L. J., I confess I do not follow that. I have no doubt the insurance offices seldom take the trouble to look to the exact interest of the tenant who insures, or perhaps of the landlord who insures, and for the best of all reasons, because it is generally intended that the insurance shall be made, not merely to cover the limited interest of the tenant, but also to cover the interest of all concerned. In most cases the covenants as to repair throw liability on one side or the other, and in a large class of leases the liability to repair is by the provisions of the lease thrown upon the tenant. Therefore, in these cases no question ever can arise between the insurance office and the tenant from year to year, or the tenant for years, as to the amount which the insurance office ought to pay. But if a tenant for a year, or a tenant for six months, or a tenant from week to week, insures, meaning only to cover his interest, does anybody really suppose that he could get the whole value of the house? It is true that in most cases the claim of the tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable value of his property; and the reason is that he insures more than the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living and the beneficial enjoyment of the house as well as its pecuniary value. That I think is all that was meant by the vice-chancellor in Simpson v. Scottish Union Ins. Co., 1 Hen. & M. 618, at page 628.

I will pass on to the case of a life tenant. I will take the case of a life tenant who is a very old man, and whose house is burnt down, but who has intended only to insure his own interest. I am far from saying that he could not under any conceivable circumstances be entitled to have the house reinstated. A man cannot be compensated simply by paying him for the marketable value of his interest. But it does not follow from that that he gets or can keep more than he has lost. I very much doubt whether, if a life tenant, having intended to insure only his life interest, dies within a week after the loss by fire, the court would award his executors the whole value of the house. In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will always be found. The present case arises between vendors and vendees. That does not fall within the category of the cases which I have been discussing, where a person with a limited interest intends only to cover his own interest. But can it be any exception to the infallible rule that a man can only be indemnified to the extent of his loss? What is really the interest of the vendors, the assured? Their insurable interest is this—they had insured against fire, and they had then contracted with the purchasers for the sale of the house, and, after the contract, but before the completion, the fire occurred. Their interest therefore is that at law they are the legal owners, but their beneficial interest is that of vendors with a lien for the unpaid purchase-money; they would get ultimately all the purchase-money provided the matter did not go off owing to defective title. Such persons in the first instance can obviously recover from the insurance company the entire amount of the purchase-money. That was decided in the case of Collingridge v. Corporation, 3 Q. B. Div. 173; but can they keep the whole, having lost only half? Surely it would be monstrous to say that they could keep the whole, having lost only half. Suppose for a moment that only £50 remained to be paid of the purchase-money, and that a house had been burnt down to the value of £10,000, would it be in accordance with any principle of indemnity that persons who were only interested, and could only be interested to the extent of £50, could recover £10,000? They would be getting a windfall by the fire, their contract of insurance would not be a contract against loss, it would be a speculation for gain. Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters. In Simpson v. Thomson, 3 App. Cas. 279, at page 284, it is said by Lord Cairns, L. C.: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Is there any real distinction here between fire policies and marine policies? It seems to me that the learned judge below, and the American authorities on which he relies, have fallen into the mistake of supposing that the distinction which obtains as to certain incidents of marine policies and fire policies, is derived from a difference of principle, and not from the diversity of the subject-matter. In any case the principle of indemnity is the same, and there is no depar-

ture from it. I will make plain what I mean by reading the language of Chitty, J. He says (8 Q. B. Div. 618): "An obvious distinction exists between the case of marine insurance and of insurance of buildings annexed to the soil. In the case of marine insurance, where there is a constructive total loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil; although the buildings annexed are destroyed, there cannot be a cession of the right to the soil itself." It seems to me, if I may venture to say it of so experienced a judge, that there is an ambiguity in the way in which he is dealing with the doctrine of constructive total loss. The doctrine of abandonment is itself based upon the principle of indemnity. It is well known, historically, that that is so, and in reason it must be so. It is only since marine policies have ceased to be wager policies throughout the world, and become contracts of indemnity, that the doctrine of abandonment has become universal, and so far from its constituting a difference of principle between marine insurance law and fire insurance law, it is the same principle of indemnity, only worked out differently, because what happens at sea is the loss of a ship, and what happens on land is the loss of a house. It is true that the doctrine of abandonment is inapplicable. But if the buildings annexed to the soil are destroyed, it is not a question of constructive total loss, it is a question of actual total loss. The same ambiguity, I think, is to be found in the language of the American case which Chitty, J., cites at page 624. The learned judge in that case says, "it may be a question whether he" (the chancellor) "has not relied too much on the cases of marine insurance in which the doctrine of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurance against loss by fire." Slight application it is true, but not because the doctrine of indemnity is not to be carried out to its extreme in case of loss by fire, but because the subject-matter in the one case is the vessel lost at sea, and in the other the house burned, which is annexed to the soil. Chitty, J., goes on to discuss the case on the basis of what he calls the principle of subrogation. I will add very little to what BRETT, L. J., has said about that. It seems to me that a good deal of confusion would be caused, if one were to suppose that insurers are in the position of sureties. A surety is a person who answers for the default of another, and an insurer is a person who guarantees against loss by an event. The default or nondefault of another, as between that other and the person who is insured, may diminish or increase the loss; but what the insurer is guaranteeing is not the default of that person, he is guaranteeing that no loss shall happen by the event. And subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and there I think is where the learned judge has gone wrong. He has taken the term "subrogation," and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss? In this case the right, whatever it be, has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity. On this point I should like to pause one instant to consider the definition which BRETT, L. J., has given. It does seem to me, that taking his language in the widest sense, it substantially expresses what I should wish to express with only one small appendage that I desire to make. I wish to prevent the danger of his definition being supposed to be exhaustive by saying that if anything else occurs outside it the general law of indemnity must be looked at.

With regard to gifts, all that is to be considered is, has there been a loss, and what is the loss, and has that loss been in substance reduced by anything that has happened? Now I admit that in the vast majority of cases, it is difficult to conceive a voluntary gift which does reduce the loss. I do not think that the question of gift was the root of the decision in Burnand v. Rodocanachi, 7 App. Cas. 333, although it seems to me that it was a very essential matter in considering the case. I think the root of the decision in Burnand v. Rodocanachi, 7 App. Cas. 333, was the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English government and the American government agreed that the sums which were to be paid were to be paid, not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss. Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of the underwriters will

depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit, but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within Burnand v. Rodocanachi, 7 App. Cas. 333. If it was given to reduce the loss, and for the benefit of the insurers as well as the assured, the case would fall on the other side of the line, and be within Randal v. Cockran, 1 Ves. Sr. 98, to which allusion has been made. In the present case the vendors have been paid the whole of their purchase-money. Even if they had not been paid, but had still the purchase-money outstanding, they would have had some beneficial interest in the nature of their vendors' lien. An unpaid vendor's lien is worth something, I suppose. I do not say that it is necessary to decide the point, and I only mention it to make more clear my view of this case, not as laying down the law for future occasions. But if an unpaid vendor's lien is worth something, on what principle could a vendor keep the unpaid vendor's lien and be paid for it by the insurers? In such a case he would be taking with both hands. Now why should not underwriters be entitled at all events to insist on the vendor's lien? As to specific performance I say nothing. I am not familiar, as COTTON, L. J., is, with that branch of the law, and there may be some special reasons why the insurers should not be able to insist upon specific performance; but why should not they insist upon the unpaid vendor's lien? The vendor, if he did not exercise it for their benefit, would be trying to make the contract between himself and the insurers more than a contract of indemnity. Chitty, J., seems to think that in this instance it is necessary to recollect that the contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured; that the contract of insurance was a collateral contract wholly distinct from, and unaffected by, the contract of sale. What does it matter? The beneficial interest of the vendors in the house depends on the contract being fulfilled or not, and the fulfillment of the contract lessens the loss, its nonfulfillment affects it. Chitty, J., indeed, says further that "the attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser." 8 Q. B. Div. 621. That may be answered in the same way. It is not that the solvency of the purchaser is guaranteed, but that the vendors are guaranteed against the loss which is diminished or increased according as the purchaser turns out to be solvent or not. The solvency of the purchaser affects the loss,—that is the only way in which it touches the insurance,—it is not because the insurance is directly an insurance of his solvency. Finally (and this is the last observation that I wish to make upon the judgment of Chitty, J.), he puts the case of a landlord insuring, and the tenant under no obligation to repair. He takes a case, "where under an informal agreement evidently drawn by the parties themselves, the large rent of £700 was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent." He says, "Assume that the building in such a case was ruinous, and would last the length of the term only. Could the insurers recover a proportionate part of each payment of rent as it was made, or could they wait until the end of the term, and then say in effect, 'You have been paid for the whole value of the building, and therefore we can recover against you?'" That seems to me at first sight to look as if it were a very difficult point, but I think this difficulty diminishes, if it does not vanish, as soon as it is considered what are the conditions of the hypothesis. Is the learned judge supposing that the landlord, who is a person with a limited interest, did intend to insure all other interests besides his own? The landlord can do so if he so intended; the question is, has he done so? If the landlord intended to insure all other interests besides his own, the difficulty dissipates itself into thin air. If he did not, it would be a very odd case, and perhaps one might ride safely at anchor by saying that one would wait till it arose. But I am not desirous of being over cautious, because I am satisfied to rest on the broad principle of indemnity, and I say, "Apply the broad principle of indemnity, and you have the answer." The vendor cannot recover for greater loss than he suffers, and if he has only a limited interest in the subject-matter, and only intends to insure that interest, I know of no means in law or equity by which he is entitled to obtain anything else out of the insurance office except what is measured by the measure of his loss. As to the form of action, I need add nothing to what has fallen already from the other members of the court. I am so much in accord with their views that I should not have added a judgment as long as mine has been if it were not for the very great importance, to my mind, of keeping clear in these insurance cases what is really the basis and foundation of all insurance law.

Judgment reversed.

CONNECTICUT FIRE INS. CO. v. ERIE RY. CO.

(73 N. Y. 399.)

Court of Appeals of New York. April 23, 1878.

Action by an insurance company against a railway company to recover the amount paid by plaintiff to a third person under a policy of insurance, on the ground that the loss was caused by defendant's negligence. A verdict for plaintiff was set aside, and the complaint dismissed. Plaintiff appealed. Reversed.

M. H. Hirschberg, for appellant. Lewis E. Carr, for respondent.

CHURCH, C. J. It must be assumed from the verdict of the jury that the buildings were burned through the negligence of the defendant's agents and servants, and it is too well settled to render the citation of authorities necessary, that as between the plaintiff, the insurer, and the defendant, the latter was ultimately liable for the loss. A fire policy is a contract of indemnity, and if a loss is occasioned by the wrongful act of another the insurer is subrogated to the rights and remedies of the assured, and may maintain an action against the wrong-doer. If the assured receives the damages from the wrong-doer before payment by the insurer, the amount so received will be applied pro tanto in discharge of the policy. Hart v. Railroad Corp., 13 Metc. (Mass.) 99. If the wrong-doer pays the assured after payment by the insurer, with knowledge of the facts, it is regarded as a fraud upon the insurer, and he will not be protected from liability to the latter. Clark v. Wilson, 103 Mass. 223; Insurance Co. v. Hutchinson, 21 N. J. Eq. 107; Graff v. Kip, 1 Edw. Ch. 619.

The question is presented in this case in a somewhat novel aspect, and unlike that of any other case to which our attention has been called. The plaintiff paid the policy after the release by the assured to the defendant, and by consenting to the judgment the payment must be regarded as voluntary on its part. If the plaintiff might have interposed the payment by the defendant to the assured, and the release as a defense to an action by the latter upon the policy, then the plaintiff cannot maintain this action. This question and the liability of the defendant depend upon the construction to be put upon the release, or rather if that construction be in favor of the plaintiff it will be unnecessary to notice any other point. The release is as follows:

"Loss and Damage.

"Erie Railway Company, to John Martin, Salisbury Mills, Dr.

"For settlement in full of all claims, demands and causes of action against the Erie Railway Company for loss and damage by fire, claimed to have been caused by sparks or coals from engine, burning hotel building, barn, shed and contents, fences, trees, etc, at Salisbury station, on or about May 13, 1873, $2,100.

"This settlement is not intended to discharge the Connecticut Fire Insurance Company from any claim which said Martin has against them for insurance, but as a full settlement with, and discharge of, the Erie Railway Company only.

"Received, September 10, 1873, of the Erie Railway Company, through the hands of R. L. Brundage, claim agent, two thousand one hundred dollars, in full of the above amount.

"$2,100. John Martin."

It is proper to refer to the surrounding circumstances. The buildings burned were worth about $3,400. Of the consideration paid for the release $300 was paid for a parcel of land conveyed to the defendant, leaving $1,800 paid for the damage to the buildings. The clause that the settlement was not intended to discharge the plaintiff from any claim of the assured against it for insurance was in the nature of a proviso or exception from the general purview of the release. It must be construed so as to carry out the intent of the parties, and that intent must be determined from the language viewed in the light of surrounding circumstances. It is evident that the assured did not receive the full amount of the damages incurred. This circumstance sheds some light upon the meaning of the release. The clause was intended for some purpose, and it seems to me obvious that it was designed to prevent the plaintiff from interposing the release as a defense to an action on the policy, and it is inferable that the amount of the policy was deducted from the amount of the loss in the settlement with the defendant. The substance of the transaction was that the assured, having a claim against the plaintiff for $1,500, settled with and released the defendant from liability for the balance, retaining the claim against the plaintiff. The form of the clause is not very specific, but looking at the substance it was a proviso that the release should not operate to prevent a recovery upon the policy against the plaintiff. With such a proviso, other portions of the release would have to yield to enable the proviso to have effect, and as to the plaintiff it would be the same as though no release had been given. It follows that the plaintiff could not have interposed the release as a defense in an action by the assured upon the policy, and if not, the logical sequence is that the right of subrogation inures against the defendant.

It is insisted that as the assured has settled and released all his claim for damages, the plaintiff could acquire no right or remedy through him by equitable subrogation, or from him by assignment. This proposition implies an assumption of the controverted fact whether the assured did release all claim.

The answer to it is that the assured released only such damages as he could without interfering with his claim against the plaintiff, and the legal consequences must be regarded as a part of the exception, viz., the right of the plaintiff to a remedy over. This was as much reserved as the right to enforce the policy. That right could not be reserved without reserving the remedy. The power to enforce the policy having been expressly reserved, the parties could not take away the right of the plaintiff to the remedy which that reservation vested in him by law. Having made their agreement so as to prevent the plaintiff from interposing this defense, they cannot object to the consequences which legally flow from it. The exception necessarily embraces the right of subrogation. It is not needful to consider whether the effect would have been different if the assured had received the full amount of the loss. No injustice is done the defendant by the result indicated. It was liable for the whole loss, and the payment to the plaintiff of the amount of the policy will, with that already paid, not exceed that amount. It did not profess to pay the assured but a part of that amount, nor did the assured intend to receive but a part, and the legal construction of the contract accords with the principles of right and justice. The action is properly brought in the name of the plaintiff. No other person has any right or interest in the claim. Code, § 111; Cummings v. Morris, 25 N. Y. 627.

The judgment must be reversed and judgment ordered on verdict.

All concur, except MILLER, J., absent.

Judgment accordingly.

DALBY v. INDIA & LONDON LIFE-ASSUR. CO.

(15 C. B. 365.)

Exchequer Chamber. Dec. 2, 1854.

Mr. Bramwell (H. Tindal Atkinson and F. J. Smith with him), for plaintiff. Channell, Serjt. (Partridge & Coxon with him), contra.

PARKE, B. If we should, upon consideration, think that the interest must be a continuing interest, as my Brother Channell contends, we will hear the matter further discussed upon the question whether the facts disclosed upon this bill of exceptions shew such continuing interest.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court:

This case comes before us on a bill of exceptions to the ruling of my Brother Cresswell at nisi prius. We learn, that, on the trial, he reserved the important point which arose in it for the consideration of the court of common pleas; and that, where it came on for discussion, it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal; and we have now, after a very able argument on both sides, to dispose of it in this court of error.

It is an action on what is usually termed a policy of life-assurance, brought by the plaintiff as a trustee for the Anchor Assurance Company, on a policy for £1000 on the life of his late royal highness, the Duke of Cambridge.

The Anchor Life-Assurance Company had insured the duke's life in four separate policies,—two for £1000, and two for £500 each, granted by that company to one Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2000 on one life; and, this insurance exceeding it, they effected a policy with the defendants for £1000 by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards, an arrangement was made between the office and Wright, for the former to grant an annuity to Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected: and that, at the time of the duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon.

If the court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the duke, the Anchor Assurance Company was interested in the life of the duke, and a plea, that they were not interested modo et formâ, —which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. Lush v. Russell, 5 Exch. 203. We are all of opinion that it was sufficient; and, but for the case of Godsall v. Boldero, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 Geo. II. c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 Geo. III. c. 48, as to insurance on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court, in Cousins v. Nantes, 3 Taunt. 315, to have been solemnly determined in the case of Lucena v. Crawford, 2 Bos. & P. 324, 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in Insurance Co. v. Magee, Cooke & A. 182, that the insurance was legal at common law.

The contract, therefore, in this case, to pay a fixed sum of £1000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an interest therein or not: and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III. c. 48. This depends upon its true construction.

The statute recites, that the making insurances on lives and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: and, for the remedy thereof, it enacts "that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge,—and that to the amount of £1000, because they had bound themselves to pay a sum of £1000 to Mr. Wright on that event,—the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount, if there were no other provisions in the act.

This contract is good at common law, and certainly not avoided by the 1st section of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided.

The question arises on the third clause. It is as follows: "And be it further enacted, that, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events."

Now, what is the meaning of this provision? On the part of the plaintiff, it is said, it means only, that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a large amount,—as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy. Upon that value, the assured must have the amount of premium calculated: if he states it truly, no difficulty can occur: he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by over-rating the value of the interest, it is his own fault, in paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy: but that value he can recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the cestui que vie, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to the amount on both sides.

This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the 1st section, the assured is prohibited from effecting an insurance on a life or on an event wherein he "shall have" no interest,—that is, at the time of assuring: and then the 3rd section requires that he shall cover only the interest that he "hath." If he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3rd section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void: but the prohibition to recover or receive more than that amount, obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

The words must be altered materially, to limit the sum to be recovered to the value at the time of the death, or (if payable at a time after death) when the cause of action accrues.

But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum: but a contract to pay,—contrary to its express words,—a varying sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict, or execution: and yet the price, or the premium to be paid, is fixed, calculated on the original fixed value, and is unvarying: so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, viz. that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not, therefore, a sum

certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were res integra, in putting the much more reasonable construction on the statute, that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself.

The only effect of the statute, is, to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of Godsall v. Boldero, 9 East, 72, has concluded this question.

Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life-policy was in its nature a contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought: and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burrows, 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract of indemnity only. But that is not of the nature of what is termed an assurance for life: it really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute 14 Geo. III. c. 48.

But, though we are quite satisfied that the case of Godsall v. Boldero was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not, and could not be, questioned in a court of error: for, one of the issues, nil debet, was found for the defendant.

Since that case, we know practically, and that circumstance is mentioned by some of the judges, in the cases hereinafter referred to, that the insurance-offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interest to do so. They have, therefore, generally speaking, paid the amount of their life-insurances, so that the number of cases in which it could be questioned is probably very small indeed. And it may truly be said, that instead of the decision in Godsall v. Boldero being uniformly acquiesced in, and acted upon, it has been uniformly disregarded.

Then, as to the cases. There is no case at law, except that of Barber v. Morris, 1 Man. & R. 62, in which the case of Godsall v. Boldero was accidentally noticed as proving it to be necessary that the interest should continue till the death of the cestui que vie. It was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured, without inquiry as to the existence of an insurable interest: and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover, on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment, in not disclosing that the interest had ceased. This was the point of the case: and, though there was a dictum of Lord Tenterden, that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case, were cases in equity, where the propriety of the decision of Godsall v. Boldero did not come in question.

The questions arose as to the right of the creditor and debtor, inter se, where the offices have paid the value of a policy, in Humphrey v. Arabin, 2 Lloyd & G. 318; Henson v. Blackwell, 4 Hare, 434, cor. Sir J. Wigram, V. C.; Phillips v. Eastwood, 1 Lloyd & G. t. Sugd. 281,—where the point decided was, that a life-policy, as a security for a debt, passed under a will bequeathing debts: the lord chancellor stating that the offices found it not for their benefit to act on the rigid rule of Godsall v. Boldero. In these cases, the different judges concerned in them do not dispute,—some, indeed, appear to approve of,—the case of Godsall v. Boldero: but it was not material in any to controvert it; and the question to be decided were quite independent of the authority of that case.

We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry; and as, in practice, it may be said that it has been constantly disregarded.

Judgment reversed, and venire de novo.

CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER.

(94 U. S. 457.)

Supreme Court of the United States. Oct., 1876.

Error to the circuit court of the United States for the Southern district of Ohio.

The facts are set forth in the opinion.

Edgar M. Johnson, for plaintiff in error.
J. D. Brannan, for defendant in error.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Franzisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced, and alimony was decreed and paid to the wife. There was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Franzisca, the survivor.

On the trial of the cause, several exceptions were taken by the defendant to the rulings and charge of the court, and this writ of error is brought to reverse the judgment for alleged error in said rulings and charge.

The first exception was for overruling certain testimony offered by the defendant. The plaintiff, having offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been an habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact, it would have falsified the statement made in the application for insurance.) The defendant called Harris, and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled, as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because, by the law of Ohio, such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf, passed in 1864, amended in 1865, and codified in Rev. St. § 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which congress deemed necessary are expressed in the act of congress; and the admission in evidence of previous communications to counsel is not one of them. And it is to be hoped that it will not soon be made such. The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.

The other exceptions were to the charge of the court, and relate to two points: First, to the forbearance note given for a portion of the last renewal premium; and, secondly, to the alleged failure of interest of the plaintiff in the policy, caused by the divorce of the insured parties.

First, as to the forbearance note. Only one half of the annual premium was required to be paid in cash; the insured, if they chose, could have a credit for the other half. This credit was given upon the assured's signing an acknowledgment in the following form: "I hereby acknowledge a credit or forbearance of —— dollars of the premium on my policy No. ——, which amount shall be a lien on said policy at six per cent per annum until paid or adjusted by return of surplus premium." It was not a note promising to pay money, but a form of acknowledgment by which the assured consented to a deduction from the policy for non-payment of a portion of the premium. As long as George F. Schaefer took any interest in the policy, he signed this acknowledgment for himself and wife, "George F. and Franz. Schaefer;" or for himself alone. One premium became due after the divorce, and Franzisca Schaefer herself attended to the payment of it,—paying the cash portion, and authorizing her son by a former marriage to sign the forbearance note, as it is called. He did so in the name of both parties insured, thus: "Geo. F. & F. Schaefer." The company accepted it. On what valid ground they can now object to the transaction, it is difficult to see. A joint act was to be done. Only one of the parties could physically do it. Either had a right to do it. This act was, to pay or settle the annual premium. The plaintiff, as one of the joint parties, performed what was necessary to be done. George F. Schaefer could not complain; for it was done in his interest, keep-

ing the policy alive for his benefit as well as Franzisca's. The company could not complain; for they accepted both the money and the acknowledgment in the form in which they were given. There is no pretence that any deception was practised upon them.

This point is really frivolous.

The other point, relating to the alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it.

It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance: First, with regard to marine risks, by statute of 19 Geo. II. c. 37; and next, with regard to lives, by the statute of 14 Geo. III. c. 48. In this country, statutes to the same effect have been passed in some of the states; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice Shaw, in a case which arose in Connecticut (in which state the present policy originated), seem to us characterized by great good sense. He says: "In discussing the question in this commonwealth [Massachusetts], we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III., passed about the time of the commencement of the Revolution, and never adopted in this state. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the cestui que vie; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt," he continues, "that a parent has an interest in the life of a child, and, vice versa, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." Loomis v. Insurance Co., 6 Gray, 399. We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject. See May, Ins. §§ 102–111; Bliss, Ins. §§ 20–31.

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the

time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them.

In England, by the operation of the statute of 14 Geo. III., as construed by the courts, the law has assumed a very definite form. In a lucid judgment delivered by Baron Parke in the exchequer chamber, in the case of Dalby v. Insurance Co. (decided 1854) 15 C. B. 365, it was held that the true meaning of the statute is, that there must be an interest at the time the insurance is effected, but that it need not continue until death; the words of the statute being, "that no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaming or wagering," and "that in all cases where the insured hath interest in such life, &c., no greater sum shall he recovered than the amount or value of the interest." The word "hath" was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amount insured, as required by the principles of life assurance. This case overruled the previous case of Goodsall v. Boldero, 9 East, 72, decided by Lord Ellenborough, in which, proceeding upon the idea that life insurance is a mere contract of indemnity, it was held that the interest must continue until death, and even until the bringing of the action. Baron Parke, in commenting upon this case, very justly says: "Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a mere contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought; and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burrows, 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an assurance for life: it really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute." As thus interpreted, we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision. Be this, however, as it may, in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured.

Judgment affirmed.

NIAGARA FIRE INS. CO. v. DE GRAFF.

(12 Mich. 124.)

Supreme Court of Michigan. Oct. Term, 1863.

Error to circuit court, Lenawee county.

C. A. Stacy and C. I. Walker, for plaintiff in error. A. L. Millerd, H. D. Condict, and T. M. Cooley, for defendant in error.

CAMPBELL, J. Plaintiffs in error insured De Graff upon his stock of goods, described in his application as a "stock of dry goods, groceries, etc.," dividing the risk into specific sums on dry goods, groceries, hardware, and other things specifically mentioned. There was evidence tending to show that he had in his store a few bottles of spirituous liquors, and a barrel of alcohol. Alcohol was among the articles mentioned in the second class of hazards in the second subdivision of extra hazards. Grocers' stocks generally were in the first subdivision of the same class. Bottled spirituous liquors were not classed as extra hazardous, but were included in the first class of ordinary hazards in the second division of hazardous. There was evidence tending to show that the insurance agent who drew up the application was informed of the presence of the liquors and alcohol, which was, however, denied by the agent. The property being destroyed, a suit was brought on the policy, and judgment was recovered. Error is brought on the rulings upon the trial. The points taken refer mostly to a clause in the policy which declared that if the store should be used "for storing or keeping therein any articles, goods, or merchandise, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." There was a further clause annulling the policy whenever gunpowder or any other article subject to legal restriction should be kept in greater quantities or in a different manner than prescribed by law.

The court below refused to charge, as requested, that since the passage of the prohibitory liquor law, alcohol and spirituous liquors are not included in the term "groceries," as used in referring to goods kept for sale; and charged that the question, whether they were so included, was one of fact for the jury. To this exception is taken.

It was claimed on behalf of the plaintiffs in error, that if these liquors can be allowed to be included in a policy, the policy will be, to all intents and purposes, insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact, that in each instance, it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties. Hibbard v. People, 4 Mich. 125; Bagg v. Jerome, 7 Mich. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property, the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. In the case of Insurance Co. v. Polleys, 13 Pet. 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of Armstrong v. Toler, 11 Wheat. 258, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist.

The question then arises, whether the court rightly left it to the jury to say, as a matter of fact, whether the term "groceries" included spirituous liquors and alcohol. That it may include them in the absence of such a statute is not denied; the recognized definitions embracing them clearly, so that it may be doubted whether it might not, in that case, require evidence of usage to exclude that meaning if such articles existed in an insured stock of groceries. See Insurance Co. v. Langdon, 6 Wend. 623. There was evidence before the jury in the case before us, that these things did in fact form a part of the stock, and evidence tending to show a knowledge of that fact by the agent. The statute does not prohibit the sale of all kinds of liquors, but, as to some, expressly recognizes the right in every one. Whatever may be the presumption, under our present

statute, as to the extent of the term "groceries,"—a question not raised in the case, and upon which, therefore, it would be improper to pass,—we think the instruction asked was altogether too broad, in claiming that alconol and other liquors could not possibly be included. The question was properly left to the jury.

If the jury found—as their verdict shows they must have done—that the term "groceries" included the liquors in question, then the other instructions complained of, which held that by insuring such a stock the liquors were embraced although extra hazardous, were clearly correct. By the use of a term including them they are "specially provided for in writing on the policy." Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not. See Bryant v. Insurance Co., 17 N. Y. 200; Harper v. Insurance Co., Id. 194; Harper v. Insurance Co., 22 N. Y. 441; Delonguemare v. Insurance Co., 2 Hall, 589. In these instructions the jury were directed to include the articles, only if satisfied that they were commonly kept and sold as part of a grocer's stock. This qualification was sufficiently broad to prevent any improper inferences.

The clause of the policy vitiating it if gunpowder and other articles subject to legal restriction should be kept in greater quantities or in a different manner than is provided by law, was not pressed very strongly on the argument, and evidently refers only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness. It has no reference to any risks except such as render the property more likely to be destroyed. There are no statutory provisions concerning liquors analogous to the laws restricting the use of powder.

Our attention has been called to the fact, that the other charges given on the one side and refused on the other, are inconsistent with those complained of. So far as this is the case, however, they favored the plaintiffs in error,—those excepted to being the only ones which could damnify them. Had the verdict been for them, the discrepancies would have been more important in determining the rights of the other party. The question whether the jury did not find against evidence, or perversely, could only be presented in the circuit court.

The judgment should be affirmed, with costs.

MANNING, J., concurred. CHRISTIANCY, J., also concurred in the result. MARTIN, C. J., was absent.

HINCKLEY v. GERMANIA FIRE INS. CO.

(1 N. E. 737, 140 Mass. 38.)

Supreme Judicial Court of Massachusetts. Barnstable. June 18, 1885.

This was an action of contract upon a policy of insurance against fire upon a pool table and other saloon fixtures. At the trial in the superior court a verdict was ordered for the defendant, and the case reported for the consideration of the supreme court.

J. M. & T. C. Day, for plaintiff. M. & C. A. Williams, for defendant.

ALLEN, J. The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections, which we have considered.

In the first place, the defendants suggest that there is certainly great doubt whether the license under which the plaintiff was doing business on the day when the policy was dated and delivered was of any validity, since this license ran to both brothers, Edwin and Herbert, though Herbert had ceased to have any interest in the place before the license was dated and issued. No authority is cited or reason assigned for so strict a construction, and we are of opinion that a license duly granted to two persons, under Pub. St. c. 102, § 111, to keep a billiard or pool table, or a bowling alley, for hire, is available to each of them. This is not like a case where two persons seek to avail themselves of a license granted to only one of them.

It is then urged that, after the license had expired, the plaintiff kept the insured property, in violation of law, from May 1, 1883, till the last week in June, 1883. The policy was dated March 15, 1883, and the license then existing expired May 1, 1883. The fire occurred on August 6, 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds: First, that the illegality and criminality of the plaintiff's act in respect to the injured property vitiates the policy by operation of law, independently of any express provisions contained in the policy; and, secondly, that under a provision of the policy the right to recover was taken away. The authorities cited in support of the first proposition do not support it. In Kelly v. Insurance Co., 97 Mass. 288, the policy was on intoxicating liquors, which at the time of the insurance, and thereafter to the time of the loss, were intended for sale in violation of law. The policy never attached. There was never a moment when the liquors were not illegally kept; and all that the case decides is that goods so kept at the time when the policy issued, or at the time of the loss, cannot be the subject of a valid insurance. In Johnson v. Insurance Co., 127 Mass. 555, the facts were similar. The policy was on billiard tables, balls, cues, etc., kept without a license at the time the policy was issued, as well as at the time of the loss. The ground of the decision in both of the above cases is stated to be "that the object of the assured in obtaining the policy was to make their illegal business safe and profitable; and that, the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and void, and the policy never attached." The same facts existed in Lawrence v. Insurance Co., Id. 557. In Cunard v. Hyde, 2 El. & El. 1, the cargo which was the subject of insurance was partly loaded on deck, in violation of law, and while in that condition was totally lost.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether, or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was proved, as a matter of fact, that the plaintiff, at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed; or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if uncontemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and uncontemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension of the risk, without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause in the policy giving them a right to cancel it upon notice, and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. "The doctrine that the risk may be suspended, and again revive, without an express provision for the purpose, seems to be within the strictest judicial principles." 1 Phil. Ins. § 975. Accordingly, temporary unseaworthiness, if the ship has become seaworthy again,

will not defeat the policy. Id. § 730. So as to other stipulations; as, e. g., that of neutral character and conduct. Id. § 975. And in Worthington v. Bearse, 12 Allen, 382, it was held, on great consideration by this court, that if the assured in a marine policy temporarily parts with his interest in the property insured, and afterwards buys it in again, the policy will revive, if there are no express provisions making it void, and there is no increase of risk. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And, as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence as the forfeiture of his policy, in addition to the penalty of $100, which the legislature have considered adequate as the maximum punishment for his offense against the public. Pub. St. c. 102, § 111.

It is further contended by the defendants that, however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "This policy shall be void * * * if the insured shall make any attempt to defraud the company either before or after the loss; or if gun-powder or other articles subject to legal restrictions shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oil, or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting." In this commonwealth, under the statutes for the regulation of trade, and providing for licenses and municipal regulation of police, there are a great many articles which, in a certain sense, may be said to be "subject to legal restriction." Dogs, fish, nails, commercial fertilizers, hacks, and horses, in cities, may be referred to as examples. It may well be questioned whether, under the maxim noscitur a sociis, the clause in the policy above quoted ought not to be limited in its application to other articles of a character similar to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void because an unlicensed dog was kept upon the premises; and yet such a dog, being subject to legal restriction, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But, irrespective of this consideration, it is not the necessary meaning of the word "void," as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phil. Ins. § 975, it is said: "After it (i. e., the policy) has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred. * * * And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances, or the express provisions of the policy, such application is excluded." In accordance with this doctrine, a provision in a policy that it should be void, and be surrendered to the directors of the company to be canceled, in case of alienation of the property by sale or otherwise, was held to be inoperative for the time being; and the assured, upon acquiring title after a sale of the property by him, was held entitled to recover. Lane v. Insurance Co., 12 Me. 44. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent (i. e., of the company), this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire. Power v. Insurance Co., 19 La. 28.

The same rule of construction has been applied to provisions against other insurance. Obermeyer v. Insurance Co., 43 Mo. 573; New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166; Mitchell v. Insurance Co., 51 Pa. St. 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss. Schmidt v. Insurance Co., 41 Ill. 295; Insurance Co. of North America v. McDowell, 50 Ill. 120, 129. Without at present going beyond what is called for by the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured, without a license, to come within the prohibition of the policy in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

The only remaining objection urged by the defendant is that the statements of loss rendered to them by the plaintiff were insufficient, in failing to state that the plaintiff had

no legal title to the injured property, and that the Spurrs had an interest in it. But there is no finding as a matter of fact that the plaintiff was not the owner of the property, and upon the report of the case we cannot say, as a matter of law, that it appears that he was not such owner. Bailey v. Hervey, 135 Mass. 172; McCarty v. Henderson, 138 Mass. 310. Moreover, no attempt to defraud the defendants being proved or charged, the provision of the policy that a statement shall be rendered setting forth the interest of the insured therein was sufficiently complied with. There was no provision calling for an exact statement of his title or interest in detail, and a general statement of ownership was sufficient. Fowle v. Insurance Co., 122 Mass. 191.

New trial granted.

FIDELITY & CASUALTY CO. OF NEW YORK v. EICKHOFF.

(65 N. W. 351.)

Supreme Court of Minnesota. Dec. 13, 1895.

Appeal from district court, Polk county; Frank Ives, Judge.

Action by the Fidelity & Casualty Company of New York against William Eickhoff. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Van Fossen, Frost & Brown, for appellant. Halvor Steenerson, for respondent.

MITCHELL, J. The plaintiff, a foreign corporation, is what is termed a "guaranty insurance company," engaged in the business of guarantying to employers the fidelity of their employés. This action was brought to recover money alleged to have been paid to the Red River Elevator Company, defendant's employer, upon a bond by which the plaintiff obligated itself to make good, and reimburse to the elevator company, such pecuniary loss as it might sustain by reason of the infidelity of the defendant as its receiving agent in one of its grain elevators. The appeal is from an order sustaining a demurrer to the complaint on the ground that it did not state facts constituting a cause of action.

The material conditions of the bond, which is set out in the complaint, are as follows: "The aforesaid company [the plaintiff] shall, * * * subject to the conditions and provisions herein contained, * * * make good, and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of fraud or dishonesty of any of the employés [of which defendant was one] named upon said schedule, as hereinafter provided, in connection with his duties as receiving agent or buyer: * * * Provided, that the company shall be liable only for the acts of fraud or dishonesty on the part of the persons mentioned in the schedule, who act as receiving agents, for shortages in their grain accounts, as follows, viz.: There shall be deducted from the total amount of grain and dockage received by the receiving agent at said elevator or elevators screenings and dirt from such grain as has been cleaned at said elevator or elevators, together with the amounts of shipments based upon weights of grain and dockage at terminals; and if the result shows a deficit, and the shortage is not caused by the various exceptions agreed to, this proof of loss will be accepted as binding on the part of the company. In case where screenings and dirt are burned at an elevator, they shall be weighed before being burned, and the weight reported daily to the employer: provided, that the company shall not be liable for the grading of grain, loss by heating, drying, or leakage of cars, or other damage, shortages caused by defective weighing apparatus or appliances, or for shortages in any elevator or elevators caused by the failure of any of the parties mentioned in said schedule to take dockage enough to make good their weights for grain checks issued, as the employer hereby assumes the risks of its superintendents, traveling men, and officers in giving instructions to its receiving agents as to the amount necessary to take to make good the amount of dockage at terminal points, and the action of receiving agents in taking dockage, the loss by cleaning grain, and the ordinary shrinkage arising from dust in handling of said grain in elevators. And it is further agreed that the company shall not be liable for errors or carelessness in weighing of grain, nor for thefts of grain by persons other than those covered by this bond, nor for robbery or thefts of money from the persons so covered, where proofs of such errors, carelessness, thefts, or robbery are conclusive, as negligence is not covered by this bond."

The complaint alleges that defendant, in consideration of plaintiff's becoming a guarantor for him by executing this bond, agreed to indemnify it against any losses, damages, or expenses it might sustain or become liable for in consequence of executing the bond; also, that this bond was in the form requested by the defendant; also, that defendant further agreed "to admit the voucher or other proper evidence of such payment by plaintiff as conclusive evidence against himself as to the fact and extent of his liability to the plaintiff." It is further alleged that defendant, within the scope of his employment as receiving agent of plaintiff, issued tickets for, received, and took in, at one of the elevator company's elevators, a certain number of bushels of wheat and dockage, but, of the same, only delivered to the elevator company a certain less number of bushels at the termination of his employment; leaving nearly 1,000 bushels which he never delivered, although requested to do so. The complaint then states specifically the manner in which this shortage was ascertained and made to appear, which was the exact manner provided for in the bond. It then negatives specifically that this shortage was caused by any of the exceptions named in the bond. It is then alleged that the elevator company presented its claim for this shortage to the plaintiff; that the latter was compelled to pay the same, and now holds the elevator's voucher for the same, but that defendant refuses to indemnify the plaintiff for the money thus paid out in his behalf. Counsel for plaintiff asks us to pass upon numerous questions touching the construction of this bond; but as it is a novel contract, and its provisions prolix, somewhat obscure, and sometimes apparently contradictory, we deem it unwise, upon a demurrer, to decide much except what is necessary to determine whether a cause of action is stated. Hence we shall confine ourselves mainly to the specific objections made by defendant's counsel to the sufficiency of the complaint.

1. The first objection urged against the

complaint is that it does not allege that the plaintiff had a license to do an insurance business in this state, as required by Gen. St. 1894, § 3331. Notwithstanding that there would seem to be some decisions holding otherwise, we are of opinion that the case is one where the maxim, "Omnia rite acta præsumuntur," is applicable. Noncompliance with the laws of this state will not be presumed, but, if it exists, must be set up in defense. Williams v. Cheney, 3 Gray, 215.

2. The second point urged is that a contract guarantying the honesty of employés is void as being against public policy; that it is the duty of all employers dealing with the general public to employ honest agents; that the effect of such a contract as set out in the complaint is to make it a matter of indifference to an elevator company whether it employs honest or dishonest agents to deal with the patrons of the elevator. There is nothing whatever in this objection. The same principle is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duties. And it is wholly immaterial whether the guarantor is a private person, or an incorporated guaranty insurance company. The advantages of the latter over the former mode of suretyship, if properly conducted, are very apparent. 2 May, Ins. § 541.

3. The third objection is that the stipulation between the plaintiff and defendant that the voucher, or other evidence of payment by plaintiff to the elevator company, should be conclusive evidence against the defendant as to the fact and extent of his liability to the plaintiff, is void as being against public policy. This question is not really involved in this appeal, but, as it is one which will necessarily arise at the very threshold of the trial of the action, it may properly be considered now. The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So, also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may, by his own ex parte acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge of his own case. The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person, such as the architect or engineer, as to the amount or character of the work, is made conclusive between the parties, in the absence of fraud or mistake. Nor is it at all analogous to a provision in an executory contract for the sale or manufacture of an article to the satisfaction of the buyer, where, if the article is declined, the parties are, in contemplation of law, left in statu quo. In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and conclusive judge of both its existence and extent. Such an agreement is clearly against public policy. If the provision had been that the voucher, or other evidence of payment, should be merely prima facie evidence of the fact and extent of defendant's liability,—thus merely shifting the burden of proof, but leaving the defendant at liberty to rebut this prima facie evidence,—although even then a somewhat drastic provision, we do not think that it could be held to contravene public policy. To that extent, we think this provision is valid, but, in so far as it assumes to make the voucher of payment by plaintiff conclusive of defendant's liability, it is void.

4. The fourth objection urged against the complaint is that, while the bond only covers acts of fraud and dishonesty, it contains no allegation that this shortage was caused by the fraud or dishonesty of the defendant. Whoever drafted this bond used language very loosely, and employed a great many words to express, or else conceal, very few ideas. But after taking it by the four corners, and considering all its provisions, our construction is that the plaintiff was only bound to make good, and reimburse the elevator company for, loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant. But the bond also provides how the existence and amount of a shortage shall be ascertained, and that, when thus ascertained, it shall be accepted as evidence that it was caused by the fraud or dishonesty of the defendant, and not by any of the various other causes, enumerated as exceptions, for which the plaintiff was not to be liable; in other words, that a shortage ascertained in the manner prescribed should be prima facie evidence of its existence, and that it was caused by defendant's fraud or dishonesty, thus casting the burden upon the plaintiff to rebut this prima facie case by proof. It is not bound to do this by affirmative evidence showing the particular one of the causes, enumerated as exceptions, which produced the shortage, but may do it by negative evidence showing that it was not caused by the fraud or dishonesty of the defendant, and hence must have been produced by one or more of the excepted causes. This it may do by a fair preponderance of evidence as to any of the excepted causes, except errors or carelessness in weighing, and thefts by persons other than those covered by the bond, in which cases the proofs must be conclusive. The word "conclusive," in that connection, we think, must be construed as meaning so strong as to require a find-

ing or verdict that the shortage resulted from the cause alleged. This may also be done by negative or circumstantial evidence. So much for the construction of the bond.

The bond having been executed at the request of the defendant, and in the form requested by him, it follows that his obligation to indemnify the plaintiff is coextensive with that of the plaintiff to reimburse the elevator company; also, that any provisions in the bond, as to proof of liability, binding on the plaintiff in favor of the elevator company, are equally binding on the defendant in an action brought by the plaintiff against him to recover indemnity for what it has paid in his behalf. Therefore it follows that the complaint alleges facts which, under the provisions of the bond, constitute a cause of action against the defendant; that is, if all the facts alleged are proved on the trial, it would follow, as a matter of law, that the plaintiff would be entitled to recover. That the facts alleged are, in one sense, merely evidentiary, and may be rebutted by other evidence, is not material, inasmuch as, by the agreement of the parties, they make out prima facie a cause of action, and if not rebutted they conclusively make it out. Otherwise expressed, under the contract of the parties, the facts alleged prove that the shortage was caused by defendant's fraud or dishonesty. Under these circumstances, an express and direct allegation that it was so caused was unnecessary. The complaint states a cause of action. Order reversed.

ROHRBACH v. GERMANIA FIRE INS. CO.

(62 N. Y. 47.)

Court of Appeals of New York. May 25, 1875.

Appeal from judgment of the general term of the supreme court in the Third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This was an action upon a policy of insurance, by its terms insuring plaintiff upon "his two framed buildings" situate in the village of Jeffersonville, N. Y. Prior to the 28th June, 1868, the plaintiff had been in the employ of Margaretha Hartmann, and she was indebted to him for his labor and services. On that day they intermarried. On the thirtieth of the same month she executed and delivered to him an instrument, in writing, of the body of which the following is a copy:

"Jeffersonville, June 30th, 1868.

"I do hereby certify that I owe to John Rohrbach the sum of seven hundred dollars; and, also, twenty-five dollars for each and every month from the fourteenth day of July, 1863, and for every month he may live with me henceforth without any deduction whatsoever, which amount shall be a lien on my property."

She died intestate July 8th, 1868, leaving personal property of the value of $600, and a lot in said village upon which were the buildings in question. The principal value of the premises was in the buildings. One Armbrust was appointed administrator of her estate. Her indebtedness, other than that to plaintiff, was from $1,200 to $1,400. Her indebtedness to him was about $2,100. Plaintiff continued in the use and occupation of the buildings. In December, 1868, plaintiff negotiated for insurance on the buildings with one Brand, who was the agent of defendant, authorized to procure and submit applications, and to issue policies furnished him by defendant, signed by its officers, which were to be countersigned by him. Plaintiff showed to Brand the said instrument, and related and explained to him all the facts and circumstances. Plaintiff was a German, he could not read or write English. Brand filled out the application, giving, as he testified, his conclusions and the facts he deemed material, and the plaintiff signed it. The material part of the application was as follows:

"Application of John Rohrbach, of Jeffersonville, state of N. Y., for insurance against loss or damage by fire for the period of one year from 26th day of December, 1868, to 26th day of December, 1869, at noon, by the Germania Fire Insurance Company of the City of New York, in the sum of ten hundred dollars, upon the property specified below:

	Cash Value.	Sum to be Insured.
On his frame 2-story building, occupied by insured as a dwelling and saloon.....	$4,000	$1,000

"The applicant will answer fully the following question:

"Title—Is your title to the above property absolute? If not, state its nature and amount.

"Ans. His deceased wife held the deed.

"And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and the same is hereby made a condition of the insurance and a warranty on the part of the insured."

The policy contained these clauses, among others:

"1. 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 contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise, * * * or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, * * * and in every such case this policy shall be void."

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void."

"11. It is a part of this contract, that any person, other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance."

"And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing."

Other facts appear in the opinion. Defendant's counsel moved for a nonsuit on the ground of breach of warranty, and that plaintiff had not an insurable interest. The motion was denied, and defendant's counsel excepted.

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 by the defendant, 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 that 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 she 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 only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good a 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 Rev. St. p. 87, § 27, subsecs. 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 (Id. p. 92, § 52), and a sale of the real estate (Id. p. 108, § 48), for the payment of his and 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 Arn. Ins. 229; Buny. Assur. 16; Hughes, Ins. 30; 1 Marsh. Ins. 115; 1 Phil. Ins. 2, 107; Sherm. Ins. 93; Pars. Merc. Law, 507; Pars. Cont. 438; Ang. Ins. § 56; Fland. Ins. 342; May, 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 a 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. Marsh. 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 lands 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 Grevemeyer v. Insurance Co., 62 Pa. St. 340, 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, Conard v. Insurance 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 v. Black, 1 Pa. St. 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 Hancox v. Insurance Co., 3 Sumn. 132–140, Fed. Cas. No. 6,013; and also that the right to pursue the debtor personally does not deprive the creditor of an insurable interest. Id. In Putnam v. Insurance Co., 5 Metc. (Mass.) 386, which was an insurance for a commission merchant upon his expected commission from the 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 lost to him; and it is not necessary to show that the insured is the legal or equitable owner. Wilson v. Jones, L. R. 2 Exch. 139; Buck v. Insurance Co., 1 Pet. 151. It will be perceived that between the case cited from 62 Pa. 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 nought 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 lienor. But when a right to 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 made, and he die leaving no personal estate, though in technical language my lien may not be specific upon that real estate, 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 specifically 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 of 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 v. 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 life-time, 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 v. Bank, 11 Paige, 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. Pend-

ing the advertisement, they took out insurance on the buildings and fixtures in the joint name 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 Insurance Co. v. Allen, 43 N. Y. 389–395, 396, 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 the preservation and protection of the property, and" that 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 v. Rice, 27 N. Y. 163. 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. Denio, Ch. J., 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 peril 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 specialty, 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 (Saunderson v. Rowles, 4 Burrows, 2064–2068); obiter dicta are such opinions uttered by the way, not upon the point or question pending (Rouse v. Moore, 18 Johns. 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 v. 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 nor 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 their 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 v. Rice was a case in which there was full argument and consideration. I consider it gives reasons as well as 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 estate.

Savage v. Insurance Co., 52 N. Y. 502. In Clinton v. Insurance 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 v. 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 mortgage 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 afterwards burned, it cannot now be said that the policy was upon the two buildings destroyed. There is no doubt what property the plaintiff and 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 phrase, it was not a warranty of ownership, nor a material misrepresentation (Niblo v. Insurance Co., 1 Sandf. 551; Insurance Co. v. Robert, 9 Wend. 404; Tyler v. Insurance 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 this view of it. There is nothing in Insurance Co. v. 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 v. Insurance Co., 18 N. Y. 376. The truth of that warranty became a condition precedent to any liability to the plaintiff from the defendant (Bryce v. Insurance Co., 55 N. Y. 240), 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 (Id). 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 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 v. Insurance 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 prevention of the statement of them by the applicant. Chase v. Insurance Co., 20 N. Y. 52; where the case in 18 N. Y., supra, is considered and distinguished. As to Rowley v. Insurance Co., 36 N. Y. 550, cited in general term opinion, it is much shaken in Owens v. Insurance Co., 56 N. Y. 565–570. 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 answer. McKecknie v. Ward, 58 N. Y. 541.

Held to the letter and substance of his 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 point 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 had 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.

Judgment reversed.

RIGGS v. COMMERCIAL MUT. INS. CO.

(25 N. E. 1058, 125 N. Y. 7.)

Court of Appeals of New York. Dec. 2, 1890.

Appeal from superior court of New York city, general term.

Action by John S. Riggs against the Commercial Mutual Insurance Company. Defendant issued to Joseph L. Tobias a policy of insurance upon the steamer Falcon for $1,000, loss payable to Andrew Simonds. Tobias was, at the time of effecting this insurance, a stockholder in the Merchants' Steam-Ship Company, which then owned the steamers Sea Gull and Falcon. Simonds, by an indorsement on the policy, directed the insurance company to "pay to John S. Riggs." Plaintiff recovered judgment at special term, which was reversed at general term, and a new trial ordered. 51 N. Y. Super. Ct. 466. At the same time a judgment in a similar action rendered at special term, in favor of Merchants' Steam-Ship Company against the defendant, was affirmed at general term, (Id. 444,) and the defendant appealed to the court of appeals. The parties to this action thereupon entered into a stipulation which provided as follows: The plaintiff in this action being about to appeal to the court of appeals, it was considered by both parties that, if the judgment in the Steam-Ship Co. Case should be reversed on the ground that the vessel insured under the policy in this case and in that was not a total loss, both actions would necessarily fail; but if the decision of this court in the Steam-Ship Co. Case, holding that the vessel was a total loss, should be affirmed by the court of appeals, the plaintiff herein would then be entitled to recover, if J. L. Tobias had an insurable interest in the vessel; and it was thereupon agreed that the plaintiff herein should waive his right to appeal to the court of appeals, upon the consent of the defendant, that, if the judgment of this court in the Steam-Ship Co. Case should be affirmed, then the question of J. L. Tobias' insurable interest in this case should be reargued at the general term, and that the decision of the general term on such reargument should be final so far as the plaintiff was concerned, but without prejudice to any right in defendant to appeal therefrom. The court of appeals thereafter affirmed the decision of this court in the Steam-Ship Co. Case. 13 N. E. Rep. 939. On this case coming on for reargument at general term on the question of the insurable interest of J. L. Tobias, that court reversed its former decision, and affirmed the judgment of the trial term, (5 N. Y. Supp. 183,) and from this judgment of affirmance defendant appeals.

David Willcox, for appellant. *George Zabriskie*, for respondent.

ANDREWS, J. This defendant is, we think, precluded by the stipulation of January 10, 1889, from raising any question on this appeal except as to whether Tobias, the assignor of the plaintiff, by reason of his being a stockholder in the Merchants' Steam-Ship Company, had an insurable interest in the Falcon when the policy was issued, and perhaps the further question whether that interest, if it existed, was covered by the policy. The situation when the policy was made was this: The judgment which the plaintiff recovered at the trial term had been reversed at the general term, and a new trial had been ordered, and the plaintiff was about to appeal from the order of reversal to this court. The Merchants' Steam-Ship Company had recovered judgment against the defendant in the same court on its policy on the same vessel similar to the policy issued to the plaintiff, and this judgment had been affirmed by the general term, and the defendant had brought an appeal to this court, which was then pending. There was one question common to both cases, viz., whether there had been an absolute total loss of the vessel insured, without which it was conceded there could be no recovery. In the Case of the Merchants' Steam-Ship Co. this was the sole question. In this case there was the additional point whether the plaintiff had an insurable interest. The parties to the stipulation assumed that the question of total loss would be conclusively determined as to both cases by the result of the appeal in the Case of the Merchants' Steam-Ship Co., but if the judgment in that case was affirmed it would still leave open in this case the question of insurable interest. Under these circumstances, the parties entered into the stipulation by which the plaintiff waived his right to appeal to this court from the order of reversal upon the defendant's consenting that if the judgment in the Steam-Ship Co. Case should be affirmed there should then be a reargument in this case before the general term of the question of the plaintiff's insurable interest, which consent was given, and the stipulation further provided "that the decision of the general term on such reargument should be final so far as the plaintiff was concerned, but without prejudice to any right in defendant to appeal therefrom." This court affirmed the judgment in the Steam-Ship Co. Case, and the reargument on the question of the plaintiff's insurable interest was then had before the general term; whereupon the general term reversed its former decision upon the point, and affirmed the judgment of the trial term. The present appeal is from this judgment of affirmance.

It was the plain purpose of the stipulation that the defense common to both actions should abide the decision in the Steam-Ship Co. Case, leaving open in this action the distinct and separate question of insurable interest only. The stipulation was valid, and governs this appeal. Townsend v. Stone Dressing Co., 15 N. Y. 587. The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific, tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured; but this was not necessary, unless required by some condition in the policy. Lawrence v. Van Horne, 1 Caines, 276; Tyler v. Insurance Co., 12 Wend. 507. The policy, if other-

wise valid, attached to whatever insurable interest he had, whether as owner or otherwise. What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. May, Ins. § 76. Contracts of insurance where the insured had no interest were permitted at common law, (Craufurd v. Hunter, 8 Term R. 13;) but the maaifest evils attending such contracts, and the temptation which they afforded for fraud and crime, led to the enactment in England of the statute 19 Geo. II. c. 37, prohibiting wager policies, and this was followed by the enactment in this state of a similar statute (1 Rev. St. 662) prohibiting wagers. But to prevent the application of the statute to cases of insurance by way of security and indemnity it was provided that it should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law." Section 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter. Plimpton v. Bigelow, 93 N. Y. 593; Van Allen v. Assessors, 3 Wall. 573. But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders—viz., the right to dividends and the right to share in the final distribution of the corporate property—may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned; as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence. Cone v. Insurance Co., 60 N. Y. 619. The question now before us was considered by the supreme court of Iowa in the case of Warren v. Insurance Co., 31 Iowa, 464. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In Philips v. Insurance Co., 20 Ohio, 174, there is an adverse *dictum*, but the decision went on another ground. In Wilson v. Jones, L. R. 2 Exch. 139, the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to an insurance on profits. See, also, Paterson v. Harres, 1 Best & S. 336. It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder. The question here is, did the plaintiff have an insurable interest covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery up to the amount insured would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of Herkimer v. Rice, 27 N. Y. 163, Rohrback v. Insurance Co., 62 N. Y. 47, and National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. Rep. 337, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say in conclusion that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured. The judgment should therefore be affirmed. All concur.

HOOPER v. ROBINSON.

(98 U. S. 528.)

Supreme Court of the United States. Oct., 1878.

Error to the circuit court of the United States for the district of Maryland.

The British steamer "Carolina" came to Baltimore, consigned to James Hooper & Co. They were also her agents while she remained in that port. The plaintiff in error was a member of the firm. Having taken on board her return cargo, the steamer proceeded on her homeward voyage. While in the Chesapeake Bay she was injured by a collision with another vessel, and put back to Baltimore for repairs. She was repaired, and Hooper & Co. paid all the bills and made other disbursements for her. McGarr, the captain, drew on Good Brothers & Co., of Hull, England, for the amount in favor of Hooper & Co., and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy here in question. The draft bore date Oct. 20, 1872; was for £1,611 18s. 7d.; was payable in London thirty days after sight; and directed that the amount should be charged "to account for advances for repairs and disbursements of steamship 'Carolina' and her freight, to enable the ship to proceed on her voyage."

The policy of insurance was dated on the 26th of October, 1872, and was to "James Hooper & Co., on account of whom it may concern, in case of loss to be paid to their order." The insurance was "lost or not lost," . . . "on merchandise, to cover such risks as are approved and indorsed on the policy." The indorsement set forth the date of the insurance, the name of the vessel, the course of the voyage, the rate of the premium, the amount insured ($8,000), and the remark, "paid advance to cover disbursements and repairs." The names of the agents of the underwriters were affixed. The instrument was a cargo policy. No inquiry was made of Hooper as to whom he was insuring for, and no representation was made by him except as is disclosed in the memorandum indorsed upon the policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore. They transmitted it to their correspondents in London. On the 11th of November, 1872, it was accepted by Good Brothers & Co., and on the 14th of December following they paid it. On the 14th of November, 1872, the steamer foundered at sea. On the 28th of that month notice of the loss was given to the underwriters. On the 6th of December, in answer to a call for proof of loss and interest, Hooper & Co. furnished the Baltimore agent of the underwriters with the protest and a full account of the items of "outfit and disbursements of the British steamer 'Carolina.'" In the statement was the charge, "to cash paid insurance on advances $117.33." On the 15th of January, 1873, the agent in Baltimore drew on the defendants in error, his principals in New York, for $8,012, at five days' sight. The draft was paid on the 24th of that month, and on the 31st Hooper & Co. remitted the amount to Good Brothers & Co. in England. When Hooper & Co. received the draft of the 15th of January, they gave a receipt setting forth that when the draft was paid it would be "in full for claim for total loss of advancements for disbursements and repairs per steamer 'Carolina,'" . . . "insured 26th of October, 1872, under policy No. 22,706." The receipt concluded with a promise, upon the payment of the draft, "to assign all our right, title, and interest in the above advances for disbursements and repairs to the underwriters." Hooper said at the time to the agent "that he had nothing to assign." On the 10th of February, 1873, Hooper & Co. executed to Robinson & Cox, the attorneys of the underwriters, the promised assignment, which was a printed form filled up by the agent, "such as is taken in all cases of abandonment for total loss." Hooper then again told the agent "that he had no interest in the matter, but as it was customary, he would sign the paper."

During all these transactions Hooper & Co. were not asked whether they had insured for themselves or for others; whether they had been or expected to be repaid their disbursements; whether any one else was interested in the policy, or for whom they were collecting the insurance. More than a month after the loss had been paid and the money remitted to England, a marine adjuster came from New York to Baltimore "to ascertain who owed Mr. Hooper for advances." A full disclosure was thereupon made by Hooper. The adjuster suggested to him "to write his friends on the other side to return the money." Hooper asked if the underwriters did not get the premium for insurance, and if the vessel was not lost. Being answered in the affirmative, he said he "would not have the face to write to the parties to return the money." No offer has been made to return to Hooper & Co., or to Good Brothers & Co., the premium for insurance. This suit was brought by the underwriters on the 30th of October, 1873, more than nine months after the loss had been paid and the money remitted to Good Brothers & Co., and more than seven months after Hooper's disclosure to the adjuster.

When the testimony was closed on both sides in the court below, the defendant, Hooper, asked the court to charge the jury, in effect, that if they believed the advances and the insurance were made; that the draft on Good Brothers & Co. was drawn, accepted, and paid; that the steamer was lost; proof of loss and payment demanded; that Hooper then furnished the plaintiffs with the account of his disbursements; that the plaintiffs thereupon paid him and took the assignment without having made any inquiry as to whether he was collecting for himself or for others, and that within a few days thereafter he re-

mitted the money to Good Brothers & Co.,—all as stated in the evidence, the plaintiffs were not entitled to recover. This instruction the court refused to give, and instructed, in substance, that if the jury believed that when Hooper made his claim for indemnity under the policy he produced the account and subquently gave the receipt and executed the assignment, and that when he received payment and delivered the assignment he had received notice of the payment of the draft upon Good Brothers & Co., given to him to recover his advances, which fact he did not communicate to the underwriters, then the plaintiffs were entitled to recover the amount of the insurance money which he had received. Hooper excepted to the refusal to instruct and to the instruction given. The jury found for the plaintiffs. and judgment was entered accordingly. The defendant then brought the case here for review.

Thomas W. Hall, for plaintiff in error. Stewart Brown and Arthur George Brown, for defendants in error.

Mr. Justice SWAYNE, after stating the facts, delivered the opinion of the court.

As the facts of which the instruction given was predicated were all indisputable and undisputed, that instruction was equivalent to a direction to find for the plaintiffs. The same remarks apply mutatis mutandis to the instruction asked by the defendant. The case, then, resolves itself into this: Were the plaintiffs entitled to recover upon the case as presented in the record?

A policy like the one here in question, in the name of a specified party, "on account of whom it may concern," or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phil. Ins. § 383.

This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id. § 384.

One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. Id. § 388.

The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Arn. Ins. (Perkin's Ed.) 238.

This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not in esse, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real-property lawyer. They always depend for their efficacy upon events occurring subsequently to the conveyance under which they arise.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it.

Where a vessel insured for a stated time was sold and transferred, and was repurchased and transferred back within that time, it has been held that the insurance was suspended while the title was out of the assured, "and was revived again on the reconveyance of the assured during the term specified in the policy." Worthington v. Bearse, 12 Allen, 382.

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. Lucena v. Cranfurd, 3 Bos. & P. 75, 5 Bos. & P. 269; Buck v. Insurance Co., 1 Pet. 151; Hancox v. Insurance Co., 3 Sumn. 132, Fed. Cas. No. 6,013.

In the law of marine insurance, insurable interests are multiform and very numerous. The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lienholder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification.

Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. Insurance Co. v. Barings, 20 Wall. 163, and the authorities there cited. If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the

cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. Clark v. Mauran, 3 Paige, 373; Dows v. Greene, 24 N. Y. 638; Holbrook v. Wight, 24 Wend. 169. The assignment of a bill of lading passes the legal title to the goods. Chandler v. Belden, 18 Johns. 157. The assignment of a debt, ipso facto, carries with it a lien and all other securities held by the assignor for the discharge of such debt. The Hull of a New Ship, 2 Ware, 203, Fed. Cas. No. 6,859; Pattison v. Hull, 9 Cow. 747; Langdon v. Buel, 9 Wend. 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and, with the consent of the debtor and creditor, be substituted to all the rights of the latter. Dix. Subr. 163; Garrison v. Insurance Co., 19 How. 312; The Cabot, 1 Abb. Adm. 150, Fed. Cas. No. 2,277. Where there is neither an agreement nor an assignment, there can be no subrogation, unless there has been a compulsory payment by the party claiming to be substituted. Sanford v. McLean, 3 Paige, 117.

Recurring to the facts, there are two points upon which we deem it proper particularly to remark:

First. We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. Buck v. Insurance Co., supra. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts, patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself, but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold, and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry, which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than Hooper. The record discloses no ground upon which, exæquo et bono, he can be called upon to pay back the fund in controversy.

Second. It does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

The proof as to who were intended to be insured is that they were Good Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached, and his testimony is conclusive. The inquiry then arises, whether Good Brothers & Co. had any insurable interest in the cargo. It does not appear whether they had or had not We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiffs' case it was necessary to be made to appear that Good Brothers & Co., the assured, had no insurable interest in the cargo, the cargo being the thing insured. Upon both reason and authority, we think the onus probandi was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred, and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this, and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish every thing necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. For authorities upon this subject see 1 Greenl. Ev. §§ 34, 35, 80, 81, and the notes. Such is the legal result, notwithstanding the negative form of the averment, to be established.

But suppose the case were made out as against Good Brothers & Co., and that a recovery could be had if the action were against them, still it by no means follows that the plaintiff in error was liable.

There was laches on the part of the underwriters, or their agents, which is the same thing. Nothing in the record is clearer than that Hooper received the money as the agent of the assured. It was his duty immediately to advise his principals and promptly to pay them. 1 Wait, Act. & Def. 252, 255. This latter duty it appears he performed. He had then received no notice of the adverse claim subsequently made, and had no reason to expect it. His parting with the money is proof of his sincerity and honesty.

Under all the circumstances, we think he is entitled to the benefit of the principle which in such cases gives immunity to the agent and refers the party complaining for satisfaction to the principals who have received and hold the money.

There was error in the instruction given by the court to the jury.

The counsel on neither side referred to the state of the pleadings. We have, therefore, not adverted to that subject, but have considered the case as it was argued,—entirely upon the merits.

The judgment of the circuit court will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is

So ordered.

WARNOCK v. DAVIS.

(104 U. S. 775.)

Supreme Court of the United States. Oct., 1881.

Error to the circuit court of the United States for the Southern district of Ohio.

Warnock, the plaintiff, is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. Davis and the other defendants are partners, under the name of the Scioto Trust Association, of Portsmouth, Ohio, and reside in that state. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company, of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of $5,000; and, on the same day, entered into the following agreement with the Scioto Trust Association:—

"This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, state of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy on his life, limited to the amount of $5,000.00, hereby agrees to and with the Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also, to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of $6.00 in hand on the execution and delivery of this agreement, and annual dues of $2.50, to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

"In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

"It is hereby expressly understood and agreed by and between the parties hereto, that said Scioto Trust Association do not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part herein referred to.

"Witness our hands, this 27th day of February, A. D. 1872.

"Henry L. Crosser.

"The Scioto Trust Association,

"By A. McFarland, President,

"George Davis, Treasurer."

The policy, bearing even date with the agreement, was issued to Crosser, and on the following day he executed to the association the following assignment:

"In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association, of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign, to said Scioto Trust Association all my right, title, and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same; which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association; to wit, nine tenths thereof, and to pay the balance, one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the

time of my death to said Scioto Trust Association for fees and dues.

"Witness my hand and seal, this 28th day of February, A. D. 1872.

"Henry L. Crosser." [Seal.]

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the association collected from the company the amount of the policy, namely, $5,000; one-tenth of which, $500, less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which with interest exceeds $5,000. The defendants admit the collection of the money from the insurance company; but, to defeat the action, rely upon the agreement mentioned, and the assignment of the policy stipulated in it. The agreement and assignment are specifically mentioned in the second and third of the three defences set up in their answer. The first defence consists in a general allegation that Crosser assigned, in good faith and for a valuable consideration, nine tenths of the policy to the defendants; that a power of attorney was at the time executed to them to collect the remaining one tenth and pay the same over to his widow; and that after the collection of the amount they had paid the one tenth to her and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial, the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the association of the insurance money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

J. B. Foraker, for plaintiff in error. A. C. Thompson, for defendants in error.

Mr. Justice FIELD, after stating the facts, delivered the opinion of the court.

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defence. All the facts established by it are admitted in the other defences. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It it not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a con-

flict in their decisions. In Insurance Co. v. Hazzard, which arose in Indiana, the policy of insurance, which was for $3,000, contained the usual provision that if the premiums were not paid at the time specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the supreme court of the state held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind. 116. The court referred with approval to a decision of the same purport by the supreme court of Massachusetts, in Stevens v. Warren, 101 Mass. 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, iustead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the trust association and the assured was invalid as far as it provided for an absolute transfer of nine tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York court of appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. St. John v. Insurance Co., 13 N. Y. 31; Valton v. Assurance Co., 20 N. Y. 32. In the opinion in the first case the court cite Ashley v. Ashley, 3 Sim. 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in Cammack v. Lewis, 15 Wall. 643. There a policy of life insurance for $3,000, procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as ad-

ministratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

So ordered.

WHITMORE et al. v. SUPREME LODGE KNIGHTS & LADIES OF HONOR.

(13 S. W. 495, 100 Mo. 36.)

Supreme Court of Missouri. Feb. 24, 1890.

Appeal from St. Louis circuit court.

The pleadings in this cause are in substance as follows: Plaintiffs, Benjamin T. and Marie E. Whitmore, are husband and wife, and defendant is a corporation. On the 22d of November, 1883, Mary A. Mudd was a member of Nonpareil Lodge, No. 592, of defendant, in St. Louis, and entitled to participate in the relief fund of said order to the amount of $1,000; said sum to be paid to plaintiff Marie E. Whitmore, as trustee of Marie L. Whitmore. Defendant issued its benefit certificate, under seal, to said Mary A. Mudd for $1,000, payable on death of said Mudd to said Marie E. Whitmore, as trustee as aforesaid. Mary A. Mudd complied with all the conditions of said certificate, paid all assessments, etc., and died on the 21st of July, 1884, a member of said order in good standing. The certificate is filed as "Exhibit A." Plaintiff asks judgment for $1,000. The petition has a second count, upon another certificate for $2,000, filed as "Exhibit B." The answer, after a general denial, alleges that the deceased, Mary A. Mudd, procured the insurance in question by false and fraudulent representations as to her health, and by false answers to the questions put to her by defendant as to the relationship of the beneficiary to her, as to the cause of death and age of her relatives. These answers are set forth in full, and alleged to have been as to material matters. The answer further sets up that Mary A. Mudd was of weak mind, and was induced by fraudulent representations and influence of plaintiffs, Benjamin L. and Marie E. Whitmore, to become a member of defendant; that Benjamin L. Whitmore, being a physician, caused himself to be made a medical examiner of defendant, and, as such, witnessed and subscribed the application of said Mary A. Mudd, and fraudulently recommended her to defendant as a good subject for insurance, and made false statements to defendant as to her health; and that he and his wife, by fraudulent acts and representations, induced the lodge of defendants to receive said Mary A. Mudd to membership, and procured further insurance on her life to the amount of $9,000 within eight months from the date of the certificate in suit. That Marie L. Whitmore, the *cestui que trust*, is the infant daughter of plaintiffs, and that the insurance in question and the other insurance was obtained by a fraudulent conspiracy of plaintiffs. That Mary A. Mudd lived with plaintiffs, and that her death was caused by their ill treatment and neglect of her, and that her initiation fee and assessments were advanced for her by plaintiffs. The answer also denies that Mary A. Mudd was of kin to either of plaintiffs or to their daughter, the beneficiary in question under the certificates in suit. The replication specifically denies the new matter set forth in the answer. It is admitted by the pleadings that the defendant was an incorporated cooperative benevolent insurance society.

The evidence is not preserved at length in the bill of exceptions, but only in short form, and, omitting the cross-examination of Williamson, (afterwards ruled out and instructed against by the court,) is the following: Plaintiffs introduced evidence tending to prove all the material allegations of the amended petition, and also introduced the constitution and by-laws of defendant. Defendant introduced testimony tending to show that the statements made by Mary A. Mudd, in her written application to defendant for insurance, as to her health, the relationship of the *cestui que trust* of plaintiffs to her, and the age and cause of death of her relatives, were, in some respects, untrue; also that said Mary A. Mudd was of weak mind, and under the influence of plaintiff Benjamin T. Whitmore; that said Whitmore was a member of the lodge of defendant to which said Mary A. Mudd belonged, and was a medical examiner of the same, and, as such, at the time of such insurance, and in order to effect the same, signed a physician's certificate as to the health of said Mary A. Mudd, which was, in some material respects, false. Defendant introduced evidence tending to show that the life of Mary A. Mudd was also insured in four other benefit societies for the benefit of the children of said plaintiffs, Benjamin J. and Marie E Whitmore, to the amount of $19,000; all of which testimony as to other and further insurance was then and there objected to by plaintiffs as incompetent and irrelevant, and the objection overruled; to which rulings the plaintiffs then and there excepted. Defendants introduced evidence tending to show that the health of said Mary A. Mudd was weak; that she was no relation to plaintiffs or to either of them, or to their children; that plaintiffs allowed said Mary A. Mudd to sleep and live in a cellar-room in their house after she was insured, and that she lived with them in a menial capacity, and that she had no money except what plaintiffs gave her; and that plaintiff Benjamin furnished her with the money with which the insurance in question was effected, and the monthly assessments with which it was kept up. And defendant also offered evidence tending to prove the several facts stated in the instructions afterwards given by the court in this cause. Plaintiffs introduced evidence tending to show that Mary A. Mudd, deceased, was of good health and fair intellectual abilities, and of good education; that she was not under any undue influence of plaintiffs, or either of them; that she was a first cousin of plaintiff Benjamin T. Whitmore; that the children of plaintiff, who are beneficiaries of the policy, were two girls of tender age; that deceased was devotedly attached to them; that she was treat-

ed always by plaintiffs as an honored member of their family, and not as a menial; that she loved them, and they her; that the most friendly relations existed between deceased and plaintiffs; that her room in their house was cheerful, wholesome, and comfortable, and not a cellar-room; that the deceased had money of her own, and that the money with which she kept up and paid the insurance in question was her own; and that no statements were made at any time to the defendant by the deceased, or by plaintiff Benjamin T. Whitmore, which they, or either of them, believed to be false, or that were false, in regard to said application for insurance; that the said Mary A. Mudd, at or about the time of the insurance in question, was examined for other insurance by two other physicians, and was passed by them, and recommended by them for membership into two of the other orders to which she belonged.

The court refused all instructions asked by either party, but gave of its own motion the following: "(1) The court instructs the jury that the relationship existing in this case between the beneficiary, Marie L. Whitmore, and the insured, Mary A. Mudd, was such that while Mary A. Mudd, under the charter of defendant, might lawfully effect such insurance on her own life for the benefit of said beneficiary, as the certificates read in evidence express, it would not have been lawful for the beneficiary, Marie L. Whitmore, or for either of plaintiffs for their said child, to effect such an insurance on the life of Mary A. Mudd. Hence, if you find, from the evidence, that Benjamin T. Whitmore procured or caused Mary A. Mudd to insure her life as expressed in the certificates read in evidence, (as Exhibits A and B,) and that he paid for said insurance out of his own funds, then said certificates are void, and your verdict should then be for defendant; but if, on the other hand, you believe, from the evidence, that said certificates were issued to said Mary A. Mudd upon her application, and the payments made to obtain the same, and keep the same in force, were made by her, (Mary A. Mudd,) or by any person on her behalf, with her money, and that during July, 1884, said Mary A. Mudd died a natural death, you should then return a verdict for plaintiffs, unless you should believe, from the evidence, that said insurance was fraudulently procured. (2) The insurance recited in the certificates read in evidence would be 'fraudulently procured,' as mentioned in instruction No. 1, if obtained by any such misrepresentation as is defined in the next instruction, No. 3. (3) The court instructs the jury that if they believe, from the evidence, that Mary A. Mudd, at the time of becoming a member of defendant, made to it any misrepresentation (in the papers read in evidence as Exhibit C or D) with regard to her age, physical condition, or family history, and that the fact so misrepresented actually contributed to her death, then plaintiffs cannot recover in this case, and the jury should find for defendant. By 'misrepresentation,' in this connection, is meant any statement of fact not then known by her to be true. (4) The court instructs the jury that, for the purposes of this case, the word 'cousin,' as used in the benefit certificates in evidence, may be interpreted to mean a degree of relationship more distant than that of first cousin. (5) The jury are instructed to disregard any statement made by any witness concerning the alleged death of James Milburn, or concerning any alleged insurance upon his life, and to give no effect to any such statement in their consideration of this case. (6) The petition of plaintiffs in this case presents two counts or demands for decision. Your verdict should contain a separate and distinct finding as to each of said counts. If you find for plaintiffs, you should assess their damages at the sum of $1,021.66 on the first cause of action, and at the sum of $2,043.32 on the second cause of action, stated in the petition. If you find for defendant as to either or both of said counts, your verdict then should simply recite that you find in favor of defendant as to such count or counts as to which you so find." The jury found the issues in favor of the defendant, and the plaintiffs appealed.

R. A. Bakewell, for appellants. *D. Hermann* and *Valle Reyburn*, for respondent.

SHERWOOD, J., (after stating the facts as above.) It is the settled law of this court that, in order to the validity of a life insurance policy, the person who secures such policy must have a pecuniary interest in the life of the person assured, or else the policy will be a gambling or wager policy, which the law will not enforce. Thus, in Singleton v. Insurance Co., 66 Mo. 63, it was ruled that an uncle had no insurable interest in the life of his nephew; and therefore such a policy, based merely upon such relationship, was void. In that case the authorities both in this state and elsewhere are well reviewed, and the principle already announced declared. This, it seems, was the rule at common law; and the statute of 14 Geo. III., avoiding wagering policies, was but declaratory of the common law. Ruse v. Insurance Co., 23 N. Y. 516. In addition to the authorities cited in Singleton's Case, supra, will be found Warnock v. Davis, 104 U. S. 775; Insurance Co. v. Hazzard, 41 Ind. 116; Association v. Hoyt, 9 N. W. Rep. 497; Brockway v. Insurance Co., 9 Fed. Rep. 249; Association v. Houghton, 13 Ins. Law J. 895; 17 West. Jur. 297. The principle announced in these authorities is expressed in the instruction given by the court of its own motion; and the declaration in that instruction contained, that what Benjamin T. Whitmore could not do directly, in the way of effecting an assurance on a life in which he had no insurable interest, he could not do indirectly, is obviously correct. A party will not be permitted to obtain an advantage by indirect methods which would be denied him if done openly.

Brockway v. Insurance Co., 9 Fed. Rep. 249; Swick v. Insurance Co., 2 Dill. 160, Fed. Cas. No. 13,692; Nino & N. Dig. 75.

Nor is anything objectionable seen in instructions 2 and 3, which the court gave. Indeed, those instructions were in substance asked by plaintiffs in instructions 21 and 22, which were refused. Where a party has asked similar instructions to those given, he is in no position to complain. Harris v. Hays, 53 Mo. 90; McGonigle v. Daugherty, 71 Mo. 259; Bank v. Hamnerslough, 72 Mo. 274; Smith v. Culligan, 74 Mo. 387; Fairbanks v. Long, 91 Mo. 628, 4 S. W. Rep. 499; Bettes v. Magoon, 85 Mo. 580; Noble v. Blount, 77 Mo. 235; Holmes v. Braidwood, 82 Mo. 610; Reilly v. Railway Co., 94 Mo. 600, 7 S. W. Rep. 407. And it may be said that the third instruction given by the court was even more favorable for plaintiffs than the law warranted; because sections 5976, 5977, 2 Rev. St. 1879, do not apply to benevolent or charitable incorporations. See Laws 1881, p. 87. In the absence of such statutory regulations, then, as prevail in cases of ordinary insurances, declarations in any respects, if false, if made contrary to the agreement of the parties, will vitiate and avoid the policy, though such declarations be not material to the risk. Insurance Co. v. France, 91 U. S. 510; Jeffries v. Insurance Co., 22 Wall. 47; Brockway v. Insurance Co., 9 Fed. Rep. 249. And courts will enforce all reasonable laws and rules established by these benevolent organizations for their guidance and the regulation of their relief funds, if in conformity with the laws of the state. Holland v. Taylor, 12 N. E. Rep. 116; Osceola Tribe v. Schmidt, 57 Md. 98; Society v. Baldwin, 86 Ill. 479; Borgraefe v. Lodge, 22 Mo. App. 127. The constitution and by-laws of the defendant were not preserved in the record, and therefore it is impossible to pass properly upon any matters connected with such constitution and by-laws.

There was no error in admitting evidence tending to show that the beneficiary effected other insurances upon the life of the party in question, when the issue was, as here, that the object was to defraud the insurance company. The supreme court of the United States, in passing upon this point, say: "The theory of the defense is that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position, evidence that he effected insurance upon the life of Armstrong in other companies, at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and, if, when considered together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act." Insurance Co. v. Armstrong, 117 U. S. 598, 6 Sup. Ct. Rep. 877.

In regard to the evidence elicited on the cross-examination of Williamson, it was admitted without objection by plaintiffs' counsel; and afterwards the court gave an instruction, as already seen, which excluded such evidence from the consideration of the jury. This cured the error, if any could be said to have been committed, in the circumstances mentioned. Moreover, there was no objection taken in the motion for a new trial to the instructions given by the court of its own motion. Considering all of these things, and looking at the record as a whole, we are not prepared to say that any reversible error was committed at the trial, and so we affirm the judgment. All concur but BARCLAY, not sitting.

OLMSTED v. KEYES.

(85 N. Y. 593.)

Court of Appeals of New York. Oct. 4, 1881.

Wm. C. Ruger, for appellant.

Charles M. Baker and Richard C. Steel, for respondent.

EARL, J. On the 9th day of July, 1846, the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Lester V. Keyes to the plaintiff, John Olmsted, as trustee for Huldah Keyes, the wife of Lester, whereby in consideration of annual premiums to be paid by such trustee, it agreed to pay to him, upon the death of Lester, the sum of $1,000. From the date of the policy to his death Lester paid the annual premiums. Lester and Huldah had several children who are defendants in this action. She died intestate in November, 1857, and thereafter, in August, 1861, Lester intermarried with the defendant Mary L. Keyes, and in August, 1864, the plaintiff, upon the request and direction of Lester, for value received, assigned to Mary L. all his right, title and interest as trustee of and for Huldah Keyes in the life policy with all the advantages to be derived therefrom, and due notice of the assignment was given to the insurance company. In January, 1878, Lester died intestate, leaving surviving him Mary L., his widow, and one child by her, and all the children of his first wife, with one exception. In the same month the defendants Burdick and Mary L. Keyes, the widow, were appointed administrators of Lester. In due time the necessary proofs of the death of Lester were made to the insurance company and it thereupon paid to the plaintiff the amount due upon the insurance policy, to-wit, the sum of $1,811, which sum was in the hands of the plaintiff at the commencement of this action. Since the commencement of this action, Helen M. Vosburg, one of the children of Huldah, has been duly appointed the administratrix of her estate, and as such administratrix she was made a party defendant in this action.

This action was commenced to determine the conflicting claims of the various defendants to the money paid to the plaintiff upon the policy. The foregoing facts were found at the special term and it was there also found that it was the intention of Lester, when he procured the policy and paid the premiums thereon, that the avails of the policy should go to his widow, if he left one, and not to his children, and the court at special term found as conclusions of law that during the life of Huldah Keyes the policy was her property, and at her death vested in her husband as survivor, and that John Olmsted then became, by operation of law, his trustee; that the assignment of the policy by Olmsted, as trustee, by the direction of Lester, vested complete title thereto in Mary L., and that she was the sole owner of the policy at the time the money was paid to the plaintiff and is solely entitled to such money. The judgment entered upon the special term decision was affirmed at general term, and the appeal to this court brings before us for determination the question, who is entitled to the money received by the plaintiff upon the policy?

This policy was taken out by Lester for the benefit of his wife. It was an insurance upon his own life for her benefit. While one cannot insure a life in which he has no interest, every person can insure his own life for any sum upon which he can agree with an insurance company. A life insurance is not like fire insurance, a contract of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. Dalby v. Assurance Co., 28 Eng. Law & Eq. 312; Rawls v. Insurance Co., 36 Barb. 357, 27 N. Y. 282; Insurance Co. v. Bailey, 13 Wall. 616. Like every other contract to pay money such a policy is a chose in action with all the ordinary incidents of every other chose in action. It is abundantly settled in this state, that one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured, and that if the policy be valid in its inception, the party taking it may assign it to any person as he could assign any other chose in action, and that the policy will continue valid in the hands of the assignee, although he has no interest whatever in the life insured. So a creditor may take out a policy on the life of his debtor, and the policy will continue valid although the creditor has been paid and has thus ceased to have an interest in the life of the insured. In Ashley v. Ashley, 3 Sim. 149, A. insured his life and afterward assigned the policy to B. for a nominal consideration; B.'s executors then sold and assigned the policy to D. for a nominal consideration; and then D.'s executors sold it to E.; and it was held that they could make a good title to the policy, and that E. was bound to complete his purchase. This case was cited and approved in 3 Kent, Comm. 370, note, and has since been cited with approval in several reported cases in this state. In St. John v. Insurance Co., 2 Duer, 419, Duer, J., a judge very learned in the law of insurance, writing the opinion, held that an assignment of an insurance policy to one having no interest in the life insured was valid, and he said: "The objection to the recovery in this case assumes, and such was the argument, that there can be no absolute sale of a subsisting policy, and that its assignment is only valid when made as a collateral security for an antecedent debt; but as we understand the law, a written promise to pay a sum of money is just as properly a subject of transfer, for value, where it de-

pends upon a condition, as where it is absolute; and we can therefore make no distinction between the rights of a bona fide assignee of a policy and those of an assignee of a mortgage." He then cited the case of Ashley v. Ashley, and further said: "This case therefore proves not only that the absolute sale of a life policy does not affect the validity of the contract, but that the assignee for value, in the event of the death of the assured, is entitled to the same remedies as is his personal representative when the title to the policy is unchanged." This case was affirmed in this court, 13 N. Y. 31, and the doctrine was there again announced that a valid policy of insurance effected by a person upon his own life is assignable, like an ordinary chose in action. Crippen, J., writing the opinion of the court, said: "I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which are applied to and govern such contracts. Policies of insurance are choses in action, and are governed by the same principles applicable to other agreements involving pecuniary obligations." And he further said: "I do not agree with the counsel of the defendant, that the assignee must have an insurable interest in the life of the assured in order to entitle him to recover the amount of the insurance. If the policies were valid in their inception, the assignment of them to the plaintiff did not change the liability of the company." In Valton v. Assurance Co., 20 N. Y. 32, it was held that one who has obtained a valid insurance upon his own life may dispose of it as he sees fit, and that it is immaterial that the assignee has no interest in the life. In Rawls v. Insurance Co., supra, it was held that it is not necessary that a party holding a policy on the life of another should have an insurable interest in such life at the time of the death to make the policy valid, if it was valid in its inception. See, also, Clark v. Allen, 11 R. I. 439; Hine & N. Assignm. 73, 75, 81; Bliss, Ins. (2d Ed.) §§ 23, 26, 30.

The rule, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and bona fide transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming and wagering policies. It follows therefore that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will, and it has been well said that if he could not do this, life policies would be deprived of a large share of their utility and value.

Therefore but for the statutes which will hereafter be noticed, it cannot be doubted that during the life-time of Huldah, the sole beneficiary named in the policy, she could have made a valid assignment of her interest therein to any person, and she could have disposed of her interest by will. It is true that her interest ceased at her death, but as shown above, the policy, being valid in its inception, continued valid in the hands of the person or persons who legally took her estate. It was a contract to run until Lester's death. There was no provision in the policy that it should become void upon Huldah's death before her husband, and such a result could not have been contemplated by the parties when they entered into the contract. The policy became more valuable as the years rolled by, and at the time of Huldah's death had considerable pecuniary value, and I know of no principle of law applicable to the business of insurance which requires us to hold that her death destroyed such value. Death no more destroyed such value than an absolute divorce would, and yet it cannot be doubted that a policy held by a wife upon the life of her husband continues valid although her interest in his life has ceased in consequence of a divorce. Bliss, Ins. § 30. When she died intestate therefore, this policy remaining a valid pecuniary obligation, her interest therein went where her other choses in action, if she had any, went.

The general rule of the common law is that the husband may, during the joint lives, reduce his wife's choses in action to possession, and thus appropriate them to his own use, or he may release them or assign them so as to bar the wife's right of survivorship. Reeve, Dom. Rel. (B. & B. Ed.) 55 et seq.; Clancy, Husb. & W. 109 et seq.; Schuyler v. Hoyle, 5 Johns. Ch. 196; Westervelt v. Gregg, 12 N. Y. 202. But during the joint lives the husband cannot assign or release, so as to bar the wife, surviving, her choses in action, payable after his death, or upon contingencies or at times which do not come or happen until after his death. In such cases however his assignment is good as against the whole world but his wife surviving. In White v. St. Barbe, 1 Ves. & B. 406, the master of the rolls said that a husband can dispose of his wife's property in expectancy against every one but the wife surviving. All the choses of the wife not reduced to possession during the joint lives, by the common law, passed to the husband upon her death—all without any exception—and there is no authority to the contrary; and this is true whether such choses are then payable or are mere reversionary or contingent interests payable at a future day or mere possibilities. He may then release them or take payment of them without administration, if he can get payment. Ran-

som v. Nichols, 22 N. Y. 110. If administration is needed to reduce the choses to possession he is entitled to it, and if there are no debts the administration is solely for his benefit. If, after his wife's death, the husband does not release, assign or reduce to possession her choses in action during his life-time, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets. 1 Bish. Mar. Wom. § 177; Westervelt v. Gregg, supra.

Now to apply these principles to this case. The wife's interest in this policy was a chose in action. At her death it passed to her husband. He then caused it to be assigned to his second wife, the defendant Mary L., and thus, within the meaning of the law, he reduced it to possession. The assignment was valid as against him and was therefore valid as against the whole world. The written assignment is expressed to have been for value received, and in the absence of proof to the contrary must be assumed to have been, but whether it was for a valuable consideration or not it was good as against him, and that is sufficient, as the rights of a surviving wife are not in question. If the chose in action had been a note payable at his death his assignment thereof would have been valid, and for precisely the same reason his assignment of this policy was valid.

There is no case which holds that a life policy for the benefit of the wife, her husband surviving, passes by the rules of the common law to her personal representatives for the benefit of her estate, to the exclusion of her husband. On the contrary, it was said by the chancellor, in Moehring v. Mitchell, 1 Barb. Ch. 264, affirmed in the court of appeals (4 How. Prac. 292), that a policy upon the life of the husband for the benefit of the wife, in a case where the wife died first, and then the husband, passed, like other choses of the wife, to the personal representatives of the husband. In that case, the general rule as to the survivorship to the husband of the choses of the wife was applied to a policy of insurance taken by her upon his life. Even if it were true that upon the death of Huldah, this policy could remain valid only in the hands of some person having an interest in the life insured, here it passed to her husband, and then to his second wife, and both had an interest in the life insured. There is no question here of administration upon the estate of Huldah. As stated above, such administration would have been if necessary, there being no debts owing by her, solely for the benefit of her husband; and as the money has been paid upon the policy, the sole question is as to the person or persons entitled thereto.

The statutes of this state, in respect to insurances upon lives of husbands for the benefit of wives, must now be considered. The first is chapter 80 of the Laws of 1840, section 1 of which made it lawful for a married woman to cause the life of her husband to be insured, and provided that in case she survived her husband, the amount of the insurance should be payable to her, to and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but that such exemption should not apply where the amount of premiums annually paid should exceed $300. Section 2 provided that in case of the death of the wife before the decease of her husband, the amount of the insurance might be made payable after her death to her children for their use, and to their guardian, if under age. It may be assumed that this policy was taken out under that act; and yet it will not aid these appellants.

Section 1 secures the amount of insurance to the wife only, in case she survives her husband. Here she did not survive her husband. There is nothing therefore in that section to take away his common-law right in the amount insured as survivor. Section 2 confers no right upon the children of Huldah, because the amount of the insurance was not by the terms of the policy, made payable to them after her death. The statute does not make it payable to them after her death, but simply provides that it may be made payable to them. The subsequent amendments of this chapter make it more certain that this is the proper construction of section 2. The first amendment of the act of 1840 was by chapter 187 of the Laws of 1858, but that amendment did not touch section 2, and therefore has no bearing upon the questions now under consideration. Section 2 was amended in 1862 by chapter 77, and was made to read as follows: "The amount of the insurance may be made payable in case of the death of the wife before the decease of her husband to his or to her children for their use as shall be provided in the policy of insurance, or to their guardian if under age." Under the section as thus amended, it is clear that the amount of the insurance cannot be claimed by the children of either the wife or the husband unless it is provided in the policy that it shall be payable to them. In 1866, by chapter 656, section 2 was again amended so as to read as follows:

"The amount of insurance may be made payable, in case of the death of the wife before the period at which it became due to her husband or to his, her or their children for their use as shall be provided in the policy of insurance, and to their guardian, if under age." Here again it is provided that the policy must determine to whom of the persons named payment shall be made. In 1873, by chapter 821, section 2 was again amended, and the section, as amended, provided that a married woman holding a policy for her benefit or for the benefit of herself and her children might surrender such policy to the company issuing the same in the same manner as any other policy; and

also provided that in case she had no issue she might dispose of such policy by will or by deed, which disposition should invest such person or persons, to whom the policy had so been bequeathed or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee should have the same right to dispose of such policy as therein conferred on such married woman.

I can see nothing in all this legislation which gives countenance to the idea that by virtue of section 2, as enacted in 1840, the children of Huldah obtained any right in this policy, the insurance not having been made payable to them in any event. If it had been the intention of the law-makers that the amount should be absolutely payable to them, in case of the death of their mother before the decease of her husband, they would have so provided in plain terms, as was done in Massachusetts (Swan v. Snow, 11 Allen, 224), instead of providing that it might be made payable to them.

There was nothing decided in Eadie v. Slimmon, 26 N. Y. 9, in conflict with any views herein expressed. All that was decided there is that a policy of insurance to a married woman, made under the Laws of 1840, for her benefit and that of her children in case of her death, could not be transferred so as to divest the interest of the wife or of her children. In that case the insurance was upon the life of the husband for the sole use of his wife, and in case of her death before him, for the use of her children. There was nothing in the statute of 1840 which expressly prohibited the assignment of such a policy; but it was held that it would be a violation of the spirit of that act to hold that a wife could sell or traffic with her policy as though it were realized personal property or an ordinary security for money. It is stated in the opinion of Judge Denio that that statute looks to a provision for a state of widowhood and for orphan children; and so it does. It provides that a married man may effect an insurance upon his life for the benefit of his widow, and also for the benefit of his children; but the provision need not be for both unless he chooses to make it so. When the learned judge said 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 the cestui que vie," he certainly fell into error, as shown above; and it is clear that he did not feel certain of the proposition thus announced, because he followed it by this language: "Or if it should be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured." The latter alternative is sufficiently correct. He says the personal representatives of the insured, not the children. The husband, in the event stated, would be entitled to administration, and would thus become the sole representative of his wife, and as shown above, the administration would be solely for his benefit in the absence of debts of the wife; and under such circumstances he could release, assign or discharge a policy without administration. In Barry v. Assurance Soc., 59 N. Y. 587, the insurance was again for the benefit of the wife, and in case of her death before her husband, for the benefit of her children; and the decision in the case of Eadie v. Slimmon was simply re-affirmed.

It is said however that because the wife could not assign this policy and because the husband could not control it during her lifetime, in consequence of the statute of 1840, therefore the common-law right of survivorship to the husband was also destroyed. It is difficult to see how this conclusion follows. The statute went so far and limited the right of the husband during her life, but it went no further. When Huldah died the statute ceased to operate upon the policy, and then the common-law right of the husband became operative. I know of no principle, and there certainly is no authority holding that the husband must have the right to dispose of his wife's choses in action during her life in order to reduce them to possession or control them after her death. Ransom v. Nichols, supra. So far as the statute interfered with his common-law right in reference to this policy it was gone. In all other respects his common-law rights remained.

Lester took out this policy and paid the premiums thereon for about eleven years to make a provision for his first wife in case she survived him. He then continued the insurance after his second marriage, and paid the premiums for about seventeen years for the purpose of making a provision for his second wife in case she survived him. That there are no rules of law which require that that purpose shall fail, and that the money paid upon the policy shall be distributed to the adult children of the first wife, to the exclusion of the second wife and her minor child, I think I have sufficiently shown.

The judgment should therefore be affirmed, with costs.

FOLGER, C. J., and ANDREWS and FINCH, JJ., concur. DANFORTH and MILLER, JJ., dissent. RAPALLO, J., absent at argument.

Judgment affirmed.

MARTIN v. STUBBINGS et al.

MARTIN et al. v. STUBBINGS.

(18 N. E. 657, 126 Ill. 387.)

Supreme Court of Illinois. Nov. 15, 1888.

Error to appellate court, First district.

Bill of interpleader by the Knights Templars' & Masons' Life Indemnity Company against Cornelia Martin and Wilson H. Stubbings to determine to whom the amount due upon the certificate of membership in it of Neal K. Martin, deceased, belongs; and bill for specific performance by Stubbings against the Supreme Council of the Royal League and Mrs. Martin to require the Supreme Council of the Royal League to levy an assessment to pay a certificate of membership issued by it to Neal K. Martin, and, when collected, to pay the amount, or a portion of it, to complainant. Prior to January 1, 1886, Martin and Stubbings were copartners, under articles which were to expire in 1888, unless dissolved on three months' notice; and it was found on examination of the books that on that day there were due from Martin to Stubbings $3,411.66, the amount drawn by Martin in excess of his share of the profits, in which alone he was interested. Stubbings thereupon announced his intention of terminating the partnership; but on April 16, 1886, new articles were entered into, and Martin and wife signed a judgment collateral note in favor of Stubbings for the amount of the overdraft, and also, for further security, assigned to Stubbings the benefit certificates. Martin having died, these suits were brought. In the interpleader suit, $3,281.87, the balance after payment of costs, were decreed to Stubbings. And in the other suit, the Supreme Council of the Royal League, having collected $1,023.28, was directed to pay to Stubbings the balance remaining due to him, amounting to $474.76, and the balance to Mrs. Martin. The decrees were affirmed in the appellate court, and Mrs. Martin brings error. Starr & C. St. c. 110, par. 91, provides that in all cases where the sum in the controversy exceeds $1,000, exclusive of costs, "which shall be heard in any of the appellate courts upon errors assigned, if the judgment of the appellate court be that the order, judgment, or decree of the court below be affirmed, or if final judgment or decree be rendered therein in the appellate court, or if the judgment, order, or decree of the appellate court be such that no further proceedings can be had in the court below, except to carry into effect the mandate of the appellate court," the cause may be removed to the supreme court. Chapter 37, par. 28, provides that "in all cases determined in said appellate courts, in actions ex contractu, wherein the amount involved is less than one thousand dollars, exclusive of costs; and in all cases sounding in damages wherein the judgment of the court below is less than one thousand dollars, exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the appellate court, * * * no appeal shall lie or writ of error be prosecuted therefrom. * * * In all other cases appeals shall lie, and writs of error may be prosecuted, from the final judgments, orders, or decrees of the appellate courts to the supreme court: provided, also, that in any case a majority of the judges of the appellate court shall be of opinion that a case decided by them involving a less sum than one thousand dollars, exclusive of costs, also involves questions of law of such importance * * * as that it should be passed upon by the supreme court, they may in such cases grant appeals and writs of error to the supreme court. * * *"

Millard R. Powers and Robert S. Iles, for plaintiff in error. Hoyne & Follansbee, for defendant in error.

BAILEY, J. The amount involved in the case of Stubbings v. The Supreme Council of the Royal League and Cornelia Martin is only $474.76. It is true the amount found due from the Supreme Council of the Royal League on the membership certificate of Neal K. Martin, deceased, was $1,023.28; but of that sum $548.52 was ordered to be paid and was in fact paid to Cornelia Martin, and only $474.76 was ordered to be paid to Stubbings. The Supreme Council of the Royal League is not complaining, the writ of error having been sued out by Cornelia Martin alone. As between her and Stubbings, the only parties to the present controversy, only $474.76, or less than $1,000, is involved. There is no certificate by the judges of the appellate court that the case involves questions of law of such importance, either on account of principal or collateral interests, that it should be passed upon by this court. It follows that in that case the writ of error was improvidently issued, and it must therefore be dismissed.

In the other case—the one involving the certificate of membership in the Knights Templars' & Masons' Life Indemnity Company—Mrs. Martin bases her right, as against Stubbings, to receive the money payable on said certificate, on two grounds: First, that there was no sufficient legal consideration to support either the note executed by her and her husband to Stubbings, or the assignment to him of the certificate of membership; and, second, that during Martin's life-time said certificate was not assignable so as to vest in the assignee the right to receive the money payable thereon at Martin's death. In support of the first of these propositions, counsel have sought to avail themselves of the principles discussed and adopted by the appellate court when the case was before that court on motion to vacate the judgment against Mrs. Martin entered on said note by confession. See Martin v. Stubbings, 20 Ill. App. 381. In that

case, it will be observed, the decision was based upon the facts established by certain ex parte affidavits, which, for the purpose of the decision, the court was compelled to take as true. The facts thus shown were, among others, that at the time the note was given the partnership had not been dissolved, but continued after its execution, and was dissolved only by the subsequent death of Martin; that no accounting took place, and no balance was struck, in Martin's life-time; that the consideration of the note was an estimated balance, which was not arrived at by any accounting, and was not regarded or treated by the parties as the true balance, but was subject to correction when an accounting should be had and a balance ascertained. A state of facts entirely different, and calling for an application of entirely different rules of law, was presented by the pleadings and proofs at the hearing in the present case. That the partnership was in fact dissolved at the time the note was given is now placed beyond the possibility of question by the express covenant of the parties in their new articles of copartnership that such was the case. It also appears without contradiction that a most careful and thorough accounting was had in respect to all the business of the firm down to January 1, 1886, which showed that Martin, who contributed nothing to the capital of the firm, and whose interest was only in the profits, had drawn out his entire share of the profits, and the sum of $3,411.66 in addition thereto. Had the firm been dissolved January 1st, Martin would, according to the accounting, have been indebted to Stubbings in the sum above mentioned. The evidence fails to show whether or to what extent the accounts between the parties were affected by the firm business transacted between January 1st and April 16th, the date of the new partnership agreement, but the presumption may be indulged in that very little, if any, business was transacted during that interval. However that may be, it was clearly competent for the parties, on dissolving their copartnership, to agree upon the balance due, if they saw fit to do so, without a new accounting. It was competent for them to adopt the balance of January 1st as the true one, and disregard subsequent transactions, and this they are clearly shown to have done. The firm being dissolved, and the amount due from Martin to Stubbings being ascertained and agreed upon, such balance constituted an individual indebtedness from Martin to Stubbings which was a sufficient consideration both for the note and for the assignment of the certificates of membership. But this is not all. The execution of the new articles of copartnership was a consideration sufficient to support Mrs. Martin's execution of the note as surety. It should be observed that the note recites no particular consideration, and it is therefore admissible, in order to establish the liability of any of the parties to it, to resort to extrinsic evidence to show a consideration. See Martin v. Stubbings, 27 Ill. App. 121, and authorities there cited. The execution of the note by Martin and wife, and the deposit with Stubbings of Martin's certificates of membership as collateral security, was the inducement to Stubbings to consent to a new copartnership, instead of terminating his business relations with Martin peremptorily and at once. There can be no doubt that the note and collaterals were given to obtain a renewal of the partnership relation, and such renewal, coupled with the existing and admitted indebtedness from Martin to Stubbings, was a sufficient consideration for Mrs. Martin's signature and for the deposit of the collaterals.

The question remains whether the certificate of membership in the Knights Templars' & Masons' Life Indemnity Company was assignable in Martin's life-time, so as to vest in the assignee the right to receive the money payable thereon at Martin's death. This question is, we think, substantially settled by the decision of this court in Association v. Blue, 120 Ill. 121, 11 N. E. 331. Counsel, however, have seen proper to reargue it at considerable length, and we have therefore been disposed to reconsider the question in the light of the numerous authorities to which our attention is now directed. It should be observed that the question comes up here in a somewhat different form from the one presented in the case last cited. There the controversy was between the mutual benefit society and the person to whom the fund, by the terms of the membership certificate, was made payable. The society denied its liability on the ground that the person to whom the money was appointed to be paid was not one of those enumerated by the statute as proper beneficiaries. Here the society admits its liability, and the only question now is to which of two parties—the assignee or the widow—the money admitted to be due shall be paid. The court has decreed it to the assignee, and the decree must be affirmed, unless the widow has succeeded in establishing a better title. She being the only one complaining, if she has failed to prove title to the money, it is quite unimportant here what disposition the court has made of it, since no one having a right to do so is calling such disposition in question. A mutual benefit society is not a life insurance company in the restricted sense in which that term is used in our statute in relation to life insurance companies, nor is a certificate of membership in such society a policy of life insurance in the same restricted sense of the term; yet it is manifest that such membership certificate is in the nature of a mutual life insurance policy. Com. v. Wetherbee, 105 Mass. 161; State v. Merchants' Exch. Mut. Ben. Soc., 72 Mo. 146; Supreme Commandery v. Ainsworth, 71 Ala. 436; Sherman v. Com., 82 Ky. 102; State v. In-

surance Co., 30 Kan. 585, 2 Pac. 840; State v. Northwestern Mut. L. S. Ass'n, 16 Neb. 549, 20 N. W. 852; State v. Farmers' Ben. Ass'n, 18 Neb. 276, 25 N. W. 81; Society v. Winthrop, 85 Ill. 537; Society v. Baldwin, 86 Ill. 479; Nibl. Mnt. Ben. Soc. 193. Such contracts are therefore subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, objects, and policy of such societies. While it is a general rule that no person can procure a valid insurance on the life of another unless he has an insurable interest in such life, policies issued where there is no such interest being deemed to be mere wager policies, yet the rule seems to be that a person having insured his own life, may, by an assignment of the policy, provide for the payment of the insurance money to an assignee who has no insurable interest in his life. See authorities cited in Association v. Blue, supra. A fortiori, may he make such assignment to a person having such insurable interest. In this case Stubbings was a creditor of Martin, and so had an insurable interest in his life. Bliss, Ins. §§ 13, 27. He might have taken out a policy of insurance directly on the life of his debtor; and there can, therefore, be no doubt that, had the case been one of an ordinary life policy taken ont by Martin on his own life and for his own benefit, the assignment of such policy by him to Stubbings would have been perfectly valid, and would have vested in the latter the right to receive the insurance money at Martin's death. If any different rule applies in this case, such rule must find its basis either in the terms of the contract evidenced by the certificate of membership, or in the provisions or policy of the statute under which the certificate of membership was issued. It must be admitted that there is neither in the statute nor contract any express prohibition of an assignment by a member of his certificate of membership to his creditor, so as to constitute such creditor a beneficiary of the fund payable at the member's death. But the position taken by counsel is that the policy of the statute is to limit the persons who may become beneficiaries to certain enumerated classes, and that such limitation is implied in the provisions both of the statute and contract. Most of the decisions seem to concur in holding that, in case of mutual benefit societies, the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member, until such death occurs. The member may, therefore, during his life-time exercise the power of appointment, without other limits or restrictions than such as are imposed by the organic law of the society, or the rules and regulations adopted in conformity therewith. Society v. Burkhart, 110 Ind. 189, 10 N. E. 79, and 11 N. E. 449; Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Splawn v. Chew, 60 Tex. 532; Johnson v. Van Epps, 110 Ill. 551; Nibl. Mut. Ben. Soc. § 201. All the beneficiary has during the life-time of the member, owing to the member's right of revocation, is a mere expectancy, dependent upon the will and act of the holder of the certificate. Cases where a different rule has been announced seem to be confined to those where the organic law of the society prohibits a change in the beneficiary first designated.

In the present case the power of revoking or changing the appointment of the beneficiary was reserved to Martin by the terms of the contract in the broadest possible manner. By his application for membership Mrs. Martin was designated as beneficiary unless he should otherwise order in his life-time or by his will, and in substantial compliance with the application the certificate named as beneficiaries his widow, children, or heirs, in the order named, unless otherwise ordered by him during his life-time or by his will. The constitution of the society, which was incorporated into and made a part of the certificate of membership, provided that any member having designated his beneficiary or beneficiaries might change the same at his pleasure, without notice to or consent of the beneficiary or beneficiaries, and that all accepting any interest in the certificate of the society did so upon those express terms. Under these circumstances, it is perfectly clear that Mrs. Martin had no vested interest or property rights in the certificate of membership or the moneys to become payable thereunder during the life-time of her husband, and that the certificate, at the time it was assigned to Stubbings, was subject to the absolute control of Martin, and that it was then in his power, either with or without the consent of his wife, to make any disposition of it which did not conflict with the terms of the contract itself, or the organic law of the society. Was there either in the statute under which the society was organized, or in the constitution of the society, an implied limitation or restriction upon Martin's power of appointment of beneficiaries which made it unlawful for him to assign the certificate to his creditor as security for his debt? The first section of the statute under which the society was organized provides for the organization of corporations, associations, or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees, or legatees of deceased members; and the constitution of the society, in enumerating the objects for which the society was organized, follows precisely the language of the statute. It cannot be contended that Stubbings could by any possibility be included within the meaning of the terms, "widow, orphans, heirs, or relatives by consanguinity or affinity;" nor can he be properly classed as a "legatee or devisee," as he could be made such only by Martin's will. It is clear, however, that the

statute, by empowering a member to name as his beneficiary his legatee or devisee, without restriction, proceeds upon a policy much broader than do those statutes which limit the benefits to accrue upon the death of the member to his relatives, or those in some way dependent upon him. Under the name of legatee or devisee the member is given the power to appoint as his beneficiary any person, however related to him, or not related to him at all. He may, in the selection of his beneficiary, be governed by considerations of affection or duty, or he may yield to the dictates of mere caprice, subject only to the limitation that the appointment be made by will. The legislature having thus enlarged the category of those capable of being selected as beneficiaries so as to include all persons whom the member may see fit to select as his legatees or devisees, we can perceive no substantial rule of public policy which would be violated by the adoption of a different mode of selection of a beneficiary. No substantial rights of any party are better secured or protected by one mode of appointment than by another. The mode of selection is mere matter of form and does not go to the substance of the right to select beneficiaries. We are aware that upon the general proposition we are discussing the decisions of the courts are not altogether harmonious, and that some courts of high respectability have reached a different conclusion. Those decisions, however, so far as we have been able to examine them, seem to be based upon statutes essentially different from ours. Thus, Briggs v. Earl, 139 Mass. 473, 1 N. E. 847, was a case arising under a membership certificate where the purposes for which the society could be formed were strictly limited by statute to rendering assistance to the widows and orphans of deceased members and the persons dependent upon them. It was there held that an assignment of the membership certificate as security for a debt was invalid. In Dietrich v. Association, 45 Wis. 79, the charter of the association declared that its business should be to afford relief to the widows and children of deceased members, and that to such business it should be limited and restricted; and it was held that an assignment by a member of his membership certificate to the association, to secure a debt which he owed to it, was void, by reason of the want of authority in the association to take it. Authorities of the class to which the foregoing belong manifestly have no application here. The assignment of the certificate of membership to Stubbings is not within the strict letter of the statute; but, in the absence of all negative words forbidding the appointment of a beneficiary in any other mode than the one prescribed, the assignment to him is not necessarily unlawful and therefore void. He was a person capable under the statute of becoming a beneficiary, and the absolute right of naming him as such was in Martin. His failure to adopt the mode prescribed by the statute,—that is, by executing a will making Stubbings his legatee,—was doubtless a matter to which the society could probably object; but Mrs. Martin had no rights in the certificate which would justify her in interposing an objection. She was to all intents and purposes a stranger to the transaction. Her rights could arise only upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place. It cannot be doubted that Martin, at any time before his death, so long as the membership certificate was his property, and subject to his absolute dominion and control, might have surrendered it to the company for cancellation. If he had done so, his wife would have had no legal ground of complaint. The power of designating his beneficiaries being wholly under his control, he had the power of determining who should not, as well as who should, be such beneficiaries. In making the assignment of the certificate to Stubbings, he appointed him to receive the benefit to accrue at his death to the extent of the debt due him, and by the same act he revoked the appointment of Mrs. Martin as a beneficiary to the same extent. She, being no longer a beneficiary, has no interest which can give her a standing to contest the validity of the assignment to Stubbings; and the society having recognized the validity of said assignment, and professed a willingness to pay the money to him, there was no error of which Mrs. Martin can complain in the decree of the court ordering such payment to be made. We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

Appeal of CORSON.

(6 Atl. 213, 113 Pa. St. 438.)

Supreme Court of Pennsylvania. Oct. 4, 1886.

Appeal of Robert Corson, executor of Ellen McLean, deceased, from the decree of the court of common pleas No. 4, Philadelphia county.

Bill in equity, wherein Robert Corson, executor, etc., is plaintiff, and the Provident Savings Life Assurance Society of New York and James Garnier, defendants. The facts sufficiently appear in the opinion of the supreme court. The master reported in favor of plaintiff. Exceptions filed thereto having been sustained by the court, plaintiff took this appeal.

John Sparhawk, Jr., and N. Du Bois Miller, for appellant. J. H. Anders and Wm. F. Johnson, for appellees.

CLARK, J. Although a policy of life insurance is not, like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death (Scott v. Dickson, 16 Wkly. Notes Cas. 181), yet the assured is not entitled to his action on the policy, unless he had, as the basis of his contract, an interest in the subject-matter insured. This is a rule founded in public policy, and is of general application. Ruse v. Insurance Co., 23 N. Y. 516. If it were not so, the whole system of life insurance would become the mere cover for wicked speculation by wager in human life, and thus prove the occasion for the commission of the grossest crimes. An insurable interest, however, is not necessarily a definite pecuniary interest, such as is recognized and protected at law. It may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life. Therefore a wife has an insurable interest in the life of her husband, or the husband in the life of his wife (Baker v. Insurance Co., 43 N. Y. 283); and a single woman, under contract to marry, in the life of her intended husband (Chisholm v. Insurance Co., 52 Mo. 213). A parent has, in like manner, an insurable interest in the life of a child, and a child in the life of a parent. Loomis v. Insurance Co., 6 Gray, 396; Mitchell v. Insurance Co., 45 Me. 104; Insurance Co. v. Kane, 81 Pa. St. 154. In the case last cited this court says: "It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son, or, if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision by insurance to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time."

In Lord v. Dall, 12 Mass. 115, a young, unmarried female, without property, who for several years had been supported and educated at the expense of her brother, who stood to her in loco parentis, was held to have an insurable interest in his life. So, also, a creditor has an insurable interest in the life of his debtor. Insurance Co. v. Robertshaw, 26 Pa. St. 189; Cunningham v. Smith's Ex'rs, 70 Pa. St. 450.

In Association v. Beaverson, 16 Wkly. Notes Cas. 188, the assured, an unmarried lady, lived with her brother, who supported or maintained her in his family, under circumstances tending to constitute the relation of debtor and creditor between them, and it was held that he had such an insurable interest in her life as would support a policy of insurance taken out by him thereon. "This case," says the court, "was not submitted to the jury under a ruling that the mere fact of a person on whose life the policy was taken, being a sister of the defendant in error, gave to the latter an insurable interest in her life, although reputable authorities have recognized such relationship to be sufficient. Insurance Co. v. France, 94 U. S. 562. In the present case, evidence was given that he was supporting and maintaining her in his family under circumstances tending to constitute the relation of debtor and creditor. It was under all the facts of the case that the court held he had an insurable interest in the life of his sister. It is very clear that the insurance was obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which he had no interest. Scott v. Dickson, supra. The policy in question shows the willingness of the company to take the risk on the ground of relationship alone."

The rule deducible from all the cases is thus stated in Warnock v. Davis, 104 U. S. 775, by Mr. Justice Field: "It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases

of this kind is considered as more powerful—as operating more efficaciously to protect the life of the insured—than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."

It cannot be pretended that Garnier had an insurable interest in the life of his aunt, by force of the mere relationship existing between them. No case has been brought to our notice which carries the rule to this extent. Between husband and wife, and parent and child, the relationship is so close and intimate, and the mutual dependence and legal liability for support so manifest, that nothing more is wanting to establish the insurable interest. Garnier, however, did not hold any such relation to Ellen McLean, either natural or assumed. He was simply her "friend and adviser." He was doubtless a valuable friend. He had advanced money to bring her to Philadelphia. He fitted up, stocked, and from time to time replenished, the store at Tenth and Manilla. Having disposed of this for her benefit, he purchased the establishment on Fitzwater, and, selling this, he bought for her a third, on Fifth below Christian. She repaid Garnier, however, for his outlays in her behalf, from time to time, from the ordinary receipts of the several stores, and from the proceeds of the sales.

The only relation existing between James Garnier and Ellen McLean which could give Garnier an insurable interest in her life was that of debtor and creditor, and upon this ground alone the case must be considered. It is not denied that at the date of the policy Mrs. McLean was indebted to Garnier, for money advanced and expended in her behalf, in some amount between $500 and $750. It is said, however, that Garnier in his answer disclaims as a creditor that he places his right to the proceeds of the policy on other grounds, and makes no claim whatever by reason of any indebtedness. We do not so understand either the answer or the evidence given by the defendant in the case. The bill charges, in the first paragraph, in substance, that the policy was taken out and applied as a collateral security to the debt which Mrs. McLean then owed Garnier; and, in the subsequent paragraphs, that the debt having been fully paid in the life-time of the assured, the proceeds of the policy should pass into her estate. This fact is specifically denied. The defendant in his answer says it is "not true that the policy of insurance, referred to in paragraph 1 of the complainant's bill, was applied for and issued upon the life of Ellen McLean for any such reason or purpose as therein stated."

It is undisputed, however, that at the issuing of the policy the relation of debtor and creditor did exist, and to the extent stated. The defendant having denied that the policy was taken as collateral security for that debt, a question of fact is thus raised to be determined by the evidence. Upon examination of the proofs we find no evidence from which the fact might be fairly inferred. The insurance was not effected at the instance of Mrs. McLean, but at the suggestion of her son Samuel McClatchy, in whose name a second policy in $1,000 was at the same time issued. The premiums were paid and the policy maintained by Garnier. Indeed, there is not the slightest proof in support of the plaintiff's hypothesis, that the policy was held in trust for the debtor, and, in the absence of such proof, the presumption is that the rights of the parties appear upon the face of the policy. Cunningham v. Smith, 70 Pa. St. 450.

It has been said, however, on the authority of Godsall v. Boldero, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt; and, if the debt is paid, the insurance is at an end. But it is now settled that this case is not the law. It was directly drawn in question, and was expressly overruled, in Dalby v. Assurance Co. (decided in the exchequer chamber) 15 C. B. 365. The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy if it was valid at its inception; and, in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. Rawls v. Insurance Co., 27 N. Y. 282; Mowry v. Insurance Co., 9 R. I. 346; Hoyt v. Insurance Co., 3 Bosw. 440; Insurance Co. v. Bailey, 13 Wall. 616.

The doctrine of all the cases to which our attention has been called, is that, if the policy was originally valid, it does not cease to be so by cessation of interest in the subject of insurance unless such be the necessary effect of the provisions of the instrument itself. Therefore, where a husband insured his life for the benefit of his wife, and was subsequently divorced, it was held that notwithstanding the relation of husband and wife no longer existed, and her insurable interest had thus ceased, yet she could recover the full amount of the policy. Insurance Co. v. Schaefer, 94 U. S. 457. "Supposing a fair and proper insurable interest of whatever kind," says the court in the case last cited, "to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficient-

ly attained; and there is then no good reason why the contract should not be carried out according to its terms." To the same effect is McKee v. Insurance Co., 28 Mo. 383. All the cases to which we have referred, it is true, arose from suits brought upon the policies of insurance; but the same principles apply where the company, admitting its liability, has paid the money into court to abide the result, and the controversy is between the remaining parties.

In our own case of Scott v. Dickson, 16 Wkly. Notes Cas. 181, our Brother Paxson, upon a review of the cases, concludes that, where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist at or prior to the death of the insured will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money. Therefore it was held that a surety on an official bond has an insurable interest in the life of the obligor, and that his right to recover upon the policy was not affected by the fact that no breach of the condition of the bond had ever occurred. But a merely colorable, temporary, or disproportionate interest may present circumstances from which want of good faith, and an intent to evade the rule, may be inferred. Therefore, although the relation of debtor and creditor may in general be said to establish an insurable interest, the amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. Wainwright v. Bland, 1 Moody & R. 481; Miller v. Insurance Co., 2 E. D. Smith, 268.

The case of Cammack v. Lewis, 15 Wall. 643, is exactly in point. The policy was taken out by Cammack, the creditor, upon the life of Lewis, his debtor, in the sum of $3,000,—$2,000 for his own benefit, and $1,000 for the benefit of Lewis. Lewis, in fact, only owed Cammack $70, although he voluntarily and without consideration gave his obligation at the time for $3,000. "If the transaction," says Mr. Justice Miller, "as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for $3,000 to cover a debt of $70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a bona fide effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2,000 out of the $3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception,—probably to impose on the insurance company." See, also, Insurance Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949.

In the case at bar the policy was $2,000. The amount of the indebtedness was, at the time, undetermined, and therefore uncertain. It has since been ascertained to have been between $500 and $750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is, as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for the purposes of speculation upon the hazard of a life in which the insured has no interest.

The case is materially different from Gilbert v. Moose, 13 Wkly. Notes Cas. 489. The principles involved in that case are not drawn in question here.

We find no error in the decree of the court below, and it is therefore affirmed. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

RITTLER v. SMITH.

(16 Atl. 890, 70 Md. 261.)

Court of Appeals of Maryland. Feb. 21, 1889.

Appeal from circuit court of Baltimore city.

Bill by Emeline Smith, administratrix of Victor Smith, against William H. Rittler. Decree for complainant, and defendant appeals.

Argued before MILLER, ROBINSON, IRVING, STONE, BRYAN, YELLOTT, and McSHERRY, JJ.

J. Wilson Leakin and R. R. Battee, for appellant. T. Alexander Seth, for appellee.

MILLER, J. In June, 1886, Victor Smith was indebted to William H. Rittler in the sum of about $1,000, and, Smith being insolvent, Rittler took out certificates of insurance on Smith's life in four several mutual aid associations, aggregating on their face the sum of $6,500. These certificates were all in favor of Rittler, and he paid all the premiums or assessments thereunder. Smith died in March, 1887, and Rittler collected from these insurances the sum of $2,124.82, which appears to have been all that could have been collected according to the terms of the certificates and the financial condition of the associations. Deducting from this sum the debt and interest due Rittler, the premiums he had paid, and the costs and expenses of effecting the insurances, there remained a balance of $474.53 as of the 1st of June, 1887. On the 3d of October following, letters of administration on Smith's estate were granted to an administratrix, who thereupon filed her bill, claiming this balance as belonging to the estate of the decedent. In his answer Rittler denied this claim, and insisted that the money belonged to him. The case was heard on bill and answer, and the court below decreed in favor of the complainant. From this decree Rittler has appealed.

The question as thus presented is an interesting one, is of first impression in this state, and has been very ably argued. On the part of the appellant it is contended that where a creditor, with his own money, and for his own account, effects and keeps up an insurance on the life of his debtor, the whole of the proceeds belong to him unless it appears that he has gone into it for the mere purpose of speculation, which, in this case, is expressly negatived by the answer, the averments of which must be taken as true, the case having been heard on bill and answer. On the other hand, counsel for the appellee contend that where the creditor receives more than enough to reimburse him for his debt and outlay, with interest, he will, as to the balance, be regarded as a trustee for the personal representative of the debtor; that the law says to the creditor in such a case: "You may protect yourself. You may, by insuring your debtor's life, secure your debt with all outlay and expenses. You may make yourself whole, but you shall not have a greater direct pecuniary interest in his death than you may have in his life."

There have been numerous decisions upon this subject, some of which are conflicting. On many points, however, bearing upon the question, there is a general concurrence of judicial opinion and authority. For instance, it is generally held by the courts in this country that one who has no insurable interest in the life of another cannot insure that life. Such insurances are considered gambling contracts, and for that reason void at common law, apart from any statute forbidding them. In England they were held valid at common law, but were prohibited as introducing a "mischievous kind of gaming" by the first section of the statute (14 Geo. III. c. 48). The effect of this section, as construed by the English courts, is to make the law of England, by act of parliament, the same as it has been held to be by the courts in this country without such an act. In some cases they have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty for such a crime. This doctrine, carried to its logical result, has a far reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in remainder after the death of a life-tenant. Every like conveyance of property, in consideration that the grantee shall support the grantor during his life, falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances, in which the same result would follow from the application of this doctrine, could be readily suggested, but we need not pursue the subject further. All the authorities also concur in holding that a creditor has an insurable interest in the life of his debtor. In England it was at one time held that though the creditor had an insurable interest at the time the policy was issued, yet, if his debt was paid in the life-time of his debtor, and his interest had therefore ceased, he could not recover, because the contract of life insurance, like insurances of property, was one of indemnity. But this doctrine has long since been repudiated, and the settled rule in England now is that a life insurance in no way resembles a contract of indemnity, but is an agreement to pay a certain sum of money upon the death of the person insured, in consideration of the due

payment of a certain fixed annual sum or premium during his life, and hence, if the contract be valid at the time it was entered into, notwithstanding the fact that the interest of the creditor has ceased during the life of his debtor, he may still recover on the policy, though the result may be that he will be twice paid for his debt,—once by his debtor and again by recovery on the policy. Dalby v. Assurance Co., 15 C. B. 365. The same construction of the contract has been approved and adopted by this court. Emerick v. Coakley, 35 Md. 193; Whiting v. Insurance Co., 15 Md. 326.

In support of the view taken by the appellee's counsel, cases have been cited in which it has been held that the assignee of a life policy, who has no insurable interest in the life, stands in the same position as if he had originally taken out the policy for his own benefit. In other words, the contention is that the assured himself can make no valid, absolute assignment of his policy to one who has no insurable interest in his life. But our own decisions are opposed to this. It is settled law in this state that a life insurance policy is but a chose in action for the payment of money, and may be assigned as such under our act of 1829, c. 51. Insurance Co. v. Flack, 3 Md. 341; Whitridge v. Barry, 42 Md. 150. It is quite a common thing for the bond or promissory note of a private individual to be sold through a broker to a bona fide purchaser for less than its face value, and when the latter takes an assignment of it without recourse, he becomes its absolute owner, and is not bound to refund to the vendor anything he may recover upon it over and above what he paid for it. So a life policy, being a similar chose in action, may be disposed of and assigned in the same way, provided the assent of the insurer is obtained where it is so stipulated in the instrument. In such case, the assignee must, of course, keep the policy alive by the due payment of premiums if he wishes to realize anything from it. Such an assignment is valid in this state if it be a bona fide business transaction, and not a mere device to cover a gaming contract. Such is also the English rule. Ashley v. Ashley, 3 Sim. 149. These considerations prevent us from adopting some of the reasoning of the supreme court in Warnock v. Davis, 104 U. S. 775. It seems to us, with great deference, that from the facts in that case the association, which was the assignee, could well be regarded as standing in the same position as if it had taken out the policy in its own name, and, having no insurable interest in the life, it clearly became a wager policy. The assignment was made the day after the policy was issued, in pursuance of an agreement to that effect made the day of its issuance. The assignment was evidently a mere device to cover up a gaming transaction. In the preceding case of Cammack v. Lewis, 15 Wall. 643, the debt due the creditor was only $70, and the policy was for $3,000. It was taken out by the debtor, who was in bad health, at the suggestion of the creditor, and was assigned to him immediately after it was made out, he, at the same time, taking a note from his debtor for $3,000, confessedly without consideration. In view of these facts, the court well said: "It was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for $3,000 to cover a debt of $70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a bona fide effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2,000 out of the $3,000, nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack." It was "under these circumstances" that the court held that Cammack could hold the policy only as security for the debt due him when it was assigned, and such advances as he might afterwards make on account of it. If such, then, be the nature of a life insurance contract, and if a bona fide assignee for value, though a stranger, may recover and hold the whole amount for his own use, why may not a creditor, who, in pursuance of a bona fide effort to secure payment of his debt, insures the life of his debtor, and takes the policy in his own name, or for his own benefit, be entitled to hold all he can recover? He is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing, in this respect. If he pays the debt to his creditor, he has only discharged his duty, and what interest has he in the policy, or in what his creditor may recover upon it? In a recent English case it was held that a creditor who had insured the life of his debtor could retain all the sums he had received from the policies, without accounting for them to the representatives of the debtor, unless there was distinct evidence of a contract to the effect that the creditor had agreed to effect the policy, and that the debtor had agreed to pay the premiums, in which case only will the policy be held in trust for the debtor. Bruce v. Garden, L. R. 5 Ch. App. 32. This is the latest English authority to which we have been referred, and was decided by Lord Chancellor Hatherley on appeal. In that case the amount received from the policies by the creditor was nearly twice as much as the debt due him by his debtor. We agree that there may be such a gross disproportion between the debt and the amount of the policy as to stamp the transaction as indicating upon its face want of good faith, and as

a mere speculation or wager. The case of Cammack v. Lewis affords an instance of such gross disparity, but no general rule on this subject has as yet been laid down by the courts, and it is probably better to leave each case to depend on its own circumstances. The disparity between the debt of $1,000 and $6,500, the aggregate of the sums named in the certificates, is certainly great, but upon examination it is more apparent than real. The answer, which we must take as true, shows bona fides on the part of the creditor. The policies were all in mutual aid associations, where mortuary dues are paid by assessments and where, of course, the sum to be realized depends upon the number and solvency of the members. One of the certificates for $2,000 contained a condition that only one-half should be paid if the assured should die within one year from its date, an event which actually occurred. Another expressly provided that he should receive an amount not exceeding $2,000, but according to the numbers liable to assessment on this certificate, and from that he received, according to its terms, only $250. Another of the associations was in financial difficulties, and he compromised his claim on a certificate for $1,000 and received only $132.82. By taking out these certificates he became liable to be assessed as a member, and during the short time they were running (from June to the following March) he paid, in this shape and in premiums, the sum of $351.75. In view of the character of these certificates, and of the associations by which they were issued, we cannot say the disproportion between the debt and the real amount and value of the insurances is so great in this case as to warrant a sentence of condemnation against the transaction as being a mere speculation or wager on the life of the debtor.

Without attempting a review of all the numerous decisions on this subject, we simply refer, in support of our views, to the following cases, in addition to those already cited (Insurance Co. v. Allen, 138 Mass. 24; Clark v. Allen, 11 R. I. 439; Olmsted v. Keyes, 85 N. Y. 593; Amick v. Butler, 111 Ind. 578, 12 N. E. 518; Johnson v. Van Epps, 110 Ill. 562; Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213); and among the text writers, to Bliss, Ins. § 30, and Hine & N. Assignm. 81, 82.

On the whole, we are of opinion the weight of reason as well as of authority sustains the appellant's claim. We shall therefore reverse the decree appealed from, and dismiss the appellee's bill.

COOPER v. SHAEFFER.

(11 Atl. 548.)

Supreme Court of Pennsylvania. Oct. 3, 1887.

Error to court of common pleas, Lebanon county; McPherson, Judge.

Case by Allen Shaeffer, administrator of Daniel Weaver, deceased, against Jacob C. Cooper, to recover the excess of a policy of insurance on the life of said Daniel Weaver, assigned to defendant's assignor as security for a debt, on the ground that the transaction was a wager. The facts as they appeared on the trial are sufficiently stated in the opinion. Verdict for plaintiff, $1,100.04, and judgment thereon; whereupon defendant took this writ.

J. P. S. Gohin, for plaintiff in error. Bassler Boyer, for defendant in error.

STERRETT, J. It is conceded that the policy of $3,000 on the life of Weaver was taken out and immediately assigned to Blouch for the purpose of securing a debt of $100, due by the former to the latter. Subsequently one-half interest in the policy was assigned by Blouch to plaintiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver the insurance company, recognizing its liability for the amount insured, paid $1,800 thereof to Cooper, and the residue to Blouch. In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance $3,000, and the debt, $100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money received by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law. It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother Paxson, in Grant v. Kline (Pa. Sup.) 9 Atl. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but, as is said in Corson's Appeal, 113 Pa. St. 438, 445, 6 Atl. 213: "In all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary, or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as against public policy." But, in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction. There is no merit in either of the specifications of error. Judgment affirmed.

LORD v. DALL.

(12 Mass. 115.)

Supreme Judicial Court of Massachusetts. Suffolk. March Term, 1815.

Assumpsit on a policy of insurance, made for $5000, in favor of the plaintiff, upon the life of Jabez Lord, her brother, aged thirty-three years, bound on a voyage to South America, or any other place he might proceed to from Boston, commencing the risk on the 16th of December, 1809, at noon, and to continue until the 16th of July, 1810, at noon; for a premium of seven per cent. The defendant underwrote the sum of $500.

At the trial of the cause upon the general issue, at the last November term, before the chief justice, it was proved, that the said Jabez had died, on the coast of Africa, before the expiration of the time for which his life was insured, and not from any of the causes excepted from the risk.

It was also proved that the said Jabez sailed from Boston, after the making of the policy, to Fayal, as supercargo of a vessel called the Mount Aetna, at which place she was converted into a Portuguese vessel, called the Vincidero, still belonging to the former owners, but sailing with Portuguese papers, and under Portuguese colors. From Fayal the vessel sailed to Madeira, and from thence to the coast of Africa, for the purpose of procuring slaves, with intention to carry them to South America; the said Jabez acting as supercargo, and having purchased some of the slaves himself.

The objections made at the trial to the plaintiff's recovery were,

1. That she had no insurable interest in the life of the said Jabez. But, it being in evidence that she was a person of no property at the time, depending altogether upon the said Jabez for her support and education, and he having for several years paid her board, provided her with clothing, and paid for her education; all which he continued to do at the time the policy was effected; this objection was overruled, but reserved for the consideration of the whole court.

2. That there was a concealment of the intention of the said Jabez to go to the coast of Africa. This was left to the jury, with directions, if they were satisfied that there had been such concealment, to find for the defendant.

3. The third objection was, that the policy was void, it being to secure the life of the said Jabez, while in the execution of an unlawful enterprise.

It was not made certain, whether the said Jabez originally designed to go to the coast of Africa, or whether that voyage was conceived after the vessel left Boston. The jury were instructed, that, if they believed that he had such intention originally, and knew that the vessel was so bound, there could be no doubt, from the evidence in the case, that such intention and knowledge were concealed. The question, therefore, which the judge states to be reserved for the consideration of this objection, was, whether the actual going upon a voyage for the purposes aforesaid, by the party whose life is insured, avoids the policy.

The said Jabez Lord gave his note for the premium; and there was no evidence that the plaintiff knew where the said Jabez was bound.

If the court should be of opinion that the plaintiff had not an insurable interest, or that the policy was void on account of the illegality of the voyage, the verdict returned for the plaintiff was to be set aside, and she was to become nonsuit; otherwise, judgment was to be rendered on the verdict.

Prescott & Hubbard, for plaintiff. Mr. Livermore and W. Sullivan, for defendant.

PARKER, C. J. It has been a question in the argument, whether a policy of assurance upon a life is a contract, which can be enforced by the laws of this state; the law of England, as it is suggested, applicable to such contracts, never having been adopted and practised upon in this country.

It is true, that no precedent has been produced from our own records, of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them.

It seems that these insurances are not favored in any of the commercial nations of Europe, except England; several of them having expressly forbidden them, for what reasons, however, does not appear; unless the reason given in France is the prevailing one, namely, "that it is indecorous to set a price upon the life of a man, and especially a freeman, which, as they say, is above all price." It is not a little singular, that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which for several centuries has been the country of established and regulated liberty.

This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it, which leads to the violation of law; nor any thing objectionable on the score of policy or morals. It must, then, be valid to support an action, until something is shown by the party refusing to perform it, in excuse of his non-performance.

It is said, that, being a contract of assurance, the law on the subject of marine insurance is applicable to it; and, therefore, unless

the assured had an interest in the subject-matter insured, he is not entitled to his action.

This position we agree to; for, otherwise, it would be a mere wager-policy, which we think would be contrary to the general policy of our laws, and therefore void. Had, then, the plaintiff an interest in the life of her brother, which was insured?

The report states the facts, upon which that interest was supposed at the trial to exist. The plaintiff, a young female without property, was, and had been for several years, supported and educated at the expense of her brother, who stood towards her in loco parentis. Nothing could show a stronger affection of a brother towards his sister, than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. One per cent. per month upon $5000, taken on the life of a man of thirty-three years of age, in good health at the time, was a sufficient inducement to the underwriter to take at least common chances, and proved the strong disposition of the brother to secure his sister against the melancholy consequence to her of his death. In common understanding no one would hesitate to say, that in the life of such a brother the sister had an interest; and few would limit that interest to the sum of $5000.

But, it is said, the interest must be a pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, &c. The former case, indeed, of the creditor would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For, if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned, why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made; although the same subject was then in their contemplation.

As to the other objection, that the life insured was employed, during the continuance of the contract, in an illegal traffic, we do not think it can prevail to the prejudice of the plaintiff, who did not participate in the illegal employment, and, indeed, does not appear to have known of it.

The underwriters insure the life of Jabez Lord, for the benefit of the plaintiff, for the term of seven months; and he is described in the policy as being about thirty-three years of age, "and bound on a voyage to South America or elsewhere, and any other place he may proceed to from Boston." This gave the utmost latitude to Jabez Lord, to go where he pleased at all times, and imposed no restriction whatever upon him, as to the place where he should exercise his industry and enterprise. Possibly, if he secretly intended, at the time the policy was subscribed, to visit some portion of the globe, where his life would be exposed to more than common hazard, and kept that intention concealed from the underwriters; had he been interested himself in the policy, or had his sister been privy to his intentions, and aided him in concealing them, such conduct might have been considered in the light of a fraudulent concealment; and, if the fact were material, the contract might have been avoided.

But the jury have found, that there was no such concealment; and the objection now rests entirely upon the supposed illegality of the enterprise in which he was engaged.

It is a sufficient answer to this objection, that, whatever the law may be as to an insurance upon an illicit voyage, between the parties to the contract, the present plaintiff, being ignorant of any intended violation of the law, ought not to be affected by such illegality. Had the policy been effected for Jabez Lord himself, it might be questionable, as the underwriters had excepted no particular employment in which he might be engaged, and no cause of death but suicide and forfeiture of life for crime, whether his engagement in any traffic prohibited by law would have discharged their liability. If it would, it must be only because it might be thought just and legal to discourage contracts, which might tend to uphold enterprises forbidden by the laws.

It would be difficult, however, to maintain, that the executors of a man, whose life was insured for the benefit of his children, should be deprived of their right to enforce the contract because he had pursued a course of smuggling or counterfeiting; neither of these acts being excepted in the policy, and the party having died within the time, from a cause which was clearly at the risk of the underwriters. A policy made for the purpose of enabling a man to commit crimes would undoubtedly be void. But one honestly made would seem not to be affected by the moral conduct of the party who had procured it.

Perceiving nothing in this contract unfriendly to the morals or interests of the community; and no knowledge of an illegal intention being imputed to the plaintiff; we see no reason for setting aside the verdict. Judgment will therefore be entered upon it.

SINGLETON v. ST. LOUIS MUT. INS. CO. et al.

(66 Mo. 63.)

Supreme Court of Missouri. Oct. Term, 1877.

Appeal from circuit court, Audrain county; G. Porter, Judge.

Henry Flanagan, for appellant. McFarlane, Jones & Carkener, and R. W. Jones, for respondent.

HENRY, J. Plaintiff sued defendants on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the life of John T. Anderson, procured by plaintiff, who paid the premiums, and was to receive the amount for which said life was insured by said company, on the death of said Anderson.

Plaintiff was an uncle of Jno. T. Anderson, but it was neither alleged nor proved by plaintiff, that he had any pecuniary interest in his life, and the mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other. It is maintained with great ability by Messrs. McFarlane and Jones, attorneys for plaintiff, that a policy of insurance, effected by one on the life of another in which he has no pecuniary interest, is valid; and they rely upon Chisholm v. Insurance Co., 52 Mo. 213, in which this court (Wagner, J.) said: "In this state we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy." These remarks, of course, are to be restricted to the case then under consideration. The plaintiff there had insured the life of Clark, between whom and herself there was a marriage engagement, and the court held that she had a pecuniary interest in the life of Clark, remarking that, "had he observed and kept the same (his contract of marriage), then, as his wife, she would have been entitled to support. Had he lived and violated the contract, she would have had her action for damages." There are intimations in the opinion which support the views urged by respondent's attorney, but they are obiter dicta. The case of Insurance Co. v. Johnson, 24 N. J. Law, 576, is approvingly cited by the court, but a different doctrine from that announced in that case has been held in Massachusetts, New York, Connecticut, Maine, Rhode Island, Indiana, by the circuit court of the United States, by Dillon, J., in Swick v. Insurance Co., 2 Dill. 161, Fed. Cas. No. 13,692, and in this state in McKee v. Insurance Co., 28 Mo. 383. And in Gambs v. Insurance Co., 50 Mo. 44, it was held indirectly that a person procuring an insurance on the life of another must, to make it valid, have a pecuniary interest in the life insured. In the latter case, Bliss, J., said: "Gambling, or wager policies, are those where the persons for whose use they issue have no pecuniary interest in the life insured. But the wife has a direct interest in the life of her husband." In the former case, Scott, J., said: "There is nothing in the contract as stated in the petition, which shows it to be a wagering one, or in any wise contrary to public policy."

He then proceeds to show, that the plaintiff had a pecuniary interest in the life of the husband, which she insured for her benefit. In Evers v. Association, 59 Mo. 430, Wagner, J., who delivered the opinion of the court, did not seem entirely satisfied with Chisholm v. Insurance Co. He said: "Our opinion on this subject was expressed in Chisholm v. Insurance Co., 52 Mo. 213, 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." As the observations of our court on this subject, in the case referred to, are obiter dicta, the question may be considered an open one in this state. In his Commentaries (volume 3, p. 462) Chancellor Kent said: "But policies, without interest upon lives, are more pernicious and dangerous than any other class of wager policies, because temptation to tamper with life is more mischievous than incitement to mere pecuniary fraud." In Lord v. Dall, 12 Mass. 115, it was held "that, unless the assured had an interest in the life insured, it would be a mere wager policy, which we think would be contrary to our laws, and therefore void." In Stevens v. Warren, 101 Mass. 564, Lord v. Dall was cited and approved, and Willis, J., speaking for the court, said: "The general rule recognized by the courts has been that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life." To the same effect are the cases of Mitchell v. Insurance Co., 45 Me. 104; Lewis v. Insurance Co., 39 Conn. 101; Bevin v. Insurance Co., 23 Conn. 244; Mowry v. Insurance Co., 9 R. I. 346; Insurance Co. v. Hays, 41 Ind. 117; Ruse v. Insurance Co., 23 N. Y. 516; Freeman v. Insurance Co., 38 Barb. 247; Cammack v. Lewis, 15 Wall. 643; Swick v. Insurance Co., 2 Dill. 161, Fed. Cas. No. 13,692; May, Ins. p. 724, § 587.

Neither the case of Shannon v. Nugent, Hayes, Exch. 539, nor Ferguson v. Lomax, 2 Dru. & War. 120, cited in Chisholm v. Insurance Co., supra, sustains the doctrine contended for by respondent. In the latter case the question was neither considered by the court nor presented in the brief of counsel, and in the former, Joy, C. B., speaking for the court, said: "It is not now necessary for us to decide whether a life insurance, made in Ireland, must be on interest." He stated, however, that the leaning of the court was, that interest was not necessary to

give it validity. We feel constrained, therefore, by the weight of authority to hold that the policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and therefore void. This policy, upon its face, does not state an interest, nor in the application is it stated that Singleton had a pecuniary interest in the life of Anderson. The following question was propounded to the applicant: "Has the beneficiary (if a creditor) an interest in the life to be assured to the full amount of this application?" To which he answered "No." He does not state that he is a creditor. It was neither averred, in the plaintiff's petition, nor proved, that plaintiff had any pecuniary interest in the continuance of the life of John T. Anderson. The following instruction, asked by defendant, the court refused: "That to entitle plaintiff to recover in this action, he must show some insurable interest in the life of John T. Anderson, the insured, and that in the absence of any evidence, showing or tending to show such insurable interest, the jury must find for defendant."

Plaintiff's counsel contend that it devolved upon defendant to show that plaintiff had no such interest, and several cases from our own Reports are relied upon as authority for this position. In the earlier of these cases all that was determined was that when a contract was good at common law, without being reduced to writiug, after the passage of the statute of frauds it was matter of defense to be pleaded that the contract was not in writing. The case here is of a contract void at common law, upon its face, and of course it devolves upon plaintiff to show such facts as render it valid and binding. In Freeman v. Insurance Co., supra, the court said: "It must be considered as well settled at present that at common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party has at the time an insurable interest. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action." "The plaintiff must aver an insurable interest, or if he has uot that, the grounds upon which he rests his right to sue." May, Ins. § 587. In Ruse v. Insurance Co., supra, in which the opinion was delivered by that able jurist, Judge Selden, the court said: "And it is apparent from the authorities, that it had always been previously held in suits upon policies, not containing the words, 'interest or no interest,' or other equivalent words, that the plaintiff must aver and prove that he had an interest." This was said in reference to Depaba v. Ludlow, Comyn, 361, which shows how the doctrine that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest," and it was held that the import of that clause relieved plaintiff from proving his interest. That the plaintiff must, in these cases, aver and prove an interest, was held in the supreme court of Illinois, in Insurance Co. v. Hogan, 80 Ill. 35, and that he must prove the same affirmatively as a part of the case.

The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed. The court did not err in excluding statements made by John T. Anderson, as to how he had been afflicted, and did properly admit statements made by him to witnesses, whether medical men or not, which were expressions of his feelings at the time. 1 Greenl. Ev. § 101. Nor was it necessary to make such statements admissible that they should have been made in answer to inquiries as to his health, or observations of others as to his appearance, &c. But they must not have been made too long before the application to throw any light upon the condition of his health when the application was made. We think evidence properly admissible to show in what sense the term "spitting of blood," was used in the application. Without any evidence of the meaning of that term, the court might properly have instructed the jury that "spitting of blood," in consequence of a drawn tooth, or a cut on the gums, was not meant by that term, and yet, if Anderson had spit blood from such trivial causes, literally his answer to the question would have been false. There was, therefore, a propriety in the admission of evidence of the meaning of the term. There is something ambiguous in the term "spitting of blood." There is room for interpretation. Literally, the meaning is spitting blood, whether from the teeth, gums or lungs, but it would be absurd to hold that it was used in that sense in the application. We have given two instances of spitting blood, which no court would hold as embraced within the term "spitting of blood," as used in that application. Hence, the necessity for an explanation; "spitting of blood" is, and was proved to be, a technical term. Other errors are assigned, but it is unnecessary to consider them. We are all agreed that the judgment should be, and it is accordingly, reversed, and the cause remanded. Reversed.

HOFFMAN v. JOHN HANCOCK MUT. LIFE INS. CO.

(92 U. S. 161.)

Supreme Court of the United States. Oct., 1875.

Appeal from the circuit court of the United States for the Northern district of Ohio.

James A. Garfield, for appellant. H. L. Terrell, for appellee.

Mr. Justice SWAYNE delivered the opinion of the court.

There is a direct conflict in the testimony of the two principal witnesses in this case, and the discrepancies are irreconcilable. According to our view, the case must turn upon the appplication of legal principles to facts about which there is no controversy. An elaborate examination of the testimony is, therefore, unnecessary. A brief statement will be sufficient for the purposes of this opinion.

Justin E. Thayer was the general agent of the appellee at Cleveland, Ohio. He was authorized to appoint sub-agents; and on the 7th of April, 1869, appointed A. C. Goodwin such agent. This arrangement continued until the 7th of June, 1869. It was then put an end to by the parties; and they agreed that thereafter Goodwin should act as an insurance broker, and that he should receive for such applications as he might bring to Thayer thirty per cent. of the first premium paid for the insurance.

On the 7th of August, 1869, Goodwin gave to Frederick Hoffman a receipt, signed by Goodwin as agent, setting forth that he had received from Hoffman $922.57, "being the first annual premium on an insurance of $8,000 on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston. The said insurance to date from Aug. 7, 1869, subject to the conditions and agreements of the policies of said company, provided that the said application shall be accepted by the said company, and a policy be by them granted thereon. The said policy, if issued, to be delivered by me, when received, to the holder of this receipt, which shall then be given up. It is expressly agreed and understood, that, if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt; but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up."

The amount of the premium specified was paid by Hoffman to Goodwin as follows:

A horse valued at	$400 00
A sixty-day note to Goodwin	100 00
A cancelled debt owing by Goodwin to Hoffman	53 57
A premium note of	369 00
	$922 57

Goodwin reported the application to Thayer, but said nothing of the receipt. Thayer forwarded the application, and in due time received the policy. Some time afterwards, Hoffman called for the policy. Thayer demanded the premium. Hoffman refused to pay it, and produced Goodwin's receipt. Thayer then, for the first time, learned the existence of the receipt, and the particulars of the alleged payment of the premium. He refused to ratify the transaction.

Ineffectual attempts were made to sell the horse. Finally Thayer, to save trouble to his company, agreed, that if Hoffman would take back the horse, and pay in his stead $250 to the company, the transaction should be closed, and the policy be delivered. This Hoffman refused to do, and sued the company in the court of common pleas of Cuyahoga county for what he had delivered to Goodwin. A verdict was found for the defendant. He took a new trial under the statute of Ohio. Upon the re-trial, a verdict was rendered in his favor. The defendant moved for a new trial, which was granted. In this condition of things, Hoffman died. The suit abated by his death, and was not revived. Thereupon his widow, Henrietta Hoffman, filed this bill. It prayed that the company should be compelled to deliver the policy to her, and to pay the amount of the insurance-money specified. The policy was upon what is known as the "endowment plan." It provided that the amount insured should be paid to Hoffman at the end of ten years, or to his wife in the event of his death in the mean time. No part of what was paid by Hoffman to Goodwin ever came into the hands of Thayer or the company, or inured in any wise to the benefit of either.

Goodwin testified that his share of the premium was "two hundred and seventy-six dollars and some cents;" and, further, that Thayer assented to the transaction in advance, and, with full knowledge of the facts, ratified it subsequently.

If it be admitted that the facts as to assent and ratification by Thayer are as stated by Goodwin,—a concession by no means warranted, in our judgment, by the state of the evidence,—the question arises, what is the legal result?

Agencies are special, general, and universal. Story, Ag. § 21. Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise. Upon v. Suffolk Co. Mills, 11 Cush. 586; Jones v. Warner, 11 Conn. 48; Story, Ag. § 60, and note; 3 Chit. Com. 199; U. S. v. Babbit, 1 Black, 61; 1 Pars. Cont. (4th Ed.) pp. 41, 42.

Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies.

Goodwin had settled his own debt to Hoffman of $53.57, and had appropriated to himself Hoffman's note of $100.

If he had the right to take his percentage in such way as he might think proper, this did not justify his taking the horse at $400. Nor, if Thayer had expressly agreed to take the horse in payment of the premium pro tanto, could that have given validity to the transaction. If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do every thing else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking.

The exercise of such a power by the agent was liable to two objections,—it was ultra vires, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. This objection is fatal to the appellant's case.

It is insisted by the counsel for the appellee, that Hoffman, by bringing his action at law, repudiated and rescinded the contract, if there was one; and that the appellant is thereby estopped from maintaining this bill. Authorities are cited in support of this proposition. Herrington v. Hubbard, 2 Ill. 569; Dalton v. Bentley, 15 Ill. 420; Smith v. Smith, 19 Ill. 349; Cooper v. Brown, 2 McLean, 495, Fed. Cas. No. 3,191; Williams v. Insurance Co., 4 Bigelow, Ins. Cas. 56.

As the point already determined is conclusive of the case, it is unnecessary to consider this subject. Decree affirmed.

McALLISTER v. NEW ENGLAND MUT. LIFE INS. CO.

(101 Mass. 558.)

Supreme Judicial Court of Massachusetts. Suffolk. March, 1869.

H. G. Hutchins, for plaintiff. D. Foster and G. W. Baldwin, for defendants.

GRAY, J. The policy upon which this action is brought is expressed to be made in consideration of a premium already paid, and of a like sum to be paid annually during its continuance; and "does not take effect until the premium is paid." But it is agreed by the parties, in the case stated, that the defendants made and delivered the policy to the assured, and at the time of the delivery took for the first premium a certain sum in cash, and two notes of the assured, one payable in six months, and the other on demand after five years. Whatever were the powers of the directors, the corporation itself might certainly take notes for part of the premium, instead of insisting on immediate payment of the whole. Hodsdon v. Insurance Co., 97 Mass. 144. The policy thus took effect as a binding contract, and the question is, whether it was terminated before the death of the assured.

The defendants rely upon that provision of the policy, which declares that, "in case any premium due upon the policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void," except for a certain period, which had expired before the death of the assured in this case. But the court is of opinion that this clause, which is inserted for the benefit of the insurers, and to be construed most strongly against them, and which merely provides that the policy "shall become forfeited and void," in case a premium "shall not be paid at the day when payable," can only apply to a policy which has once taken effect, and to nonpayment of a premium payable after that time, and cannot be held to refer to that premium which the policy contemplates and requires to be paid before the contract of insurance has any binding force.

This policy does not provide that it shall be avoided or forfeited upon the failure to pay any note or obligation given for a premium, and differs in that respect from the cases of Pitt v. Insurance Co., 100 Mass. 500, and Roberts v. Insurance Co., Disney, 355, cited for the defendants.

The subsequent stipulation, by which the policy, and any sums that shall become due thereon from the company, are pledged and hypothecated to them to secure the payment of any premium on which credit may be given, and of any note or security therefor, expressly declares that "this pledge and hypothecation shall in no respect affect the provisions respecting the forfeiture of the policy," and cannot therefore enlarge those provisions.

The difference also in the form of the two notes taken by the defendants for part of the premium—that for the smallest amount and payable in the shortest time omitting the provision, which is carefully inserted in the other, of "said policy being agreed to be subject to forfeiture, and to become void in case of nonpayment of interest and principal of this note in compliance with the terms thereof"—accords with the construction that nonpayment of the first note was not intended to have the effect of avoiding the policy.

The refusal of the assured to pay that note after it had become due, accompanied by the statement that "he would not have anything more to do with the company, and abandoned the whole thing," does not appear to have been assented to by the company; for the company continued to hold the notes, and the assured to hold the policy.

The defendants, having admitted the death of the assured and due notice and proof thereof, and having failed to show that the policy was forfeited, canceled, or in any way avoided or determined before his death, are liable to his administratrix in this action.

Judgment for the plaintiff.

THOMPSON v. INSURANCE CO.

(104 U. S. 252.)

Supreme Court of the United States. Oct., 1881.

Error to the circuit court of the United States for the Southern district of Alabama.

This was an action on a policy of insurance for $5,000, issued by the Knickerbocker Life Insurance Company, the defendant in error, on the life of John Y. Thompson, for the benefit of his wife, Ruth E. Thompson, the plaintiff in error. The policy bore date Jan. 24, 1870, and was to continue during his life, in consideration of an annual premium of $410.-20, payable on or before the twenty-fourth day of January in every year. He died Nov. 3, 1874. The complaint was in the usual form, setting forth the contract contained in the policy, his death, and the performance of the conditions of the policy by him and the plaintiff. The company pleaded the general issue, and two special pleas, which set up in substance the same defence. The second plea, after setting forth the provisions of the policy for the payment of the annual premium, proceeds as follows:

"Under said policy an annual credit or loan of a portion of said premium was provided for, and said policy also contained a condition or proviso that the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or that the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein.

"The defendant further says that the said annual premium was not paid on or before the twenty-fourth day of January, A. D. 1874, and thereupon the defendant did give time for the payment of said premium upon the condition named in the note hereinafter mentioned, and for the payment of said premium did take certain promissory notes of said Thompson, one of which was as follows:

"$109. New York, Jan'y 24th, 1874.

"Nine months after date, without grace, I promise to pay to the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

"No. 2334 was an error, No. 2331 being intended."

It then avers that the note was not paid when it became due, Oct. 24, 1874, and that by reason thereof the policy became void and of no effect before the death of the assured.

To these pleas four replications were filed, numbered 2, 3, 4, and 5, as follows:

"2d. That the said policy of insurance was renewed by said defendant on the twenty-fourth day of January, 1874, and continued in force until Jan. 24, 1875. That the payment of said note at maturity was not a condition precedent as alleged. That the said Thompson had the money in hand, was ready and willing and intended to pay said note, but that before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died on the third day of November, 1874; that during all this time he was mentally and physically incapable of attending to his business, or knowing of and performing his obligations, and was non compos mentis; that the existence of said note was not known to the plaintiff.

"3d. That it was, and had been for many years before, and on the day said note fell due, the uniform usage and custom of said defendant in such cases to give notice of the day of payment to its policy-holders; such is and was the uniform usage and custom with all insurance companies, and the said defendant had in all cases adopted and acted on said usage, and in all its dealings with said Thompson had adhered to said usage, and gave notice of the day when such payments fell due; yet said defendant in this case failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the city of Mobile, and was sick. Plaintiff avers that said Thompson was ready and willing to pay, had said notice been served as in previous cases, but acting on said usage he was deceived by want of said notice, and that the plaintiff had no notice of the existence of said note, or when the same fell due, wherefore and whereby said note was not paid.

"4th. That on the twenty-fourth day of January, 1874, said policy was renewed and entered in full force for one year, to wit, until Jan. 24, 1875. That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out on said note; that by said agreement said policy was not to become void on the non-payment of the note alone at maturity as alleged in said plea, but was to become void at the instance and election of said defendant, and plaintiff avers that said defendant did not elect to cancel said policy or take any steps to avoid it or give any notice of such intention during the life of said John Y. Thompson, or since, and still holds said note against said estate of said Thompson.

"5th. And for further replication to the first and second special pleas by said defendant pleaded, plaintiff says that it was the general usage and custom adopted by said defendants, and practised by them before and after the making of said note, not to demand punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit, for thirty days thereafter, and the said defendants had repeated-

ly so done with said Thompson and others, and they led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived, and said note not paid, and he did rely on them for such notice."

Demurrers to these replications were sustained by the court. The case was then tried upon the plea of the general issue. On the rejection of evidence at the trial, the same questions presented by the replications were raised. Exceptions were taken in due form and preserved on the record.

There was a judgment for the defendant. The plaintiff thereupon sued out this writ of error.

J. Hubley Ashton and Thomas N. McCartney, for plaintiff in error. Fletcher P. Cuppy and Thomas H. Herndon, contra.

Mr. Justice BRADLEY, after stating the facts, delivered the opinion of the court.

The questions presented for review in this case arise on the rulings of the court below on the demurrers of the defendant.

It appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity.

The replications do not pretend that the note given for premium, which became due on the twenty-fourth day of October, 1874, was ever paid, or that payment thereof was ever tendered, either during the life of Thompson or after his death; but it is contended that such payment was not necessary in order to avoid the forfeiture claimed by the defendant.

First, it is contended that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture; and for this reference is made to the case of Insurance Co. v. French, 30 Ohio St. 240. But, in that case, no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity.

Beside this general answer the plaintiff set up, in her replications, various excuses for not paying the note in question, which are relied on for avoiding the forfeiture of the policy.

In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the third day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of Klein v. Insurance Co., supra, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premiums is material in this contract, as was decided in the case of Insurance Co. v. Statham, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all.

The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. Insurance Co. v. Eggleston, 96 U. S. 572, is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

The fourth replication sets up a parol agreement of defendant made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant,

which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void. We did hold, in Eggleston's Case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

The last replication sets up and declares that it was the usage and custom of the defendants, practised by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of "leniency." It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public.

But a fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all.

Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come up to the line of any of the previous cases referred to, in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely.

Judgment affirmed.

KLEIN v. INSURANCE CO.

(104 U. S. 88.)

Supreme Court of the United States. Oct., 1881.

Appeal from the circuit court of the United States for the Northern district of Illinois.

The facts are stated in the opinion of the court.

Hiram Barber, Jr., for the appellant. Francis H. Kales, contra.

Mr. Justice WOODS delivered the opinion of the court.

On Sept. 1, 1866, a policy of insurance was issued by the New York Life Insurance Company upon the life of Frederick W. Klein, in the sum of $5,000, payable to his wife, Caroline Klein, within sixty days after his death and due notice and proof thereof.

The policy is in the usual form. The consideration for its issue was the payment to the company by Caroline Klein of an annual premium of $173, in semi-annual instalments of $86.50 each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein.

The policy contains the following provision: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that . . . in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof, with any interest that may be due thereon, then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual instalment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871.

The agent of the company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept any sum less than the amount of the insurance, and on the company then insisting upon the absolute forfeiture of the policy, according to its terms, she filed this bill.

She therein alleges as the ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness of which he died; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that she failed to pay it because she was ignorant of the existence of the policy and of its terms.

The prayer of the bill is as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Frederick W. Klein in the non-payment of said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of $5,000," &c.

The answer of the company denies its liability upon the policy of insurance, and insists that the contract ceased and determined by reason of the non-payment of the premium due March 1, 1871, and denies the equity of the bill.

The bill was dismissed upon final hearing. The cause was then brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill is sustained by the evidence, the question is presented whether, upon the facts, the appellant was entitled to the relief prayed for.

In Insurance Co. v. Statham, 93 U. S. 24, it was held by this court, Mr. Justice Bradley delivering its opinion, that a life insurance policy "is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

But, in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.

We cannot accede to the view of the appellant. Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. Sloman v. Walter, 1 Brown, Ch. 418; Sanders v. Pope, 12 Ves. 282; Davis v. West, Id. 475; Skinner v. Dayton, 2 Johns. Ch. 526.

But in every such case the test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made.

In Rose v. Rose, Amb. 331, 332, Lord Hard-

wicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a day certain; against forfeitures of copyholds: but they are all cases where the court can do it with safety to the other party; for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve."

A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.

Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons.

It was said in Insurance Co. v. Statham, supra, that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company."

If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. Wheeler v. Insurance Co., 82 N. Y. 543. See, also, the opinion of Judge Gholson, in Robert v. Insurance Co., 1 Disn. (Ohio) 355.

It might as well undertake to release the assured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and assured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium.

The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. He also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the assured has from loss consequent on the risks assumed by him.

Neither has any such right.

The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the insurance company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was ner agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by her to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the circuit court is right, and should be affirmed.

CARPENTER v. CENTENNIAL LIFE ASS'N.

(27 N. W. 456, 68 Iowa, 453.)

Supreme Court of Iowa. April 6, 1886.

Appeal from circuit court, Des Moines county.

This is an action in chancery on a policy of insurance upon the life of Henry L. Carpenter. Plaintiff is his widow, and prays that defendant may be required to make assessments upon holders of its policies to pay the amount insured upon the life of her deceased husband, as provided for in the policy. The defendant, as a defense to the action, alleges that when the assured died he had made default in the payment of an assessment which, under a condition of the policy, rendered it void. The cause was tried upon an agreed statement of facts, and a decree was entered dismissing plaintiff's petition. She now appeals to this court.

Stow, Hammond & Day, for appellant. Newman & Blake, for appellee.

BECK, J. 1. The agreed statement of facts upon which the case was tried is in the following language: "(1) The plaintiff was the wife of Henry L. Carpenter at the date of his death. (2) On the twenty-second day of May, 1883, the defendant association issued the policy declared upon, insuring the life of Henry L. Carpenter. (3) The insured, in his life-time, had not been liable to pay any assessments or dues, except the $5 dues which fell due December 1, 1883. (4) The plaintiff had no knowledge of the conditions of said insurance, or that the dues became delinquent December 1, 1883, until after the burial of the insured, December 9, 1883. (5) In the fall of 1883 the said Henry L. Carpenter was taken sick, and on the twelfth day of November, 1883, he went to bed with typhoid fever, and after the seventeenth or eighteenth of November, 1883, he had no conscious understanding of anything whatever, because of his delirious condition. (6) The life insured expired on the eighth day of December, 1883. (7) During the last illness of the said insured his business, mail, and correspondence were kept from him by direction of his physician, but plaintiff at once forwarded the dues after she discovered, on December 9, 1883, that they were delinquent; and the defendant refused to receive the same, claiming that the policy had lapsed for non-payment of said annual dues on or before December 1, 1883. (8) The policy was in custody of the assured continually from its date to the time of his death, and the date when said annual dues are payable is therein fixed and definitely named. (9) The notice sent by the defendant, reminding him that, by the conditions of his policy, his annual dues of five dollars were due and payable December 1, 1883, was duly mailed to the assured on the fifteenth of November, 1883, properly addressed, directed, and forwarded, and reached said assured in due course of mail, about November 17, 1883, but for the reasons heretoforth set forth he never saw it or knew of its receipt. (10) Proof of loss was duly made December 22, 1883, and demand that an assessment be made as provided in the policy sued on, and the company declined and refused to make the same for the sole reason that said policy was void and had lapsed by the failure to pay the annual dues of five dollars on or before December 1, 1883. (11) No person other than the plaintiff is interested in the subject-matter of this action."

2. Counsel for plaintiff insists that the obligation of the assured to pay the assessment was a condition subsequent, the non-performance of which was excused by the unconsciousness and delirium of the assured, which is to be regarded as the act of God. It is urged by counsel that as it became impossible for the assured to pay his insurance by reason of the visitation of God, the policy did not become forfeit.

3. It is a familiar rule that when the performance of a contract becomes impossible by the act of God, the obligor is excused, and his rights under the contract are not forfeited. We presume that the rule contemplates cases of absolute impossibility to perform contracts; as in the case of the destruction of property which the obligor undertook to deliver, as the closing of a river with ice upon which the obligor undertook to sail a vessel to be delivered at a port situated on the river. In such cases the obligors could not have performed the conditions of the contract, nor could they have been performed for the obligors by others. Neither could the obligors, by the exercise of foresight and care, have provided against the effects of the act of God, which destroyed the subject of the contract or the sole means of its performance. But there was no such impossibility of performing the contract in this case. It is true it was impossible for the assured at the time required therein to perform it; but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the policy before her husband's death does not change the case. Prudence and care on the part of assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time therein prescribed. We reach the conclusion that the facts of the case do not constitute grounds for excusing the non-performance of the contract of the assured, and do not present a case of impossibility of performance caused by the act of God. Our conclusions are supported by the following cases: Klein v. Insurance Co., 104 U. S. 88; Thompson v. Insurance

Co., Id. 252; Wheeler v. Insurance Co., 82 N. Y. 543. Other cases tending in the same direction could be cited.

4. Counsel for plaintiff cite many cases wherein it is held that the non-performance of contracts may be excused by the act of God, rendering performance impossible, but these facts distinguish them from the case at bar. They cite other cases, wherein it is held that performance is excused by reason of the act of the government rendering performance impossible, and probably others which hold that performance will be excused when it becomes unlawful; but it is obvious that these decisions are not applicable to the case before us, and do not serve to elucidate the principles upon which it should be decided.

It is our opinion that the judgment of the circuit court ought to be affirmed.

LANTZ v. VERMONT LIFE INS. CO.

(21 Atl. 80, 139 Pa. St. 546.)

Supreme Court of Pennsylvania. Jan. 26, 1891.

Appeal from court of common pleas, Philadelphia county.

Rudolph M. Schick, for appellant. *Adelbert E. Stockwell*, for appellee.

PAXSON, C. J. This was an action on a policy issued by the defendant company, insuring the life of Simeon B. Lantz, for the benefit of his wife, Evalina B. Lantz, the plaintiff below. The policy stipulated that the premiums should be paid quarterly, on the 19th days of February, May, August, and November in each year; that if the said premiums should not be paid on the days named, and in the life-time of the assured, the policy should cease and determine; that the acceptance of a premium after maturity should not be deemed or construed as a waiver, or as any evidence of an agreement to waive the payment of any future premiums at the time the same shall, by the terms of the policy, become payable; and that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts or waive forfeitures. Upon the trial below it was among the admitted facts of the case that the premiums falling due in May, August, and November, 1887, were not paid at maturity, but were paid after maturity, and accepted by the company; that the premium due on February 19, 1888, was not paid at maturity; that on March 2, 1888, a brother of the insured, who was also a policyholder, called on the general agent of the company in Philadelphia, and informed the latter that Simeon B. Lantz would be down on March 6th to pay his premium, and was told that he, the agent, did not make out his monthly report until the 10th of the month, and that if the premium was paid by the 9th it would be all right. So far there is no dispute. But Mr. Lantz, the witness, testified that there was no condition annexed to the promise to receive the money, while Mr. Ryer, the agent, testified that he said he would receive the money, provided the insured was in his usual health at the time; that he would have to be satisfied upon this point either by a health certificate, or by seeing the insured personally, and that in the mean time the latter was carrying the risk himself. This question of fact was submitted to the jury, and they have found there was no condition annexed to the promise. We must, therefore, treat the case upon this basis. It may simplify the discussion somewhat to note the following admission of the learned counsel for the company, to be found on page 12, of his paper-book: "It was admitted on the trial that the insured had paid three prior premiums after maturity, which had been received by the defendant; and also that the manager was in the habit of, and practically had authority to, receive premiums and deliver renewal receipts after maturity, provided that the insured was at the time of the payment in good health. This was as far as the testimony went. There was no evidence which, even the plaintiff pretends, goes to show that the agent had authority, or has ever acted beyond this, or that the company had ever known of or ratified such agreement; and it was further admitted, that, if Simeon B. Lantz, the insured in this case, had on March 9th been alive and in good health, and had tendered payment of the premium, it would have been received." Simeon B. Lantz, the insured, was in good health on March 2d, but was taken ill on the next day, and died on March 6th. The above admission disposes of any question as to the authority of the general agent to receive overdue premiums. But we must stop where the admission ends, unless a further or greater authority is to be found in the evidence. In order to establish an authority to receive an overdue premium after the death of the insured, one of two things must be shown, viz.: (*a*) An express authority to do so, conferred upon him by the company; or (*b*) such a course of dealing on the part of the company, by ratifying or recognizing such acts of the agent, as would justify persons dealing with said company in assuming that he possessed such authority. There is not a word in the testimony to sustain either of these propositions. All that it shows was the receipt of overdue premiums on three occasions. But the insured was in full life and health at the time. The case of the plaintiff, if sustained at all, must rest upon the promise of the agent to receive the premium up to the 9th day of March. This promise, as before observed, the jury have found to be an unconditional one. This I understand to mean that the money would be received as late as the 9th of March, without regard to the health of the insured, or even his death prior to that time. It remains to consider the legal effect of such promise.

The first question which logically suggests itself is, what was the legal effect upon the *status* of the policy by the default or failure to pay the premium due on the 19th of February? Did it continue to bind the company and protect the insured thereafter? And, if so, how long did it remain in force? Was it for a week, a month, or a year? I know of no instance in which a policy was held to be in force after such a default, unless in pursuance of a contract made between the company and the insured contemporaneous with the insurance, or during the life of the policy. In Helme v. Insurance Co., 61 Pa. St. 107, the plaintiff offered to prove that it is the custom among insurance companies to receive premiums if tendered at any time within 30 days of the time they fall due, provided the insured is in usual health, and that this is the custom among companies issuing policies stipulating that non-payments of premiums at the day shall be a forfeiture. This offer was rejected by the court below, and the rejection was held to be error, Chief Justice THOMPSON saying: "It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer." The grounds of this decision are obvious. While a custom which has grown into a law may not be heard, as a general rule, to affect the

terms of a statute nor a contract to the extent of enlarging or abridging the force of it, yet it may interpret either. Rapp v. Palmer, 3 Watts, 178. The chief justice gives a number of examples of the application of this principle; among others, the familiar instance of the days of grace on commercial paper. By the custom of merchants, so universal as to have grown into law, such paper is not due until three days after it purports to be due; or, rather, the remedy is suspended during that period. It was not alleged that any such custom existed in this case. There was not even an offer to show it, much less proof to support it. Did the fact that the company upon three prior occasions accepted the premium from the insured after maturity, the insured being in good health at the time, continue the policy in force after the default on the 19th of February? I know of no authority for such a proposition, and none has been called to our attention. It was at most a mere personal indulgence, a matter of grace on the part of the company, and all that can be claimed for it is that it may have led the insured to believe that, if he again neglected to pay on the day, the money would be accepted if paid shortly thereafter, provided no change had occurred in his condition of health. The law upon this subject is so clearly stated by Mr. Justice BRADLEY in Thompson v. Insurance Co., 104 U. S. 252, that I need make no apology for quoting it at length: "The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to-wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff himself calls it, an act of leniency. It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise an insurance company could never waive a forfeiture on an occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and to the public." The consequence of a default in the payment of the premium is defined in the policy itself. It declares that, if not paid on the days named, and in the lifetime of the insured, the policy should "cease and determine." By this I understand that it is suspended, it ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. This term is often used, and, I think, inaccurately, in such cases; nor is the policy void in the general sense of that term. It is voidable at the election of the company, and that election can be exercised without notice to the assured, for the reason that the policy itself is notice that his rights cease with the non-payment of the premium. As to him it is a dead policy. It is true it may be restored to life by the subsequent payment of the premium, and its acceptance by the company. This, however, is a new contract by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy. Want v. Blunt, 12 East, 183. I do not understand it to be contended that, had the assured died between the 19th of February and the 2d of March, there could have been a recovery on this policy. It seems almost a work of supererogation to cite authorities for so plain a proposition, and I will refer to but few, out of an abundance. In Insurance Co. v. Rosenberger, 84 Pa. St. 373, which was a case of fire insurance, our Brother STERRETT, after saying that the default suspended the protection of the policy, continued: "Upon the payment of the assessment the policy would have been revived in its full vigor; but it was never paid, or even tendered, until after the fire, and as delinquent policy-holders they had no right to maintain the action without showing that the default was either waived or excused by the company. There is no evidence of waiver, nor do we think there is any evidence to excuse the default. There was considerable testimony showing that great indulgence was extended to delinquent members, and that the company was accustomed to receive assessments long after they were due; but this is entirely consistent with the fact that, while the default continued, the protection of the policy was suspended." In Insurance Co. v. Rought, 97 Pa. St. 415, it was said by Mr. Justice MERCUR: "It is well settled, if a member of a mutual insurance company is in default in the payment of an assessment upon his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default;" citing Hummel's Appeal, 78 Pa. St. 320; Insurance Co. v. Buckley, 83 Pa. St. 293; Insurance Co. v. Rosenberger, 84 Pa. St. 373; Insurance Co. v. Cochran, 88 Pa. St. 230. It is true these were cases of fire insurance companies, but the principle is equally applicable to a case of life insurance. This we think sufficient to show

that no recovery could have been had upon this policy had the assured died between the date of the maturity of the premium and the promise of the agent to accept the premium on the 9th of March. Regarding that as a promise to accept the premium even in the case of the previous death of the assured, we are led to inquire, in the first place, what authority had the agent to make such a promise? The condition of the policy is explicit that the premium must be paid "in the life-time of the insured." Had the agent the authority to waive this condition? The policy not only declared that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts, or waive forfeitures, but a notice to the same effect was printed on the back of each renewal receipt given to Mr. Lantz. It was not alleged that the president and secretary, acting together or singly, had ever waived this condition in the policy, or that they, or either of them, had given authority to the agent to waive it in this or any other instance. No course of dealing was shown on the part of the company by which the grant of such authority to the agent could be implied. There was not even an attempt to prove that the company or its agent had ever received an overdue premium after the death of the assured. There is nothing within the four corners of this record to show that the agent had authority, express or implied, to waive this condition? What right had the assured to suppose, with this condition in the very front of his policy, that the agent would receive his overdue premium after his death?

We are not without authority upon this point. The leading case is Want v. Blunt, 12 East, 183. The following statement of the facts is condensed from the opinion of Lord ELLENBOROUGH. The policy provided for the payment of quarterly premiums on March 25th, June 24th, September 29th, and 20th of December during the life of the said W. W. Want, or within such time after those days, respectively, as is or shall be allowed for that purpose by the rules of the said society. It was provided by the rules of the society that if any member neglected to pay the quarterly premiums for 15 days after the same become due, the policy will be void. This provision was attached to the policy. The quarterly payments were all paid at maturity until the one that came due on December 20th, which was not paid, and Want died on December 25th; and on December 27th, 2 days after his death, but within the 15 days, his executors tendered the payment of the premium, which was refused. The court sustained the refusal, Lord ELLENBOROUGH saying, *inter alia*: "This is a contract of assurance, and must be construed according to the meaning of the parties as expressed in the deed or policy. * * * The risk insured against is his death, and the premium is a quarterly payment, to be made by him to the society during his life. The duration of the insurance is so long as he shall continue to make those quarterly payments; but the insurance is not to be void if he pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. * * * The covenant on the defendant to pay the wife's annuity after Want's death is: 'If Want shall pay, or cause to be paid, the quarterly premium on every quarter day during the life of Want, or within such time after as shall be allowed by the rules of the society for that purpose;' in construing which sentence, the expression, 'during the life of Want,' must be understood as applying to and carried on to the latter part of the sentence, and is the same as if the words 'during the life' had been repeated after the words 'within such time after,' *i. e.*, or 'within such time after, during the life.' * * * For these reasons we are of opinion that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy, and that on the true construction of the policy and rules of the society, the insurance could not be continued beyond the expiration of the quarter, which ended on the 20th of December, by a tender of the premium by his executors after his death, though within fifteen days after the quarter day, so as to include within the policy the period of his death." In Simpson v. Insurance Co., 2 C. B. (N. S.) 257, the words of the policy were: "Provided he, the said insured, on or before * * * pay or cause to be paid to the defendant the annual premium;" and on this point the court said: "The policy was to continue, provided he, the insured, paid the premium within the twenty-one days; and this, we think, did not give the executors the right to pay it after his death." To the same point is Pritchard v. Society, 3 C. B. (N. S.) 622; Insurance Co. v. Ruse, 8 Ga. 534. The rule laid down in Want v. Blunt, supra, appears to have been followed in all subsequent cases where the same point arose. If there has been any departure it has not been called to our attention. If, however, we are wrong in this, if we regard the condition in the policy that the premium must be paid in the life-time of the insured, as of no effect, or, if effective, that it has been waived, there is another reason why the company was not bound to receive the premium after the death of the assured. I have endeavored to show that by the failure to pay the premium, the policy lapsed, or was suspended, on the 19th of February. With the policy in this condition, the plaintiff proved, as already stated, an unconditional promise on the part of the agent of the company to accept the premium up to the 9th of March. In the ordinary case of the payment of an overdue premium, as all the authorities show, the policy does not bind between the default and the payment. The plaintiff claims that this case does not come within the rule; that the promise enlarged the time of payment, precisely as if March 9th had been the period stipulated in the policy; and that from the time the promise was made until the time it was to be fulfilled the policy was in full force. But if, as I have at least endeavored to show, the policy did not bind between the default and the promise, what occurred on the 2d day of March to change the situa-

tion of the parties and restore this dead policy to life? Was it the payment of the premium? The premium was not paid. Was it a promise to pay it? There was no such promise. There was nothing but the bare promise of the agent to accept the premium if paid by the 9th of March. Had it been paid by the assured prior to that date, and accepted by the company, the policy undoubtedly would have been restored to life. This would result, not by virtue of the promise of the agent, but from the acceptance of the premium as a consideration for the renewal. It would have been a new assurance under the old policy. The mere promise of the agent, made after the default had occurred, to receive the premium up to March 9th, was a *nudum pactum*. It was not a contract because there were no contracting parties. The assured gave nothing, promised nothing. A lapsed policy can only be restored to life, so far as the assured is concerned, by the actual payment and acceptance of the premium, or a contract based upon a sufficient consideration. What consideration did the company receive for carrying this risk from the 19th of February until the 9th of March? Had the insured lived until the latter date, and then refused or neglected to pay his premium, he would have had the benefit of an insurance on his life during said period without paying a dollar of consideration. For, as before stated, he did not give anything, nor did he promise anything. It was optional with him to pay. The company could not have enforced it against him had he declined. There is no provision in the policy which covers such a case. If the insured does not pay, the policy drops, and the contract relation ceases.

Marvin v. Insurance Co., 85 N. Y. 282, is so exactly like the case in hand upon the facts that a reference to it will not be out of place. In that case one Milton B. Marvin had a policy of $3,000 on his life, payable to his wife in case of his death. The premium due on the 13th of April was unpaid. On the 27th of April, Hinkle, the agent of the company, told the assured that if he paid the premium the next morning, the 28th, he, the agent, would receive the same. Hinkle went to the house of the assured the next day, and there found him lying sick upon his bed, and, on being offered the overdue premium by the assured, declined to receive it at that time, because the assured was then sick, but told him to keep the money, and when he got well, he, Hinkle, would receive it, and keep the policy alive. The assured never did recover from his sickness, the premium was not paid, and the company notified the assured that it would hold itself absolved from the contract by reason thereof. The assured died in the following September. Under this state of facts it was held there could be no recovery upon the policy, the court below saying: "We think the plaintiff was properly nonsuited. As we understand the law as laid down by the court of last resort in such cases, in order to a valid extension of the time for the payment of a premium upon a life-policy after the time of payment has gone by, there must be some valid consideration for the extension or waiver of the condition of payment, or there must be something said by or on behalf of the insurance company, while the party bound to make the payment has still time and opportunity for so doing, by which the insured is induced to believe the condition is waived, or that strict compliance will not be insisted on. This introduces an element of estoppel in the case. In such a case it would be unjust to allow the insurance company to repudiate the agreement, and to insist that, because of the non-payment of the premium punctually, which omission had been induced or countenanced by its own act, it should be absolved from the performance of its part of the contract." This case was affirmed in the court of errors and appeals in an opinion by FINCH, J., principally upon the ground that, even if Hinkle was the general agent of the company, he had no authority to waive the condition as to payment, the clause in the policy containing a condition similar in this respect to that in the policy in this case. For this reason the court did not deem it necessary to express an opinion upon the ground upon which the court below rested the case, viz., the want of consideration for the promise, but said expressly: "It must not be inferred that we deem the ground of the decision below incorrect." This case is valuable for the further reason that it shows very clearly the ground of the distinction between a promise to extend the time of payment made before the time of such payment and one made after the default. In the former instance the assured may have relied upon the promise, and allowed the time to slip by, whereas, without such promise, he might have procured the money and paid the premium. Hence the cases hold that the company, having misled the assured to his harm, are estopped from alleging a default because of non-payment on the day. But where a promise is made after the default the assured has not been misled or injured in any manner. He has allowed his policy to lapse by his own neglect. It can only be restored by the consent of the company, and he has no reason to suppose that if he dies before the matter is perfected by the payment and acceptance of the premium the company will pay as in the case of a live policy.

In nearly every case cited to show the authority of an agent to bind the company, by a promise made after a default to pay the premium, the decision of the court was rested upon the ground of estoppel, a principle which I do not think has any application to the case in hand. In Dean v. Insurance Co., 62 N. Y. 642, the agreement to extend the time was not only made before the premium became due, but the company had actually received the notes of the assured for the payment of three-fourths of the premium. This not only introduced the element of estoppel, but the notes received constituted a valid consideration for the waiver of punctual payment. In Homer v. Insurance Co., 67 N. Y. 478, the agreement extending the time of payment was also made before the premium fell due, and thus the policy-holder was prevented from paying the premium

on the day it became due by the terms of the policy. In Tennant v. Insurance Co., 31 Fed. Rep. 322, the credit was extended while the policy was in full force. In Church v. Insurance Co., 66 N. Y. 222, the dealings were between the assured and the home office, and no question was involved as to the authority of the agent. The court held there was evidence to go to the jury that a credit was intended, inasmuch as it showed a prior dealing with the assured for many years, and that he was in the habit of getting policies without paying for them at the time. In Insurance Co. v. Norton, 96 U. S. 234, there is an expression by Mr. Justice BRADLEY which indicates that he did not see any difference between a promise to extend the time of the payment of the premium, made before the default, and a promise made after such default. In this case, however, there was not only a promise made to pay, but this was followed up by an actual tender of the premium, and a refusal by the company of such tender. This presents an entirely different state of facts from the case I am discussing, and Mr. Justice BRADLEY'S remarks must be taken in connection with the particular facts to which he was referring. In Insurance Co. v. Eggleson, 96 U. S. 572, the question was whether the assured was excused for not paying his premium at maturity. This clearly appears from the concluding portion of the opinion of Mr. Justice BRADLEY. It is as follows: "The insured, residing in the state of Mississippi, had always dealt with agents of the company, located either in his own state, or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such agent, and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office. It had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of the fact, at least such was the finding of the jury from the evidence." Insurance Co. v. Doster, 106 U. S. 30, 1 Sup. Ct. Rep. 18, is somewhat similar as to its facts. The assured was entitled to a dividend on the business of the company, which was set apart to the insured in part discharge of his premium. The company failed to notify him of the amount, and it was the cause of the delay in the payment. In Insurance Co. v. Block, 109 Pa. St. 535, 1 Atl. Rep. 523, the premium had been paid, and the question was whether it had been paid to the proper person. In Insurance Co. v. Hoover, 113 Pa. St. 591, 8 Atl. Rep. 163, which was the case of a payment of the premium on a fire policy after maturity, there was a course of dealing by which the agent gave the assured a credit in his accounts, and became himself the debtor of the company therefor. This clearly appears from the following extract from the opinion of Mr. Justice STERRETT: "On the trial, evidence was received tending to show that Fredrick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him from the persons to whom the policies were issued or not; that he made the persons or firms to whom he delivered policies his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same; and that the bills for premiums were generally rendered some time during the month after the insurance was effected." I have not, of course, reviewed all the authorities cited; I have considered the most important. To review them all would protract this opinion to such a length that no one would probably read it. No Pennsylvania case was cited which is in serious conflict with the views above expressed, nor have I been able to find one after a careful examination of the digests. It is possible I may, in the press of business, have overlooked some such case. We have little leisure to search for cases that are not cited. But I regard the overwhelming weight of authority, both in this state and elsewhere, to be in accord with the principles above stated; moreover, I believe them to be sustained by the sounder reason. Under the circumstances, we think it was error for the learned judge below to charge the jury as follows: "Therefore I think the question arises, and it is for you to say, in this case, whether this general superintendent, residing here in Philadelphia, with his principal in Vermont, and in a constant habit of doing this very thing, because we find a number of receipts where he did receive the money subsequent to the time fixed, and it is testified to in this case that he certainly agreed to do it, and had done it in the case of Mr. Lantz, his brother, so that, if the rule was to be enforced as it is written, he would have no right to do this thing which he had been in the habit of doing, and that therefore it is a question for you to say whether he had any authority; whether the company, having permitted him to do this thing constantly, had not authorized him —the secretary and president had not authorized him—to perform the acts that he was doing." See first assignment. The "thing" which the agent had done and which the company had ratified was the acceptance in three instances of overdue premiums from the assured, he being in full life at the time. Authority beyond this could not be inferred from any act of the company or its agent. It was not denied—indeed, it was expressly admitted —that, had the assured tendered the premium during his life-time, it would have been accepted, and the policy reinstated. No inference can be properly drawn from this, however, that the com-

pany would receive the premium after the death of the assured. The learned judge failed to note the difference between the renewal of a lapsed policy by the actual payment and acceptance of the premium and a mere attempt to renew it without any consideration moving from the assured to the company. The one is a completed transaction, and therefore binding; the other is uncompleted, and does not even amount to a contract. The same error runs through the charge. The assignments are all sustained. We think there should have been a binding instruction in favor of the defendant.

Judgment reversed.

PHOENIX MUT. LIFE INS. CO. v. RADDIN.

(7 Sup. Ct. 500, 120 U. S. 183.)

Supreme Court of the United States. Jan. 31, 1887.

In error to the circuit court of the United States for the district of Massachusetts.

Action on life insurance policy Plaintiff had judgment below.

M. F. Dickinson, Jr., for plaintiff in error. R. M. Morse, Jr., and Wm. M. Richardson, for defendant in error.

GRAY, J. This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25, 1872, the material parts of which were as follows: "This policy of assurance witnesseth that the Phœnix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, state of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life. This policy is issued and accepted by the assured upon the following express conditions and agreements," namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application was signed by Sewell Raddin, both for his son and for himself, and contained 29 printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"(10) Is the party addicted to the habitual use of spirituous liquors or opium?	No.
"(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy.	$10,000, Equitable Life Assurance Society.
"(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon?	Yes.

"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 this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue, or fraudulent answers, any suppression of facts, or should the applicant become as to habits, so far different from condition now represented to be in as to make the risk more than ordinarily hazardous, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon."

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Insurance Society for $10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of $10,000, whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society, and to the New York Life Insurance Company, for additional insurance upon the son's life, each of which had been declined. The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule—First, that the answer to question 28 was untrue, and therefore no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore he could not recover; and, third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know, and the plaintiff was bound to communicate." But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that, if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that, if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question." The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested, and to the rulings aforesaid, present the principal question in the case.

The rules of law which govern the decision

of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. Moulor v. Insurance Co., 111 U. S. 335, 4 Sup. Ct. 466; Campbell v. Insurance Co., 98 Mass. 381; Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Jeffries v. Life Ins. Co., 22 Wall. 47; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Insurance Co., L. R. 9 Q. B. 328; Edington v. Insurance Co., 77 N. Y. 564; Id., 100 N. Y. 536, 3 N. E. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. Assurance Co., 29 Law J. C. P. (N. S.) 160, affirming s. c., 6 C. B. (N. S.) 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. Insurance Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949; Hall v. People's Ins. Co., 6 Gray, 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176; Insurance Co. v. Mahone, 56 Miss. 180; Carson v. Insurance Co., 43 N. J. Law, 300, 44 N. J. Law, 210; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Insurance Co., 7 Allen, 51. But if to the same question he merely answers that the property is incumbered without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Insurance Co., 1 Allen, 63.

In the contract before us the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer. But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object,—the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the

omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of Assurance Co. v. Mansel, 11 Ch. Div. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions,—the first whether a proposal had been made at any other office, and, if so, where; the second whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000, at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete, and therefore untrue. As applied to the first question, it disclosed only some, and not all, of the proposals which had in fact been made; and, as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions. For these reasons, our conclusion upon this branch of the case is that there was no error of which the company had a right to complain, either in the refusals to rule, or in the rulings made.

Another defense relied on at the trial was that after the issue of the policy Charles E. Raddin became, as to habits of using spirituous liquors, so far different from the condition he was represented to be in at the time of the application as to make the risk more than ordinarily hazardous, and thus to render the policy null and void. The bill of exceptions, after showing that in support of this defense the defendant introduced evidence, which it is now unnecessary to state, because the exception to its admission was abandoned at the argument, contains this statement: "In rebuttal of the foregoing defense of change of habits on the part of the assured after the issuing of the policy, the plaintiff not only denied the fact, but offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy. Evidence to the contrary was introduced by the defendant, and the questions of change of habits, knowledge thereof by the company, notice to Sewell Raddin, receipt of premium after knowledge, and waiver, were all submitted to the jury."

The whole charge to the jury is made part of the bill of exceptions, in accordance with a practice which this court for more than half a century has emphatically condemned, and has by repeated decisions, as well as by express rule, constantly endeavored to suppress. As long ago as 1822, Mr. Justice Story, speaking for the whole court, said: "The charge is spread in extenso upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the case." Evans v. Eaton, 7 Wheat. 356, 426, 427. Opinions to the same effect have been delivered in many later cases. Carver v. Jackson, 4 Pet. 1, 80, 81; Ex parte Crane, 5 Pet. 190; Conard v. Insurance Co., 6 Pet. 262, 280; Magniac v. Thompson, 7 Pet. 348, 390; Gregg v. Sayre, 8 Pet. 244, 251; Stimpson v. Railroad Co., 3 How. 553; Zeller v. Eckert, 4 How. 289, 297; U. S. v. Rindskopf, 105 U. S. 418. And in 1832 this court adopted a rule which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the circuit and district courts should not allow any bill of exceptions containing the charge of the court at large to the jury in trials at common law, upon any ground of exception to the whole of such charge, but also "that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court." Rule 38 of 1832, 6 Pet. 4, and 1 How. 34; Rule 4 of 1858 and 1884, 21 How. 6, 108 U. S. 574, and 3 Sup. Ct. 5.

The disregard of this rule has caused the principal embarrassment in dealing with the question now under consideration.

The substance of the instructions to the jury on this part of the case was as follows: The judge directed the jury that if they should find that the assured was addicted to the habitual use of spirituous liquors at the date of the policy, or his habits afterwards changed in this respect so as to make the

risk more than ordinarily hazardous, they would consider whether there had been a waiver on the part of the insurance company. The judge then told the jury that the plaintiff not only claimed that any misrepresentation as to the habits of the assured, or failure to inform the company of a change in those habits, had been waived by the company by accepting payment of a premium on or about April 25, 1881, after it had knowledge of the habits of the assured, or of the change in those habits, but further claimed that mere silence of the company, after knowledge of such change in habits, was a waiver of the violation of the provision of the policy; and the judge did charge the jury upon both the supposed grounds of waiver, instructing them that if the defendaut had knowledge of the change in the habits of the assured before receiving the premium of April 25, 1881, the acceptance of that premium would be a waiver, which would estop the company to set up that the policy was forfeited for a breach of that provision; and further instructing them that if the company, having knowledge of the change in the habits of the assured, did not give notice to the plaintiff of that change, and he was prejudiced in any way by the failure of the company to give such a notice, and by reason of this silence of the company did any act, or omitted to do any act, which prejudiced him, there was a like waiver and estoppel on the part of the company.

The bill of exceptions, after setting out the charge of the court, proceeds as follows: "To so much of the foregoing instructions as related to notice and waiver the defendant excepted, and asked the court to instruct the jury (1) that no notice of the cancellation of the policy or termination of the risk was necessary, if the jury find the fact to be that the habits of the assured had so far changed from the condition represented to be in as to make the risk more than ordinarily hazardous; (2) that even if any notice were necessary at all, under any circumstances, until the company had completed its investigations, if the company acted in good faith and with reasonable dispatch, they were not bound to give the notice; also that the receipt of the last premium, April 25, 1881, pending such investigations, would not amount to a waiver, especially if a much larger sum was tendered back when full knowledge was had by the company. The court refused these requests, and the defendant excepted thereto."

But the bill of exceptions does not state what the investigations and the tender were which are mentioned in the second request for instructions, or at what time or for what purpose either was made; nor does it show that any evidence had been introduced of prejudice to the plaintiff in consequence of the defendant's silence, or any other evidence upon the question of waiver, except that already mentioned, namely, that "the plaintiff offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy," and that "evidence to the contrary was introduced by the defendant." It does not, therefore, appear that the instructions requested, or the instructions given, except so far as they related to the effect of accepting payment of the last premium with previous knowledge of the habits of the assured, had any application to the case on trial. Except as just mentioned, the bill of exceptions is in the same condition as that of which Mr. Justice Miller, delivering a former judgment of this court, said: "There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of the reference to it in the charge of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical, and wholly unwarranted by any testimony before the jury." Worthington v. Mason, 101 U. S. 149, 151.

It follows that the only question upon the instructions of the court to the jury which is open to the defendant on this bill of exceptions is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. Insurance Co. v. Wolff, 95 U. S. 326; Wing v. Harvey, 5 De Gex, M. & G. 265; Frost v. Insurance Co., 5 Denio, 154; Bevin v. Insurance Co., 23 Conn. 244; Insurance Co. v. Slockbower, 26 Pa. St. 199; Viele v. Insurance Co., 26 Iowa, 9; Hodsdon v. Insurance Co., 97 Mass. 144.

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of $152.10, and of an annual premium of $304.20, while the policy showed the consideration to be the representations made in the application as well as payment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract, is the quid pro quo; that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then, and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such. Judgment affirmed.

WHITE v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(39 N. E. 771, 163 Mass. 108.)

Supreme Judicial Court of Massachusetts. Essex. Feb. 28, 1895.

Exceptions from superior court, Essex county; Edgar J. Sherman, Judge.

Action by Bridget L. White against the Provident Savings Life Assurance Society of New York on a policy of insurance. There was a verdict for defendant, and plaintiff excepts. Verdict set aside, and a new trial ordered.

J. F. Quinn and H. P. Moulton, for plaintiff. William H. Moody and Joseph H. Pearl, for defendant.

BARKER, J. The most important question raised by the report is as to the effect of St. 1887, c. 214, § 21, now, by the Massachusetts insurance act of 1894, re-enacted as St. 1894, c. 522, § 21. The question is, in substance, whether the provisions of that section include in the word "misrepresentation" statements which in insurance law are classed as "warranties," because expressly said to be warranties by the language of the parties, or whether the section deals only with statements which are representations, and not with technical warranties. The ruling of the trial court went upon the theory that the section did not affect statements which were said in the policy and the application to be warranties, but only misrepresentations as to matters which were the subject of representations as distinguished from warranties. The section, as it stood in St. 1887, c. 214, § 21, was in these words: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss;" and the language of St. 1894, c. 522, § 21, is the same. This language is broader than that of Pub. St. c. 119, § 181, which applied only to misrepresentations made in obtaining or securing policies of fire insurance and of life insurance, and which was in these words: "No oral or written misrepresentation made in obtaining or securing a policy of fire or life insurance shall be deemed material, or defeat or avoid the policy, or prevent its attaching unless such misrepresentation is made with actual intent to deceive or unless the matter misrepresented increases the risk of loss." The broader language of the section, as it is found in the general insurance act of 1887, was clearly designed to extend the rule, which up to that time dealt only with misrepresentations affecting policies of fire insurance and of life insurance, and to apply it to misrepresentations made in the negotiation of any contract or policy of insurance of whatever kind. Pub. St. c. 119, § 181, is merely a re-enactment identical in language with St. 1878, c. 157, § 1, which as to life insurance was a wholly new provision. There was, however, a previously enacted statute containing the form of fire insurance policies, providing that the conditions of the insurance should be stated in the body of the policy, and that neither the application of the insured nor the by-laws of the company should be considered as a warranty or a part of the contract, except so far as incorporated in full into the policy, and appearing on its face before the signatures of the officers of the company. This was St. 1864, c. 196, which took the place of and repealed St. 1861, c. 152, which seems to have been the earliest statute dealing with the form of fire insurance policies, and which provided that in all insurance against loss by fire the conditions of the insurance should be stated in the body of the policy, and that neither the application nor the by-laws, as such, should be considered as a warranty or part of the contract. The provisions of Pub. St. c. 119, § 181, were substantially re-enacted in the general insurance act of 1887 and in that of 1894. See St. 1887, c. 214, § 59; St. 1894, c. 522, § 59. Besides the statutes already noted, there are also the several enactments, beginning in the year 1873, establishing a standard form for policies of fire insurance. These are St. 1873, c. 331, with the amendatory act (St. 1880, c. 175; St. 1881, c. 166), repealing the two acts last cited, and prescribing a new standard form of policy; and Pub. St. c. 119, § 139; St. 1887, c. 214, § 60; and St. 1894, c. 522, § 60,—the last three being substantially re-enactments, continuing in force the provisions of St. 1881, c. 166. In the standard form of policy given in St. 1873, c. 331, is this clause: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the assured;" and the same clause is in the standard form given in St. 1881, c. 166, and in Pub. St. c. 119, § 139; in St. 1887, c. 214, § 60; and in St. 1894, c. 522, § 60. The provisions of St. 1887, c. 214, § 21, are thus seen to be part of a system of legislation, beginning in the year 1861, and then applied only to fire insurance, in which the legislature has dealt with the subject of statements on the part of the assured affecting contracts of insurance, and which, before the question now raised for decision arose, had been made to apply to all statements made in the negotiation of contracts and policies of insurance of whatever kind. St. 1878, c. 157, does not appear to have been enacted in consequence of any recommendation by the insurance department, nor has any construction been given to that statute or to Pub. St. c. 119, § 181; St. 1887, c. 214, § 21; or St. 1894, c. 522, § 21—by that department, or by this court, except so far

as St. 1887, c. 214, § 21, has been dealt with in the case of Ring v. Assurance Co., 145 Mass. 426, 14 N. E. 525, and in that of Durkee v. Insurance Co., 159 Mass. 514, 34 N. E. 1133. The case last cited has no bearing upon the present question, nor is that question governed by the decision of Ring v. Assurance Co. The statutes above referred to show a general intention on the part of the legislature to make, in lieu of the rules which spring from the doctrines held in the law of insurance as to technical warranties and representations, a statute rule by which to determine the effect upon the contract of all statements on the part of the assured, and also the effect of by-laws and similar matters which it might otherwise be contended would avoid or modify the contract.

The distinction in insurance law between "warranties" and "representations" is said by Baron Parke in Anderson v. Fitzgerald, 4 H. L. Cas. 484, 496, to have been laid down by Lord Mansfield. In Pawson v. Watson, Cowp. 785, decided in the year 1778, Lord Mansfield said: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition, which makes a part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. * * * Nothing tantamount will do or answer the purpose. It must be strictly performed, as being part of the agreement. * * * So that there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent." And in De Hahn v. Hartley, 1 Term R. 343, decided in 1786, he said: "There is a material distinction between a 'warranty' and a 'representation.' A representation may be equitably and substantially answered; but a warranty must be strictly complied with. * * * A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." And, in the same case, Ashhurst, J., says: "The very meaning of a 'warranty' is to preclude all questions whether it has been substantially complied with; it must be literally so." These doctrines of the law of insurance have long been recognized in our decisions, and their effect was fully pointed out by this court before the enactment of St. 1878, c. 157. See Houghton v. Insurance Co., 8 Metc. (Mass.) 114, 120; Campbell v. Insurance Co., 98 Mass. 381, 389, 401.

It is easy to see how an insurer by multiplying immaterial statements to be made by the insured, and giving to them, by the wording of the policy, the technical character of warranties, can, in the absence of any statute provision upon the subject, place the assured in a position in which it will be difficult, if not impossible, for him, although he has acted in good faith, to recover upon his contract, because of some inaccurate statement on his part. If he is held to have warranted the truth of a statement, its exact and literal truth is a necessary condition of his right to recover, however immaterial the statement may be, and however honest may have been his conduct. In the opinion of a majority of the court, it was the intention of the legislature by St. 1878, c. 157, to change this rule to some extent, and to enact in place of it one which should hold the contract valid unless the misstatement, if made in the negotiation of the contract, was made with an actual intent to deceive, or unless the misstatement was of a matter which actually increased the risk of loss; and this with reference to statements which may be said by the parties to be warranties as well as those which were only representations. Such was already the law as to statements not technical warranties. As to mere representations, the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court, it speaks in terms neither of warranties nor of representations, technically so called, but deals with all misrepresentations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called "warranties" by the parties no less than if they are mere "representations." And the same construction must, in the opinion of a majority of the court, be given to Pub. St. c. 119, § 181, and to St. 1887, c. 214, § 21, which was in force when the policy sued on was written.

It is not necessary at present to consider whether the statute would have any effect if an immaterial statement declared by the application to be a warranty, instead of, as in the present case, being referred to in the policy, and thus brought into it by such reference only, were independently written out at length in the policy itself, and thus there declared to be a warranty upon the exact truth of which the policy was conditioned and founded. The statements upon the falsity of which the defendant relies in this case are not incorporated into the policy except by reference to the application. The declaration of the applicant warranting the answers to be true was in his application made in the negotiation of his policy, and was within the operation of the statute. In the opinion of a majority of the court, it was not taken out of the operation of the statute by the reference to the application

in the policy, that it was "in consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which are a part of this contract." In the trial of the present case a different view of the effect of the statute was held by the presiding judge, who ruled that, because the statements of the assured were warranties, the provisions of St. 1887, c. 214, § 21, did not apply. The plaintiff's exception to this ruling was well taken, and because the ruling was wrong the verdict for the defendant must be set aside, and a new trial ordered. We all agree that the ruling was correct; that the assured was attended by a physician, within the meaning of the question, "When and by what physician were you last attended, and for what complaint?" If he went to the office of a physician, told him that he had coughed and spit blood, desired him to make a physical examination, to which he submitted, receiving a prescription, and paying for the services of the physician, and subsequently calling again at the physician's office, and consulting him professionally, and paying him a fee, the circumstances recited show that the assured was under the care and treatment of the physician for a complaint, and was as really attended by the physician as if the latter had seen the assured at his home. Verdict set aside, and a new trial ordered.

CHAMBERS v. NORTHWESTERN MUT. LIFE INS. CO.

(67 N. W. 367.)

Supreme Court of Minnesota. May 25, 1896.

Appeal from district court, Washington county; W. C. Williston, Judge.

Action by George W. Chambers, administrator, against the Northwestern Mutual Life Insurance Company. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Edmund S. Durment, for appellant. Clapp & McCartney, for respondent.

MITCHELL, J. This was an action on a policy of insurance on the life of plaintiff's intestate. The complaint alleged the issuing of the policy, the death of the insured, the furnishing of proofs of loss, and the refusal of the defendant to pay; also, generally, that the insured and the plaintiff had each fulfilled all the conditions of the policy. The policy, which was attached to the complaint, provided that the insured's application was made a part of the policy; also, that "if any fraudulent representation or statement shall be made in the application, * * * then and in every such case the policy shall be null and void." The application, which was introduced in evidence, contained numerous questions to the applicant and his answers thereto. All of these related to then existing or past facts. It also contained an agreement, signed by the applicant, that all the statements and answers written on the application, including those made to the medical examiner, are warranted to be true, and to be full and fair answers to the questions, without evasion or concealment, and are offered to the company as a consideration for the contract of insurance. Defendant, in its answer, admitted the issuing of the policy, the death of the insured, the furnishing of proofs of death, and a refusal on its part to pay, but, except as thus admitted, denied all the allegations of the complaint. It then alleged that the answers to the following questions in the application were false and untrue: "Have you ever had disease of the heart? Ans. No. Do you use malt or spirituous beverages? Ans. No. Have you always been temperate? Ans. Yes. Is there anything, or has there ever been anything, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? Ans. No." And that by reason of said false and fraudulent representations, and each of them, said policy or contract of insurance is null and void. The assignments of error are very numerous, but most of them can be disposed of very briefly.

1. After a careful examination of the entire record, we are satisfied that there was no abuse of discretion on part of the trial court in refusing defendant's application for a continuance, for a postponement of the trial, for leave to amend its answer, or for a new trial on the ground of accident and surprise. To fully state our reasons for this conclusion would require an extended review of the facts as disclosed by the record, which time and space will not permit, and which would be of no particular value as a precedent.

2. The next question is, was the burden on the plaintiff to allege and prove the truth of the answers to the questions contained in the application, or was it upon the defendant to allege and prove their falsity? Defendant's contention is that because, if any of these answers were false, the policy would be void ab initio, therefore they were conditions precedent, and hence, according to a familiar rule, the burden was on the plaintiff to allege and prove that they were true. The law is so well settled otherwise that it would hardly seem to require discussion. For the purposes of this case it is immaterial whether these answers are to be deemed warranties or mere representations, for the rule of pleading and proof would be the same in either case. Hence we shall assume, most favorably to the defendant, that the answers are warranties. A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so provides, if there is a breach of a warranty, the policy is void ab initio. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties. Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ignorant as to which of his numerous answers would be assailed as false. The number of questions in these applications is usually very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on part of the

beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no hardship to require of the insurer, if he believes that any of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. It would be superfluous to cite authorities on this subject; but, to the point that these warranties are not conditions precedent, in the legal sense of the term, we refer to Redman v. Insurance Co., 49 Wis. 431, 4 N. W. 591; and, for a forcible statement of the practical reasons for the rule, to Insurance Co. v. Ewing, 92 U. S. 377. The dictum in Price v. Insurance Co., 17 Minn. 497 (Gil. 473), that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured, was, we think, inadvertent, and cannot be adhered to. We therefore hold that it was no part of plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false.

3. Upon the trial the only substantial evidence produced by defendant tending to prove the falsity of any of the answers in the application related to those in response to the questions whether the applicant used malt or spirituous beverages and whether he had always been temperate. The only assignments of error not disposed of by what has been already said are those relating to the rulings of the court in the admission of evidence, and to its instructions to the jury upon the issue of the truth or falsity of the answers to these questions. The testimony of Dr. Clark, referred to in the tenth assignment of error, does not seem to have been relevant to any issue in the case; but it was harmless, and its admission, if error, was without prejudice. The testimony of Durant, referred to in the eleventh, twelfth, and thirteenth assignments of error, as to the business habits, pursuits, and associations of the insured, at and prior to the date of the application, had a legitimate and direct bearing upon the question whether he was temperate or intemperate. The defendant had very fully cross-examined the witness Welch as to all facts within his knowledge as to the habits of the deceased, and there was no error in excluding the questions, referred to in the fifteenth and sixteenth assignments of error, as to whether the deceased looked as if he had been full or drinking, and whether the witness believed that he was sobering up, on a certain occasion previously testified to. The question (referred to in the sixteenth assignment of error) put to the plaintiff, when called in rebuttal, was properly excluded, as not being proper cross-examination.

The court instructed the jury that the question, "Do you use malt or spirituous beverages?" was to be construed as referring to a customary and habitual use, and not to a single or occasional act of use; also, that the word "temperate" was to be taken in its ordinary sense, and not as meaning total abstinence,—and refused defendant's requests to instruct the jury that if the deceased, at the time he made the application for the insurance, used malt or spirituous beverages, even though only occasionally, and in small quantities, or if he used such beverages at all, or if, prior to the date of the application, he had drank such beverages to excess even once, then plaintiff could not recover. But the court did instruct the jury that if, prior to the issuing of the policy, the deceased had been in the habit, periodically and frequently, of using spirituous and malt liquors to excess, or to such an extent as tended to shorten his life, then his answer to the last question was false; also, that before the plaintiff could recover, it must appear from the evidence that the deceased was always temperate before making the application for the insurance; also, that if any one of the answers alleged to be untrue were in fact untrue, the plaintiff could not recover, although all the others were true. The charge of the court was sufficiently favorable to the defendant. In fact, as respects the burden of proof, it was too favorable. The questions, "Do you use malt or spirituous beverages?" and "Have you always been temperate?" referred to the applicant's habits, and not to exceptional and occasional acts; and the word "temperate" suggests moderation, refraining from excessive or injurious use, and not total abstinence. May, Ins. § 299; Beach, Ins. § 436, and cases cited. Whether the applicant had always been temperate, and whether he used malt or spirituous beverages, within these definitions of the terms, were, under the evidence, questions for the jury.

Order affirmed.

ARMOUR v. TRANSATLANTIC FIRE INS. CO.

(90 N. Y. 450.)

Court of Appeals of New York. Dec., 1882.

Action on a policy of fire insurance. The facts are stated in the opinion. Judgment for defendant.

D. M. Porter, for appellant. Lewis Sanders, for respondent.

RAPALLO, J. The court at the trial dismissed the complaint in this action on the defendant's evidence, and refused the plaintiffs' request to submit the questions of fact in the case to the jury. The only questions for our consideration are whether the facts alleged on the part of the defendant were, or either of them was, sufficient to defeat the plaintiffs' claim to recover, and so clearly proved by conclusive or uncontroverted evidence as to justify the court in withdrawing the case from the consideration of the jury. The action was upon a policy of insurance issued by the defendant upon a warehouse of the plaintiffs in the city of Chicago, which was partially destroyed by fire upon the 25th of January, 1879. The warehouse consisted of three sections, and the amount of insurance on one of the sections covered by the plaintiffs' policy was $3,000. The loss on that section was about $14,000, and the total insurance thereon about $17,000. The amount insured on all three sections was $38,000, exclusive of defendant's policy at the time of the loss. The pro rata share of loss claimed from the defendant was $2,440.

The defendant set up three defenses: First. That the policy was issued upon a misrepresentation of the plaintiffs, through their agent, that the rate of insurance in Chicago on the premises insured was, at the date of their application for said insurance, seventy-five cents for every $100 insured for the term of one year; whereas in fact the rate of insurance upon the property in Chicago at the time of plaintiff's application was $1.25 for every $100 insured. Second. That, at the time of the application for said insurance, the plaintiffs, by their agent, represented that the property sought to be insured was already insured in the amount of $200,000 in various other companies, of which a list was furnished; that the defendant relied upon the truth of said representation in making the policy and accepting the risk, but that in fact none of the property mentioned in said policy was insured in the amount of $200,000, or to exceed the sum of $50,000. Third. That, according to the terms of the policy, the defendant was entitled to terminate it on giving notice to the plaintiffs, and that it did so elect to terminate it before the alleged loss by fire.

The plaintiffs, after making the prima facie proof necessary to maintain the action on their part, rested their case, and the defendant introduced evidence in support of the defenses set up by it. We have carefully examined the evidence, and think there may be some question as to whether the allegation of misrepresentation as to the rate of insurance should not have been submitted to the jury; but the defense of misrepresentation as to the amount of insurance on the property was, we think, so fully established that a verdict in favor of the plaintiffs could not have been sustained.

The insurance was effected by the plaintiffs through Mr. Cameron of Chicago, who, with the knowledge of the plaintiffs, employed a broker in New York named Dickinson, to obtain the insurance in that city. The whole warehouse was divided into three separate sections—A, B and C. Mr. Cameron was authorized by the plaintiffs to procure $80,000 upon the entire building, viz., $20,000 on section A, and $30,000 each on sections B and C. The plaintiffs at that time had over $200,000 of insurance upon the stock of merchandise in the warehouse, but had no insurance upon the building. Mr. Cameron by letter instructed Mr. Dickinson in New York as to the situation of the building, and informed him that he probably should request him by telegraph to effect the insurance in question, in New York, on the building; that $200,000 had already been placed on the three sections at three-quarters per cent. Mr. Cameron, in his testimony taken on commission, says that in employing that language he referred to the insurance on the stock in the warehouse, and did not intend to refer to the insurance on the building. But nevertheless the letter which conveyed Mr. Cameron's instructions states distinctly that $200,000 had already been placed in Chicago, on the three sections of the warehouse, and Mr. Dickinson states that he understood that the $200,000 of insurance was upon the warehouse.

Mr. Hoenig, the general manager of the defendant, testifies that when Dickinson applied to the defendant for the policy in question, he stated to him that he already had $200,000 of insurance on the building in Chicago, and that in issuing the policy he acted upon the statement of Mr. Dickinson that the board rate of insurance in Chicago was seventy-five cents on $100, and that there had already been procured insurance on the building to the amount of $200,000. Mr. Dickinson does not contradict this statement, but testifies that he exhibited to Mr. Hoenig the list of companies which he had received from Chicago, stating that they were on the risk, and that he understood that that risk was on the building, and he was not informed that it was on the stock until after the fire. There is consequently no conflict of evidence on that point between these two witnesses.

By the terms of the policy of the defendant other insurance was permitted without notice, and it was provided that losses should be apportioned on the whole sum insured, and it was further provided that any omission to make known every fact material to the risk, or any overvaluation, or any misrepresenta-

tion whatever, either in a written application or otherwise, should avoid the policy. The representation in this case was not fraudulent, and arose from a mistake or misappropriation of the plaintiffs' agent, but, nevertheless, it was a very material representation, and was untrue, the insurance on the entire building being, as appears by the testimony of one of the plaintiffs, only $30,000 at the time of the application to the defendant, and the insurance on the section which was injured only $17,000. Had the insurance been $200,000, the proportion of loss chargeable to the defendant would have been comparatively trifling. The risk was greatly enhanced by the comparatively small amount of insurance actually existing.

On the other branches of the defense, the testimony indicates that the defendant issued the policy to Mr. Dickinson with the express understanding that if the board rate in Chicago was more than three-quarters per cent., the policy should not take effect and should be returned, and that long before the fire, having ascertained that the rate was $1.25, they recalled the policy and demanded its surrender. There is however some slight conflict of evidence in relation to these points, but it is unnecessary to consider them, as we find that the misrepresentation as to the amount of other insurance is so clearly established that a recovery by the plaintiffs could not have been sustained. It is not necessary, in all cases, in order to sustain a defense of misrepresentation in applying for the policy, to show that the misrepresentation was intentionally fraudulent. A misrepresentation is defined by Phillips to be where a party to the contract of insurance, either purposely or through negligence, mistake, or inadvertence, or oversight, misrepresents a fact which he is bound to represent truly (Phil. Ins. § 537), and he lays down the doctrine that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. If the misrepresentation induces the insurer to enter into a contract which he would otherwise have declined, or to take a less premium than he would have demanded had he known the representation to be untrue, the effect as to him is the same if it was made through mistake or inadvertence, as if it had been made with a fraudulent intent, and it avoids the contract. An immaterial misrepresentation, unless in reply to a specific inquiry, or made with a fraudulent intent, and influencing the other party, will not impair the contract. But if the risk is greater than it would have been if the representation had been true, the preponderance of authority is to the effect that it avoids the policy, even though the misrepresentation was honestly made. Phil. Ins. §§ 537–542; Wall v. Insurance Co., 14 Barb. 383.

A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself. Carpenter v. Insurance Co., 1 Story, 57, Fed. Cas. No. 2,428. In this case (which was a case of fire insurance), Story, J., says: "A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design."

The rules as to misrepresentations and concealments, or omissions to state facts material to the risk, are more strict in cases of marine than of fire insurance. But the distinctions are founded on the differences in the character of the property, and the greater facility the insurers possess, of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat, and the distinctions are applied, ordinarily, in cases where the insurer sets up the omission of the insured to state material facts. In those cases there is a difference between the rules applicable to marine insurances and those applicable to fire insurance. But where the defense is a material affirmative misrepresentation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance. See Phil. Ins. § 635 et seq.

Where any doubt exists as to the materiality of the misrepresentation, it is a question of fact for the jury. But in this case it so clearly appears that the amount of risk incurred by the defendant was so much greater than it would have been had the representation as to other insurance been true, that a verdict that the representation was immaterial could not have been sustained. Aside from these considerations however in the present case the parties stipulated in a policy that any misrepresentation whatever, either in a written application or otherwise, should avoid the policy, and the parties, by this agreement, put every material representation on the same footing as a warranty. Burritt v. Insurance Co., 5 Hill, 188. That that is the effect of such an agreement was reaffirmed in this court in Gates v. Insurance Co., 2 N. Y. 49–53.

The judgment should be affirmed.

All concur. Judgment affirmed.

DANIELS et al. v. HUDSON RIVER FIRE INS. CO.

(12 Cush. 416.)

Supreme Judicial Court of Massachusetts. Norfolk. Nov. Term, 1853.

R. Choate and J. J. Clarke, for plaintiff. P. C. Bacon and D. Foster, for defendants.

SHAW, C. J. This is an action of contract, to recover on a policy of insurance, made by the defendant company, for a loss by fire. The insurance was upon the plaintiffs' factory building in Medway, and the machinery and stock. The defendant company have their office and principal place of business at Waterford, N. Y. The policy, for one year, purports to be dated there, and signed by the president and secretary; but the negotiation was had by an agent of the company in Massachusetts, and by the terms of the policy, it was not to be valid unless countersigned by their agent at Worcester, and it was so countersigned and delivered by him. There can be no doubt that this is a contract made in Massachusetts, and to be governed and construed by the laws of this state; for though it was dated in New York and signed by the president and secretary there, yet it took effect, as a contract, from the countersignature and delivery of the policy in Massachusetts. It is to be interpreted according to the laws, and with reference to the usages and the practice of this state, in the same manner with any other Massachusetts policy of insurance against fire.

It came to trial before one of the justices of this court; several exceptions were taken by the defendants to the directions and decisions of the judge. These are now brought before the whole court by bill of exceptions.

1. The defendants, relying upon a violation of the statements in the application, contended that these statements were warranties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterwards ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury, that the statements of the application were not warranties, requiring an exact and literal compliance, but that they were representations; and as such, must have been substantially true and correct as to things done, or existing, at the time the policy was issued, and that so far as they related to the future—to things to be done, and rules and precautions to be observed—they were stipulations, to be fairly and substantially complied with.

The court are of opinion, that looking at the policy and the application, this instruction was correct. There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations. One general rule is, that a warranty must be embraced in the policy itself. If by any words of reference, the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy. In a recent case, it was said that "the proposal or declaration for insurance, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends." Vose v. Insurance Co., 6 Cush. 47. But no rule is laid down in that case, for determining how or in what mode such statements contained in the application, or in answer to interrogatories, shall be embraced or incorporated into the policy, so as to form part thereof.

The difference is most essential, as indicated in the definition of a warranty in the case last cited, and as stated by the counsel for the defendants in the prayer for instruction. 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 a representation, and is untrue, it does not avoid the contract if not wilful, or if not material. To illustrate this; the application, in answer to an interrogatory, is this: "Ashes are taken up and removed in iron hods;" whereas it should turn out in evidence, that ashes were taken up and removed in copper hods; perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not wilful 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. Hence it is, we suppose, that the leaning of all courts is, to hold such a stipulation to be a representation, rather than a warranty, in all cases, where there is any room for construction; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view, in making their contract.

In the present case, the only clause in the policy having any bearing upon this question, is this: "And this policy is 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." Here is no reference whatever to the application or the answers accompanying it; the only reference is to the conditions an-

nexed to the policy. In looking at these conditions, second clause of article 1, the provision is, that "if any person, insuring any building or goods in this office, shall make any misrepresentation or concealment, or, &c.,— mentioning several other cases, all of which would tend to increase the risk,—such insurance shall be void and of no effect."

The terms "misrepresentation" and "concealment" have a known and definite meaning in the law of insurance; and it is that meaning and sense in which we are to presume the parties intended to use them in their contract of insurance, unless there is something to indicate a different intent. "Misrepresentation" is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. "Concealment" is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. "Aliud est celare, aliud tacere." And every such fact, untruly asserted or wrongfully suppressed, must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. If the fact so untruly stated or purposely suppressed is not of this character, it is not a "misrepresentation" or "concealment" within this clause of the conditions annexed to the policy.

But further; the clause in this policy has none of the characteristics of a warranty, because it is not, in its own terms, or by reference to the terms and conditions annexed, an absolute stipulation for the truth of any existing fact, or for the adoption of any precise course of conduct for the future, making the truth of such fact, or a compliance with such stipulation, a condition precedent to the validity of the contract, or the right of the assured to recover on it. The policy is made in reference to the terms and conditions annexed; but these are referred to, not as conditions precedent, but "to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in cases not herein otherwise specially provided for." They are not to control or alter any express provision in the contract, or become parts of the policy; but they are statements in a collateral document, which both parties agree to, as an authoritative exposition of what they both understand as to the facts, on the assumption and truth of which they contract, and the relations in which they stand to each other.

The court are of opinion, therefore, that the statements in this application were not warranties, and could have no greater effect than that of representations, and that the judge was right in giving such instruction to the jury.

2. Another exception was taken to the direction of the judge in regard to the force-pump, which is, that the judge erroneously ruled that the burden of proof was on the defendants, to prove its materiality to the risk, and also, whether it had been complied with or not. This was correct. Whether the answer was responsive to the question or not, it could have only the character of a representation; and, therefore, if the defendants rely either upon the falsity of the representation, or the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact for the jury, in either aspect.

3. With respect to the representation and stipulation that a water-cask should be kept in each room, the presiding judge instructed the jury, that if the plaintiffs established a rule that such water-casks should be kept full, and employed servants to execute such rule, and if, through their negligence at any time, they were not full, such negligence of servants would not avoid the policy.

We understand it to be a well-settled principle in the law of fire insurance, and, indeed, the strong tendency of modern judicial decisions in cases of marine insurance is in the same direction, that the negligence of subordinates, many of whom must often be employed, without much knowledge of them by employers, is one of the perils insured against. In Chandler v. Insurance Co., 3 Cush. 328, the rule is laid down thus: "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitutes no defence." The question there was, whether gross negligence on the part of the assured himself, gross carelessness, equivalent in legal estimation to a wilful intent to burn the building, would be a good defence. It seems difficult to see how an incorporated company, who must act by agents and servants, could otherwise comply with their representations. If, indeed, such servants and agents are habitually or frequently careless in performing their duties, it may become negligence on the part of the employers, whose duty it is to have a reasonable vigilance over them, and employ faithful servants.

4. The next exception turns on the representation that a water-cask was kept in each room, and the admission of evidence tending to show in what sense the parties understood the word "room." This is a

point which seemed most doubtful, and which has had the particular attention of the court.

The question arises upon the representation made in answer to the twenty-fourth interrogatory. It may be remarked, in passing, that there is some discrepancy between the question and answer. Whether designed or not, does not appear. The question is, "Are there casks in each loft constantly supplied with water?" The answer is, "There is in each room, casks of forty-two gallons each kept constantly full." If the plaintiffs intended to conform their answer to the question proposed, then it is manifest, that in their view the word "loft" in the question, and "room" in the answer, would mean the same thing, and the effect of the answer would be, that a cask was kept in each loft. This would raise another question, whether the term "loft" would include the basement story, or only the chambers over the basement the "rooms aloft"? Or, did it mean each story? These considerations are, perhaps, not material, except that they have some tendency to show that the word "room" was used without any very precise or definite meaning. The evidence offered for the purpose of falsifying this representation was, that there was in the basement story a partition, setting off a part for a particular purpose, in which no water-cask was kept,—that in the next story above there was a small apartment partitioned off, in which there was no water-cask; and in the two stories above, the water-casks stood in the entry ways by the doors of the main rooms, and not in the main rooms. If the plaintiffs, in answering the interrogatory as put, intended to say that there is a cask of water kept for each loft, or each story, the jury might well find that the representation was true; if they intended to use the word "room" in a narrower sense, so as to mean more than one apartment, in each loft or story, then it becomes necessary to inquire what was the extent of the word "room" as used in this answer. The word is certainly a familiar one in the English language, and as ordinarily used and construed, as all words must be, by the subject-matter and the context, is not likely to be misunderstood, yet it is not without some considerable varieties of meaning. Apply it to a dwelling-house, and suppose one, in offering a house to be sold or let, should represent that there is a fireplace in every room. Suppose there is a cellar, or an attic, with or without windows, are they rooms? Or suppose a large apartment into which the front door opens, used for the double purpose of an entry, and for a sitting-room in warm weather, and furnished for that purpose; is it a room within the representation that there is a fireplace in it? Or suppose above stairs, one or more small apartments, capable of being used as a closet or clothes-press, or for a bedroom; would the representation be falsified by showing that either of these divisions of the house had no fireplace in it? The language might be somewhat ambiguous, and require aid to ascertain its meaning.

The interpretation of written contracts, indeed, of all written documents, is a question of law for the court; and it is of great importance that the meaning of written evidence should not be altered or varied by parol evidence. But this presupposes that the words are used in their ordinary and normal sense, according to the established rules of the language; but if they are foreign words, or words used in a peculiar, unusual, or technical sense, evidence may be proper to show their meaning, and then it is the province of the court to declare and apply the law, according to the true meaning of the language as thus ascertained. The rule is laid down, in the case of Eaton v. Smith, 20 Pick. 156, thus: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word modified or explained by the usage."

This principle seems to be intelligible enough, but the difficulty in applying it as a practical rule is this: The words severally and as first read seem plain, but like other matters of latent ambiguity, it is when they come to be applied to the subject-matter, that the ambiguity becomes apparent. Then it is, that evidence of usage, or other evidence aliunde, becomes competent and admissible, to show the sense in which the words were used in the particular written paper. It must depend, therefore, much upon the circumstances of each case, and the posture of the evidence already admitted in the trial, whether such evidence alinnde ought to be admitted. In the present case, we are of opinion that there was sufficient uncertainty and ambiguity in the representation in question, to warrant the introduction of evidence of usage, and it was a quesion of fact for the jury to decide, whether, according to the true meaning of the language used, the representation was substantially true, when made, and substantially complied with afterwards.

One other ground was taken by the defendants in this branch of the case, thns: The defendants contended not only that the meaning of the word "room" in the application was a question of law for the court to decide, and also whether there was such a general use of language; but also, that if there were such use of language, it was in-

sufficient, unless it was known and general among insurers, as well as manufacturers. Such a direction, we think, would not have been conformable to the rules of law. The general rule on that subject is, that if any person, or any company, foreign or domestic, shall engage in any branch or department of business, they must be presumed to be acquainted with the rules and usages of such business, to be conversant with the language employed in it, whether strictly technical or not. When, therefore, the defendant company undertook to insure a manufactory in Massachusetts, with the machinery and stock therein, they must be presumed to be acquainted with the structure and arrangement of such building, and the distribution of the apartments within it, with a view to its adaptation to the business to be therein carried on, and with the use of the language employed by the owners, superintendents, and persons employed therein. If, therefore, the language of this representation was understood in a particular manner by manufacturers, according to which understanding the representation was true, the legal presumption is that it was so understood by the insurers, in their contract.

5. Exception was taken to the admission of the witness Adams as an expert; but no sufficient ground has been shown that his admission was erroneous; nor does it appear to us that the questions permitted to be put to him, and the answers he gave to them, for the limited purpose to which they were confined by the instructions given thereon to the jury, are open to exception. Exceptions overruled.

KIMBALL v. AETNA INS. CO.
SAME v. SPRINGFIELD FIRE & MARINE INS. CO.

(9 Allen, 540.)

Supreme Judicial Court of Massachusetts. Essex. Jan. Term, 1865.

Two actions on policies of insurance. The defense was the breach of an oral promise made to procure the insurance, that the premises should be occupied. The judge ruled that such breach constituted no defense. The defendants alleged exceptions.

E. Avery and S. B. Ives, Jr., for plaintiff. J. W. Perry and W. C. Endicott, for defendants.

GRAY, J. The ruling of the judge who presided at the trial was in accordance with the opinion which had been repeatedly expressed by this court in previous cases. Higginson v. Dall, 13 Mass. 99, 100; Whitney v. Haven, Id. 172; Rice v. Insurance Co., 4 Pick. 442, 443; Bryant v. Insurance Co., 22 Pick. 200. That opinion has been ingeniously and elaborately criticised and controverted by learned writers to whose commentaries the defendants have referred; but a careful re-examination has satisfied us that it is founded upon elementary principles of the law of insurance, and supported by the adjudged cases in England and in the United States.

The contract of insurance is a contract to indemnify the owner of certain property against certain risks. This contract is founded upon the representations previously made by the assured to the insurer. The condition and circumstances of the property are within the knowledge of the owner more than of the insurer, and must be truly represented by the former to the latter, in order that he may estimate the risk before entering into the contract. In making this representation, the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter, the minds of the parties never meet, they agree on no subject-matter to which the contract can attach, the contract founded on such misrepresentation never takes effect, the underwriter may treat it as a nullity, and the other party, unless chargeable with fraud, may recover back the premium. If representations, whether oral or written, concerning facts existing when the policy is signed, are false, it never has any existence as a contract, unless it contains in itself terms which expressly, or by necessary implication, waive or supersede the previous representations. If the representations are positive, and not of mere opinion or belief, it matters not whether they are made at or before the time of the execution of the policy, nor whether they are expressed in the present or the future tense, if they relate to what the state of facts is or will be when the policy is executed and the risk of the underwriter begins. If the facts are then materially different from the representations, the whole foundation of the contract fails, the risk does not attach, the policy never becomes a contract between the parties. Representations of facts existing at the time of the execution of the policy need not be inserted in it; for they are not necessary parts of it, but, as is sometimes said, collateral to it. They are its foundation; and if the foundation does not exist, the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract, or to terminate a contract which has once been made; but to show that no contract has ever existed.

The word "representations" has not always been confined in use to representations of facts existing at the time of making the policy; but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called "promissory representations," to distinguish them from those relating to facts, or "affirmative representations." And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract.

The distinction between representation of facts existing when the policy was signed, which, if untrue, would prevent its taking effect as a contract, and representation of what should exist in the future, which would not avoid the policy, if merely false and not fraudulent, was pointed out by Lord Mansfield. In

the leading case of Carter v. Boehm, which was of an insurance of a fort in the East Indies against loss by capture, by a foreign enemy, he laid down the general principles as to concealment or misrepresentation of existing facts, saying, "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement." 3 Burrows, 1909. This last proposition is reported in slightly different language by Sir William Blackstone, thus: "If a concealment happens, without any fraudulent intention, by mistake of the principal or his agent, still the policy is void, because the risk which is run is not that which the underwriter intended." 1 W. Bl. 594. Lord Mansfield in the same opinion repeated the statement that concealment, whether designed, and so fraudulent, or undesigned and materially changing the risk, would have the same effect, saying, "The question therefore must always be, whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation; or a concealment, fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run." 3 Burrows, 1911. In Pawson v. Watson, Cowp. 785, it was represented to Ewer, an underwriter on the Julius Cæsar, that "she mounts twelve guns and twenty men;" but to Watson and others only that she was "a ship of force." There were neither men nor guns on board at the time of the insurance; and at the time of her capture she had less than twelve carriage guns, and less than twenty able men, but so many swivels and boys as to be stronger than if she had had that number. The actions against all the underwriters were tried together, and the only question reserved for the whole court was, "whether the written instructions which were shown to the first underwriter are to be considered as a warranty inserted in the policy, which must be strictly complied with, or as a representation which could only avoid the policy, if fraudulent;" and the court held them to be a representation only. Cowp. 786; 1 Doug. 11, note. But Lord Mansfield, in his report of the trial, said that he was of opinion "that it would be of very dangerous consequence to add a conversation that passed at the time, as part of the written agreement;" "but, secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent." Cowp. 786. And in delivering the opinion of the court, he said of the representation by the assured to Ewer, "There is no fraud in it, because it is a representation only of what in the then state of the ship they thought would be the truth; and in real truth the ship sailed with a larger force;" and that Ewer had "determined whether it should be in the policy or not, by not inserting it himself." Cowp. 789, 790. So in Bize v. Fletcher, 1 Doug. 285, 289; Park, Ins. (7th Ed.) 314, 315, Lord Mansfield held that a representation, not made part of the policy, that the ship should go to China, could not, unless fraudulent, be introduced to limit the policy, which in terms extended to all ports and places beyond the Cape of Good Hope; and a verdict was found for the plaintiff, and acquiesced in. The opinion of Lord Mansfield, that actual fraud was necessary to be proved in order to avoid a policy for a mistake in asserting "what would be the truth" in the future, is brought out still more clearly in a later case of misrepresentation of an existing fact, as to which it was held that if the assured made representations to the underwriter without knowing the truth, he took the risk upon himself, although there was no evidence of actual fraud; and Lord Mansfield pointed out the distinction that in the case of The Julius Cæsar the ship was only fitting out and had no guns or men on board when the insurance was made. Macdowall v. Fraser, 1 Doug. 261.

In Driscol v. Passmore, 1 Bos. & P. 200, in the common bench, no decision was made upon this question. There a vessel being about to sail from Lisbon to Madeira, thence to Saffi, and thence back to Lisbon, insurance on the freight from Saffi to Lisbon was applied for, without success, because of the distant period at which the risk was to begin; but was subsequently made, on a representation of the intended round voyage, and that the ship had arrived at Madeira, and was about to proceed on her voyage immediately. The ship, on her arrival at Madeira, was obliged, by the refusal of the crew to go on to Saffi, to put back to Lisbon, and was thence ordered by the charterer to Saffi, and lost on her way back from Saffi to Lisbon. The only point decided was, that the voyage insured, being from Saffi to Lisbon only, was substantially performed. None of the judges suggested that subsequent non-compliance with an oral representation would defeat the policy. On the contrary, Eyre, C. J., said, "That representation was really true at the time that it was made, and the underwriter was to form his own conclusion of the time when the Timandra would arrive at Saffi. If the insurance was made on a representation which was true at the time, it will be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, will discharge the underwriter. He formed his

judgment of the case, knowing that all was executory, and that an alteration might arise of a kind that might increase his risk, upon the representation made to him to underwrite." And in Weston v. Emes, 1 Taunt. 115, in the same court, the insurers offered to show that before the execution of a policy on goods for a certain voyage "in ship or ships," it was orally agreed that a particular ship should not be included. But the whole court "determined that the evidence could not be admitted, without abandoning in the case of policies the rule of evidence which prevails in all other cases; and that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected. The court also observed that Lord Mansfield says of misrepresentations that they must be of a matter collateral to the contract; but that this was part of the contract."

In Edwards v. Footner, 1 Camp. 530, a week before the policy on the vessel was signed it was represented to the underwriter that she was to sail with two armed ships, and to carry ten guns and twenty-five men. The reporter, after stating this, simply says, "There was no evidence of any conversation upon the subject having passed between the parties, either when the policy was signed, or in the intervening period. In fact, the Fanny sailed by herself, and carried only eight guns and seventeen men." The report does not show whether the ship had or had not sailed when the policy was signed. The only point raised or denied was whether the court could look to the previous conversation, or must be confined to what took place at the time of subscribing the policy; and upon that Lord Ellenborough ruled that the previous conversation "must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured." But he gave no intimation that oral representations, made in good faith, of what should take place during the term of the insurance could be admitted to control the policy. And such a position could hardly be reconciled with the contemporaneous case of Bowden v. Vaughan, 10 East, 415, in which the owner of a cargo, applying for insurance, having represented that the ship would sail in a few days, the same eminent judge submitted to the jury, as the turning point in the case, the question whether the representation was made in good faith, advising them indeed to take into consideration that the owner of the goods had no control of the vessel, but not making that decisive of the case; and the jury having found that it was made in good faith, the court of king's bench gave judgment on the verdict for the plaintiff.

Lord Ellenborough's successor, Lord Tenterden, reaffirmed the distinction between oral representations as to the present, and as to the future condition of the subject insured. An applicant for insurance on a ship represented to the underwriter, at the time of his signing the policy, that she was to carry only so much salt as would put her in ballast trim. The ship was in fact deeply laden with salt, but whether shipped before or after the representation did not appear. Lord Tenterden instructed the jury to find for the defendant if they thought that a material misrepresentation was made as to the quantity then on board, but for the plaintiff if they thought that the representation was respecting the cargo expected to be shipped. The jury found that the misrepresentation was not material, on evidence which was thought sufficient by the full court, who on that ground refused a new trial, without passing upon this point. Flinn v. Headlam, 9 Barn. & C. 693. Upon the trial, within a month after the decision of this case, of an action upon another policy on the same ship, the evidence was similar, and the defence relied on was the misrepresentation that the salt would not exceed the amount necessary for ballast. But Lord Tenterden instructed the jury that the defendant would not be entitled to a verdict unless he satisfied them that there was a fraudulent misrepresentation of the cargo which the ship was to carry; that "the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which is in writing, and cannot be varied by parol." Flinn v. Tobin, Moody & M. 367.

The case perhaps most often cited, as showing that an oral promissory representation may be set up to defeat a written policy, is Dennistoun v. Lillie, 3 Bligh, 202. But an examination of the facts of the case shows that the representation to the underwriters was in no sense promissory, or relating to anything after the execution of the policy. The representation was contained in a letter received and shown to the underwriters in June, which stated that the ship would sail from Nassau on the 1st of May; she had sailed on the 23d of April, and been lost on the 11th of May; so that the representation, as made to the underwriters, was an untrue statement of a past fact. It was so distinctly pleaded, as appears by the report of the same case in 1 Shaw, App. Cas. 23. Lord Eldon so treated it after the argument, stating the question to be "whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk." 3 Bligh, 209. In announcing his final opinion, he omitted the word "past," before "fact," and said, "There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk." 3 Bligh, 210. Yet the report clearly shows that the chancellor was merely reaffirming his original opinion; and used "fact" as past, opposed to "expectation" which was future; and did not intend to speak of anything in the future, which no human being could control, as a fact.

Alsop v. Coit, 12 Mass. 40, falls within the same class. The vessel which was represented to sail with convoy had in fact sailed without convoy, and been captured when the representation was made. Mr. Justice Jackson, delivering the opinion of the court, said, "The underwriter could not suppose, when signing such a policy, that the vessel had sailed two days before the letter was written, and that the frigates which were to protect her were still in port." So in Von Tungeln v. Dubois, 2 Camp. 151; Feise v. Parkinson, 4 Taunt. 640; and Vandenheuvel v. Church, 2 Johns. Cas. 173, note,—the misrepresentations were as to the documents or national character of the ship at the time of the insurance.

In several of the cases cited by Mr. Duer, there was no oral representation whatever. The decision in Steel v. Lacy, 3 Taunt. 290, 298, went upon the ground that, in the absence of all warranty or representation, a ship was bound to carry the documents necessary to establish her national character. In Vandenheuvel v. Insurance Co., 2 Johns. Cas. 127, the ship was warranted American on the face of the policy. In Murray v. Alsop, 3 Johns. Cas. 47, the representation on which the policy issued was in writing, resembling the applications for insurance against fire recently in use in this commonwealth.

The law seems to be settled in New York in accordance with that of England and of Massachusetts. In Vandervoort v. Smith, 2 Caines, 155, it was held that a policy on a vessel "from New York to two ports on the coast of Brazil" could not be controlled by a previous statement of the assured to the underwriter that the ports were only four or five hours' sail apart, although the premium on such a risk would have been less. The case decided in the same year, of Suckley v. Delafield, Id. 222, in which a representation (whether oral or written does not appear) was held to have been substantially complied with, contains no intimation of an opposite rule. In a subsequent case, singularly like those now before us, upon a policy of insurance on a house against loss by fire, the defendants proved that before obtaining the policy the plaintiff used a fireplace in the basement, and, on the defendants refusing for that reason to insure, promised to abandon the use of the fireplace and use a stove instead, but did not keep this promise. The supreme court, without much consideration, citing no cases except Edward v. Footner and Bize v. Fletcher, and without any notice of the difficulty of controlling the performance of a written contract by a previous oral statement, held that the action could not be maintained. Alston v. Insurance Co., 1 Hill, 510. But this judgment was unanimously reversed by the court of errors, in accordance with a very able opinion of Chancellor Walworth. 4 Hill, 329. See, also, Undelock v. Insurance Co., 2 N. Y. 221; Allegre v. Insurance Co., 2 Gill & J. 136. We do not find that Mr. Duer's views have been approved in any court in New York, except in a single instance by one judge of the superior court of the city of New York, while Mr. Duer was a member of that court. Bilbrough v. Insurance Co., 5 Duer, 593.

In the cases now before us, there was no representation that the house was already occupied, and no representation or agreement that it should be occupied the instant the policies took effect. The plaintiff's statement was that "the house would be occupied; that he had a man in view who was going to occupy it." There is nothing to show that this statement was not made in the most perfect good faith. Giving it the strongest possible interpretation against the plaintiff, it was a promise that the house should be occupied within a reasonable time, and the policies attached as soon as they were made, and continued in force until such reasonable time had elapsed. The policies, having once taken effect, cannot be terminated or avoided, in the absence of fraud, by the subsequent breach of an oral agreement made before they were executed. The cases come exactly within the rule laid down by Chief Justice Shaw, and confirmed by the opinion of the whole court, in Bryant v. Insurance Co. "The evidence offered was not admissible for any other purpose than to prove a fraudulent intent on the part of the insured to mislead the defendants and to induce them to take the risk, or to take it at a lower premium than they otherwise would have done; as a representation, not of a fact, but of an intention, it did not avoid the policy, unless made with a fraudulent intent; as it related solely to the employment of the vessel within the time for which she was insured, it was not of an independent or collateral fact affecting the risk, but was embraced in the terms of the contract, and must be considered as absorbed in the contract afterwards formally executed, or as by mutual consent withdrawn and waived by the execution of the policy." 22 Pick. 201.

This subject illustrates the wisdom of the common law in taking for its guides judicial opinions, given after argument, under the responsibility of determining the rights of parties in actual controversies, rather than the theories of scholars and commentators, however learned or acute.

It may be added that the legislature of the commonwealth seem to have assumed the law upon this question to be settled in favor of excluding such evidence as was here offered. Before the policies in suit were made, it was provided by St. 1861, c. 152, that in fire insurance, "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company, as such, shall be considered as a warranty or part of the contract." The legislature can hardly have contemplated that while separate writings should pass for nothing, oral promises might control the policy.

Exceptions overruled.

MILLER v. MUTUAL BEN. LIFE INS. CO.

(31 Iowa, 216.)

Supreme Court of Iowa. June Term, 1871.

Appeal from circuit court, Delaware county.

Adams & Robinson, for appellant. De Witt C. Cram and C. J. Rogers, for appellee.

DAY, C. J. I. The defendant requested the court to give the jury the following instruction, to wit: "It is provided in the policy that it is the true intent and meaning thereof that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, shall be found in any respect untrue, then the policy should be void. If, therefore, you find said declaration in any respect materially untrue, your verdict must be for the defendant."

The court refused this instruction, and gave the following, to wit:

"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 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."

"If an insurance company issues a policy upon a greater risk than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact."

"If you find that James A. Miller made an untrue or fraudulent statement of a fact material to the risk, in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and, after knowing such fact fully, received the application, the premium money and notes, and issued the policy; in which case you should find for the plaintiff."

"A full knowledge of the truth of the alleged misstatements of Miller in the application, communicated to Thornton and Case, or either, was a communication to the company."

The refusing to give the one, and the giving of the other instructions, the defendant assigns as error.

This assignment presents for our consideration this interesting question: "Is an insurance company, transacting business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts at such time done with respect thereto?" Upon this point there is much conflict in the decisions. In the case of Vase v. Insurance Co., 6 Cush. 42, it was held that, where an agent of a life insurance company, who was not authorized to agree for insurance, knew of the falsity of a material representation by an applicant, such knowledge would not prevent the company from insisting upon a discharge in consequence of the false representation.

The same doctrine was recognized in the case of Smith v. Insurance Co., 24 Pa. St. 320. In Mitchell v. Insurance Co., 51 Pa. St. 102, it was held that an agent of an insurance company, whose duty is to take surveys, receive applications for insurance, examine the circumstances of a loss, approve assignments and receive assessments, is not authorized to accept notice of other insurance or waive its consequences.

And the case of Wilson v. Insurance Co., 4 R. I. 141, does not stop with a recognition of the foregoing doctrines, but holds that an agent of an insurance company, empowered merely to receive written applications for insurance, to transmit them to the company, and, if they decide to take the risk, to receive the policy executed by them, and to issue it to the applicant upon receipt from him of the premium, is not the agent of the company for the making of applications; and if employed by the applicant, or permitted to act for him in drawing up the application, is his agent, for whose mistakes of fact committed in the statements or answers to interrogations in the application he is responsible. To the same purport, see Lowell v. Insurance Co., 8 Cush. 127; Forbes v. Insurance Co., 9 Cush. 470; Lee v. Insurance Co., 3 Gray, 583.

In support of the converse doctrine, see Rowley v. Insurance Co., 36 N. Y. 550. In this case the plaintiff stated to the agent, verbally, the facts necessary to meet the requirements of the rules of the company, and, among other things, informed him that the premises were incumbered by mortgage. An application was signed in blank by plaintiff, and given to the agent, he promising to insert, over the signature thus obtained, the particulars thus furnished him, as a basis of the insurance, on his return to his residence. In filling up the application the agent inserted what was not the fact, and in violation of his instructions, that there was no incumbrance on the premises. It was held that he was the agent of the company in filling up the application, and that the company was bound by his acts.

In the case of Masters v. Insurance Co., 11 Barb. 624, it was held that, although the by-laws of an insurance company make the person taking a survey in its behalf the agent of the applicant, still he is the agent of the company also, and it is bound by his acts.

In the case of Septon v. Insurance Co., 9 Barb. 191, it was held that, when a policy of insurance required that in case of any prior existing insurance upon the same property notice thereof shall be given to the company, notice to an agent authorized to make sur-

veys and receive applications for insurance, and to receive the moneys paid by the assured, is sufficient, and that such notice need not be in writing. In the case of McEwen v. Insurance Co., 5 Hill (N. Y.) 101, it was held that notice to the traveling agent of the company, whose business was to solicit insurances, make surveys and receive applications, while actually engaged in preparing an application for a policy, was binding upon the company, although the notice never reached the company; and that notice to an agent, relating to business which he is authorized to transact, and while actually engaged in transacting it, will, in general, operate as notice to the principal. See, also, Rowley v. Insurance Co., *42 N. Y. 559, and Anson v. Insurance Co., 23 Iowa, 84.

To this latter view the judicial mind seems rapidly tending, and it is certainly more in accord with the enlightened and progressive spirit of the age. These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth provided with blanks and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks, it is more in consonance with reason that the loss should be borne by the company than that the assured should be made the victim of the incompetency or the avarice of the agents. More especially is this true in view of the fact that the company has the means of indemnity through the bond of the agent. Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents, and the masses will, in part at least, be relieved from an annoying importunity, which often leads them to procure policies, without the full concurrence of their judgments and in opposition to their best interests.

The business of insurance is rapidly increasing in magnitude and importance, and it is as essential to the companies themselves as to the assured that the rules of law declared applicable to them should be based upon just and equitable principles, and administered in a manner in harmony with the doctrines of an enlightened jurisprudence.

It is quite time that the technical constructions which have pertained with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals.

It follows that. in our opinion, the court did not err in instructing the jury that the defendant was bound by notice communicated to its agents.

II. The court gave the following instruction, to wit: "The language of the policy does not make the statements contained in the application for it matters of warranty, but matters of representation." The defendant excepted to this instruction and assigns the giving of it as error.

A warranty differs from a representation in two essential aspects. First, a warranty constitutes a part of the contract, and it is necessary that it should be exactly and literally complied with; but a representation is collateral to the contract, and it is sufficient if it be equitable and substantially complied with. Second, in case of a warranty the burden of proof is upon the party seeking indemnity to establish a case in all respects in conformity with the terms under which the risk was assumed; but in case of a representation the burden is cast upon the defendant to set forth and prove the collateral facts upon which he relies. 1 Phil. Ins. §§ 669, 754, and Campbell v. Insurance Co., 98 Mass. 389, 390. In the case of Daniels v. Insurance Co., 12 Cush. 416, Shaw, C. J., very clearly and forcibly illustrated the distinction between a warranty and a representation. He said: "The difference" (between a warranty and a representation) "is most essential. 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 an interrogatory is this: 'Ashes are taken up and removed in iron hods,' whereas it should 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 is 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." In the case of Campbell v. Insurance Co., it was said, that "when statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy they do not necessarily become warranties. Their character will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection, or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations

of course will apply. * * * In considering the question whether a statement forming a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties." Citing Daniels v. Insurance Co., 12 Cush. 416, 424; Blood v. Insurance Co., Id. 472; Insurance Co. v. Cotheal, 7 Wend. 72; Forbush v. Insurance Co., 4 Gray, 337, 340.

"The application is in itself collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of representations. They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated, to make it part of the policy, it will not be so treated." Campbell v. Insurance Co., 98 Mass. 391, 392; Snyder v. Loan Co., 13 Wend. 92.

In the case of Daniels v. Insurance Co., Shaw, C. J., having alluded to the fact that a warranty, however immaterial, if untrue, avoids the policy, uses this language: "Hence it is, we suppose, that the leaning of all courts is, to hold such a stipulation to be a representation rather than a warranty, in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract." And the learned chief justice, in the same case, further said: "If by any words of reference the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as makes it in legal effect a part of the policy."

In the case of Campbell v. Insurance Co., the defendant insisted, as in the present case, that certain statements were to be regarded as warranties, and the point decided in the case is so pertinent to the present inquiry, and the reasoning is so clear and forcible, that we feel justified in quoting further from it. The court said: "In every case cited in support of the defendant's position, there was an express reference in the policy, which made the application a part of the contract. The one most relied on, and claimed to be especially applicable to the facts of the present case, is that of Miles v. Insurance Co., 3 Gray, 580. In that case it was declared in the policy itself to be 'expressly understood and agreed to be the true intent and meaning hereof, that if the proposal, answer and declaration made by the assured, and upon the faith of which this agreement is made, shall be found, in any respect, untrue, then and in such case this policy shall be null and void.' In that proposal the assured declare (among other things) that the answers and statements therein made are correct and true, and 'agree that the answers given to the following questions, and the accompanying statements, and this declaration, shall be the basis, and form part of the contract or policy between them and the said company.' Two marked features in that case distinguish it from the present. First, the clause in the policy relates distinctly and exclusively to the paper called 'The Proposal and Declaration.' Second, when the two papers are thus brought together there is a distinct agreement not only that the statements are true and correct, but that they are to form a part of the contract. In the present case the policy contains no reference to any application, nor to any declaration or statement in writing, made or to be made by the assured. The only clause in the policy which can have any bearing upon the question, when disconnected from other provisions of a diverse character, reads as follows, namely: 'Or if the statements made by or on behalf of, or with knowledge of, the said assured to the company, as the basis of, or in the negotiation for, this contract, shall be found, in any respect, untrue, then, and in each of said cases, this policy shall be null and void.' It is clear that this is not a reference to any particular instrument or paper, but it includes any and all statements, whether oral or written. The defendant, however, contends, that a written application having been made in this case, which by its own terms declares the statements therein contained to be made 'as the basis of' the insurance applied for, the policy will attach to that application as containing the statements referred to, and thus constitute an express warranty. We are far from being ready to concede that the reference is sufficiently definite to warrant the bringing of the two papers together for the purpose of giving a construction to the contract. But, even if the application may properly be resorted to for aid in the construction, it contains no agreement and no words to indicate that its statements are to be taken as warranties, nor that they are to form part of the contract."

In the case at bar the proceedings with reference to the proceedings of the policy comprise five papers. The one designated "A" is headed "Particulars Required from Persons Proposing to Effect Assurance on Lives in This Company." That designated "B" is headed, "Questions to be Answered by the Physician of the Party Applying for Insurance." That designated "C" is headed, "Questions to be Answered by the Friend of the Party Applying for Assurance." That designated "D" is headed, "Questions to be Answered by the Agent, if the Applicant is not Previously Known to Him." And the fifth is designated as follows: "Declaration

to be Made and Signed by the Person Proposing to Make an Assurance on the Life of Another." This last-mentioned paper is the one which appears first in the statement of facts, and is signed, "Mary L. Miller, by James A. Miller." To this reference is made in the policy as follows: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void."

It is worthy of note that the declaration is referred to by name, and that to none of the other papers, each of which has a specific designation in the proceedings, is any reference made in the policy. In this respect it differs from the case of Miles v. Insurance Co., before alluded to, in which the policy made direct reference to the proposal, answer and declaration made by the assured, and provided that if they were found in any respect untrue the policy should be null and void.

Applying the principles of the foregoing decisions to the present case, it follows that the statements contained in the declaration can alone be regarded as warranties, and that the answers of Miller to the questions propounded to him are mere representations.

If the instruction of the court had reference to the answers to the printed interrogatories, it was proper. If it had reference to the declaration, it was not error to the prejudice of appellant. The only alleged misstatement, of which complaint is made, is contained in the answer of Miller to the questions asked him. Hence it becomes quite immaterial what construction is placed upon the statements in the declaration.

As the court did not err in giving the foregoing instruction, it follows that the fourth instruction asked by defendant, embodying a doctrine at variance with it, was properly refused.

In the case of Wilkinson v. Insurance Co., 30 Iowa, 119, it was said that, under the terms of the policy in that case, the answers to the questions contained in the application became warranties. That action was against the same company in which the decision of Miles v. Insurance Co., 3 Gray, 580, was rendered, the policies of which, as we have seen, contain provisions differing widely from those now under consideration.

III. The court further instructed the jury as follows: "It is for you to determine the materiality of the alleged misstatements, if any have been proven." This instruction we consider erroneous. The only misstatements complained of are the answers of Miller to the following questions, to wit: "Is the party sober and temperate?" "Has he always been so?" A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since, by making such inquiry, he implies that he considers it so. In all jurisprudence this distinction is recognized. It is particularly applicable to written answers to written inquiries, referred to in a policy. The rule is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if, by making specific inquiry, he implies that he considers a fact to be so, the other party is bound by it as such. 1 Phil. Ins. § 342, and cases cited; also, Campbell v. Insurance Co., 98 Mass. 401. Representations of this kind differ from warranties, in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance,—that is, whether the representation is, in every material respect, true,—is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is, notwithstanding, immaterial. An illustration will make plain the view of the court. Suppose that, in answer to a specific question, the assured states that his age is thirty years. It appears, from the evidence, that his age is a week or a month greater. The question would be a proper one for the jury to say whether the representation, though strictly and technically untrue, was not substantially and materially true. But suppose it appears, from the evidence, that the age of the assured is fifty, instead of thirty, years. It is not the province of the jury to say that the representation, though untrue, is immaterial. As is well said, in the case of Campbell v. Insurance Co., it is not within the province of the jury, under the guise of determining whether the statements of the applicant were materially false or untrue in some particulars material to the risk, to find that diseases and infirmities were not material to be disclosed, which the parties had, by the form of the contract of insurance, and of the contemporaneous written application, conclusively agreed to consider material. See, also, Davenport v. Insurance Co., 6 Cush. 341. We are aware that there are authorities which sustain the instruction of the court, but they seem not to have noticed the distinction here recognized, and are not, in our judgment, so much in accord with sound legal principles as those which support the converse doctrine.

IV. The defendant assigns as error the refusal of the court to give the following instruction, to wit: "The proper evidence of the cause of a disease is the testimony of medical men, whose practice has been such as to enable them to speak as experts. Upon this point you have the testimony of Dr. Staples, who attended Miller in his last sickness, and whose practice for fifteen years qualifies him to speak as an expert as to the cause of Miller's disease. If, therefore, you

believe his opinion to be that the disease of which Miller died was caused by intemperance, from the use of intoxicating liquors,—in other words, if you believe his opinion to be that Miller died of congestion of the lungs and brain, and that such congestion was caused by irritation of the stomach, and that the irritation was caused by the use of intoxicating liquors,—and if you find that his testimony is uncontradicted, then his opinion must prevail."

Upon this branch of the case the court instructed as follows: "The opinion of a physician is competent evidence as to the cause of death." In this action of the court there was no error. There was no testimony contradicting Dr. Staples as to the cause of Miller's death, but there was some testimony tending to impeach him. However slight the effect of this testimony, and however little the consideration to which it was entitled from the jury, still its weight is to be determined by them.

It is not the province of the court by an instruction to withdraw any proper testimony from the jury. Had this instruction been given, its effect might have been to lead the jury to believe that, as there was no other testimony than that of Dr. Staples as to the cause of death, his opinion must prevail, without regard to the testimony introduced for the purpose of impeachment. The instruction given by the court contained the law as to the competency of the opinion of the doctor, and very properly left the weight of this opinion to be determined by the jury.

V. It is claimed that the court erred in giving the following instruction: "The defendant avers that there were certain untrue and fraudulent statements contained in the application by James A. Miller, and insists that only his statements in regard to his health and habits should be inquired into. But, as the contract was based upon the statements of the insured's physician and friend as well as his own, the statements of all three should be considered in determining the question of fraud." This instruction is proper. The answers of the physician and friend constituted as much a part of the proceedings as those of Miller, and were equally entitled to the consideration of the jury.

VI. The giving of the following instruction is assigned as error: "If an insurance company issue a policy upon a risk greater than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact, for this would simply be allowing insurers to commit a deliberate fraud upon the insured." The correctness of this instruction, as an abstract proposition, is conceded. It is said, however, that it assumes that the jury would be justified in finding, from the evidence, that the company had full knowledge that the risk was greater than an ordinary one.

We have before seen that the company is affected by the knowledge of its agents acquired when actively engaged in procuring the application for the policy. The defendant, however, insists that there is nothing in the record which shows that either Case or Thornton had knowledge that Miller's habits had been intemperate.

We think that the testimony of Rogers, as set forth in the statement of this case, tends to establish this fact, and that the question of their knowledge was properly submitted to the jury.

VII. It is claimed that the court erred in instructing the jury as follows: "If you find that Miller's death was produced by other causes, then you should find for the plaintiff on this branch of the case. The policy must be construed strictly against the defendant, and if you find that Miller's death was only contributed to by the intemperate use of liquor, then you must find for the plaintiff on this branch of the case. In order to avoid the policy, the defendant must satisfy you, by a preponderance of evidence, that the sole or paramount cause of Miller's death was caused by the intemperate use of intoxicating liquors." The defendant claims that, "if intemperance shortens life, it is a cause of death, within the meaning of the policy," and that the policy is thereby avoided. It rarely, if ever, happens, that the intemperate use of intoxicating drinks is indulged in for a considerable period without, to some extent, shortening life. The consequences of the construction contended for by the defendant would, therefore, be, that an insurance company which had assured the life of one known to be intemperate, and which had charged a higher rate of insurance in consequence of such fact, could exonerate itself from liability upon the policy by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate or predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote and which the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the mediate cause. Nor is the difficulty in questions of this kind any greater than that which arises in questions of negligence, contributory negligence, and many others which are constantly the subjects of judicial investigation.

That the policy is to be construed strictly against the company, see Catlin v. Insurance Co., 1 Sumn. 434, Fed. Cas. No. 2,522; Wilson v. Insurance Co., 4 R. I. 142.

The instruction given, we think, correctly reflected the law.

VIII. The deposition of the plaintiff was

introduced as follows: "Ten days before my husband died, and when Dr. Staples was first called, he stated that my husband had a severe attack of congestion of the lungs; on the day following he repeated this same language, and stated that I need not be alarmed if my husband was delirious, as congestion of the brain usually accompanied congestion of the lungs; and continued to remark that my husband had done work enough to kill any ordinary man, or, perhaps, two men, and that he had no doubt injured himself by leaning against the desk."

The attention of Dr. Staples was directed, upon the cross-examination, to this conversation, and he stated that he thought he did not make the statements above detailed. The deposition was introduced for the purpose of impeachment.

It is claimed that the statements were mere matters of opinion, and that, with respect to them, the witness cannot be impeached.

The witness, as an expert, testified to matters of opinion, and may be impeached by showing that, upon a former occasion, he had expressed a different opinion. Patchin v. Insurance Co., 23 N. Y. 268; Sanderson v. Nashua, 44 N. H. 492.

IX. Some objections were made upon the trial to the introduction of testimony, which may be briefly considered:

The evidence tending to show that Case and Thornton had knowledge that Miller's previous habits had been intemperate was proper, for the reasons already considered. The evidence showing that the certificates of Rogers and Sprague were incomplete when delivered to the agents was competent for the same reasons. The receipt for premium signed by Thornton as "general agent," constituted a link in the chain of testimony tending to show the extent of Thornton's authority, and, although, alone, it would not establish the extent of his agency, yet, as bearing upon that question, it was properly admitted, and even if erroneously admitted, it was, under the views herein expressed, error without prejudice.

X. The errors considered embrace substantially all those insisted upon in the argument. As the cause must be reversed for the error already noticed, it is not necessary to consider whether the verdict is sustained by sufficient testimony.

For the error of the court in submitting to the jury the materiality of the misstatements alleged to exist in the answer of Miller, the judgment is reversed.

NORWICH FIRE INS. CO v. BOOMER.

(52 Ill. 442.)

Supreme Court of Illinois. Sept. Term, 1869.

Appeal from superior court of Chicago; William A. Porter, Judge.

O. B. Sansum, for appellants. Waite & Clarke, for appellee.

WALKER, J. This was an action of assumpsit, brought by appellee, in the superior court of Chicago, against appellants, on a policy of insurance. The policy was issued and bears date on the third of April, 1867, and covers a frame packing and slaughter house, with the alley or pens attached, known as Boyington, Cash & Wilder's Slaughter and Packing House, in Chicago; also the engine and boiler, machinery and pipes, hoisting machine and belts, and lard rendering tanks, water tanks and cooling vats, all contained in the building, for one year from that date, and insuring appellee against all immediate loss by fire, not exceeding $4,000.

The policy contained several conditions, among which are, first, that the company shall not be liable if the applicant has made any erroneous representations materially affecting the risk; nor for loss if there was any prior or subsequent insurance without the written consent of the company; nor for loss of property owned by any other party, unless such interest is stated in the policy; second, the policy to become vitiated if the insured premises should become vacated by the removal of the owner or occupant for more than twenty days; third, the assured not to recover of the company any greater portion of the loss or damage than the amount insured bears to the whole sum insured on the property. Within the year the property was partly destroyed by fire, and this action was brought to recover for the loss. After the fire, appellee took possession of the portion not destroyed, and sold it, and after deducting expenses, it yielded the sum of $1,070. A trial was had, resulting in a verdict in favor of appellee, for $2,757.56, upon which judgment was rendered by the court.

It appears that appellee, at the time the application was made, by the broker, only held a chattel mortgage on the property insured, and it is urged by appellants that, by failing to disclose the nature of his interest, the policy became void; that he was bound to disclose this as a material fact. and its suppression vitiated the policy. That he was bound to disclose all facts material to the risk, is no doubt true; but, in what respect it could be material that the company should know whether the interest was that of mortgagor or mortgagee, we are at a loss to perceive. It was, no doubt, material that he should have had an insurable interest, but it has, so far as we can find, never been held that the interest of a mortgagee was not of that character. All that he was bound to disclose, unless interrogated, was, that he had an insurable interest, and this he did, and in that the representations of his application are true. He was not asked by the company to state the nature of his title, nor did the terms of the policy require that he should. If the company had deemed it material, they would have propounded the necessary question to learn the fact, and inserted a clause that the policy should be void if the nature of his interest had not been fairly disclosed. Had the question been asked, and appellee had given a false statement in answer, then, it may be, a different question would have been presented.

That the company did not regard it material is clearly shown by the policy itself. We find, in limiting their liability, they say they will not be liable "for loss for property owned by any other party, unless the interest of such party be stated in this policy." From this condition it is apparent they deemed it unnecessary appellee should disclose his own interest. It, by implication, says he need not, and no other inference can be drawn from the language. It, however, discloses the fact that the company did regard it material, where one person insures the property of another, that the assured should state the nature of the interest of the owner in the property. Neither reason, authority, nor the contract of assurance, so far as we can see, required appellee, unless interrogated, to state the nature of his interest in the property insured.

It is again urged that, inasmuch as the mortgagors paid the debt to appellee before the recovery in the court below, and the mortgagee has sustained no loss, he is not entitled to recover. Had appellants paid this loss before the mortgagors paid the debt to appellee, then the question of their right to subrogation would have been presented for consideration; but, inasmuch as appellants had not done so, the questions presented are of a different character. Had appellee applied for the policy, paid the premium, and effected the insurance, and on the occurrence of this fire appellants had paid the loss, they would no doubt have been entitled to subrogation, by an assignment of the mortgage. In such a case, the insurance would be considered as a further security of the debt, and on the familiar principle that a surety who pays the debt may resort to the principal debtor for payment; in such a case the insurer might, no doubt, resort to the mortgagor for payment.

But in this case the mortgagors paid the premium, and obtained the policy, in pursuance to an agreement with the mortgagee before it was effected. The mortgagors procured it as a part of the security they agreed to give appellee for the debt they owed him. It was, then, in equity, their policy, and not appellee's, although in his name. Had the mortgagors paid the premium, and obtained the policy in their names, the question could not have arisen. Then why, when they, in pursuance of their agreement, pay the premium should they not be regarded as the beneficial assured, when they shall have paid the

debt and released the property? In such a case they seem to have strong equitable, as well as legal, claims to pay for the loss, and should be permitted to use the name of the mortgagee to recover. Had they taken this policy in their own names, with the loss payable to appellee, according to his interest, and they had subsequently paid the debt, no one, we presume, would question their right to sue in the name of the mortgagee, and recover for their own use.

We understand it to be the settled law that, when the mortgagor or pledgor insures the property, and a loss occurs, he may recover because he has an insurable interest in the property, and reason and justice require that when he pays the premium, although he insures in the name of the incumbrancer, and he afterwards pays the debt, he should be permitted to recover for loss to the property. And this rule is supported by the authorities. King v. Insurance Co., 7 Cush. 1; Insurance Co. v. Woodbury, 45 Me. 447; Kernochan v. Insurance Co., 17 N. Y. 428. The first of these cases, however, goes further, and holds that the mortgagee may insure, and, in case of loss, may collect his debt and recover on the policy; and the insurer has no right to subrogation. But these latter propositions are not in harmony with the current of the authorities, but the opinion sustains the rule we have announced.

It is again urged that the premises became vacant for more than twenty days, and the policy became void under the condition in the policy. A careful examination of the evidence discloses the fact that the premises were not vacated. Boyington, Cash & Wilder had ceased to manufacture meats and their produce as early, at any rate, as the twenty fifth of March, and the insurance was effected on the third of April following. The property insured was not removed, but it only ceased to be used for manufacturing purposes. No one resided in the property to remove from it, or to vacate it, and a watchman was employed to guard it after the policy was issued, as he had before. In fact, so far as we can see, no change whatever took place, as regards the occupancy of the premises, after the policy was issued. As there were no representations as to its occupancy in the application, no reason is perceived why any forfeiture could be declared because it remained in the same condition until the fire occurred. There was, in fact, no vacation of the property after the policy was issued. It was occupied up till the fire as it was on the day the insurance was effected.

We now come to consider the remaining point urged by appellants; that is, that other insurances were effected by Boyington, Cash & Wilder, without the written consent of appellants. The policy declares that other prior or subsequent insurance on the property therein described shall vacate the policy, unless consent is given by the company, in writing. It appears that other insurance was effected by Boyington, Cash & Wilder, and that consent was given therefor to the amount of $2,500, by the policy itself. But it is not pretended that appellee ever procured any, or that any other policy was issued in his name. But it is claimed that Boyington, Cash & Wilder did obtain other policies to a large amount, and without the written consent of the company. Inasmuch as appellants have not abstracted the evidence upon which they raise this question, we should have supposed they placed no great reliance upon it, had they not urged it with apparent earnestness in their argument.

In the body of the policy we find that other insurance is allowed to the amount of $2,500. And from a careful examination of the record we find that, on the same day this policy was issued, Boyington, Cash & Wilder took a policy from the Albany City Fire Insurance Co. of $2,000, on grease, tallow, and meats, their own, and held for others by them, in trust, &c. contained in their packing house. It will be observed that, although the property insured by this policy may have been in the same building, it was not the same covered by appellee's policy. It was on different property, and hence could, in no wise, affect the validity of the policy in controversy.

It appears, from an agreement between Boyington, Cash & Wilder and appellee, which is set out in the record, that the firm had obtained a policy for $2,500 of the Mutual Security Company. It does not, however, appear that this policy embraced the same property, and unless it did, it could in no way invalidate this policy. We have examined, with some care, the great volume of questions and answers contained in this record, and fail to find any other proof of other insurance on this property. As appellants' counsel has given no reference to the page where such evidence may be found, and after much time spent in a fruitless search for it, we conclude that the record does not contain it.

It then becomes unnecessary to determine whether, as Boyington, Cash & Wilder had effected the insurance in the name of appellee, and paid the premium, and being entitled to receive the insurance money, they would have lost the right by taking other policies contrary to the conditions contained in this. Had it appeared that there were other policies in their name beyond the sum specified in this policy, then that question would have been presented. The judgment of the court below is affirmed.

Judgment affirmed.

BLACKBURN et al. v. VIGORS.

(55 Law J. Q. B. 347.)

Court of Appeal. May 22, 1886.

The Attorney-General (Sir C. Russell) and Cohen, Q. C. (Hollams with them), for appellant. Sir R. Webster and G. Barnes, for respondents.

Solicitors: Hollams, Son & Coward, for appellant. Waltons, Bubb & Johnson, for respondents.

Appeal of the defendant against the judgment of Day, J., at the trial for the amount claimed.

The action was on a policy of reinsurance of the Florida (lost or not lost), dated the 2nd of May, 1884.

The plaintiffs, carrying on business in Glasgow, had insured the Florida from New York to Glasgow for £1,500, through Rose, Murison & Thompson of Glasgow, who were her insurance brokers, and had insured her otherwise elsewhere. On the 30th of April, the ship being four or five days overdue, the plaintiffs instructed their London insurance brokers, Roxburgh, Currie & Co., to reinsure the ship, but on learning the price telegraphed that they were not disposed to pay it.

The next day, that is, the 1st of May, the plaintiffs saw Rose, Murison & Thompson, and hearing that they had effected some reinsurance of the ship in London requested them to telegraph to their London agents, Rose, Thompson, Young & Co., to effect a reinsurance at a certain rate. This was done at 11:30, and at half past twelve Rose, Murison & Thompson, received from one Murray information tending to shew that the Florida had been lost some days previously—which was the fact. Meanwhile the reply from London of Rose, Thompson, Young & Co. arrived, quoting a higher rate. Rose, Murison & Thompson shewed the answer to the plaintiffs, and, without making them acquainted with the intelligence communicated to them, telegraphed to London in the plaintiffs' name, and this put them in direct communication with Rose, Thompson, Young & Co. In the course of the afternoon a reinsurance was effected for the plaintiffs to the extent of £800 through Rose, Thompson, Young & Co.; but the rates rising higher still, the plaintiffs closed their negotiations through this channel at 4:53 in the afternoon.

Next day, the 2nd of May, the plaintiffs sent new instructions to their usual London brokers, Roxburgh, Currie & Co., and through them the reinsurance in question was effected with the defendant.

The plaintiffs were admitted to have known nothing of the information possessed by Rose, Murison & Thompson at the time of effecting the reinsurance; but the defendant resisted payment on the ground that this information was not communicated to him although known to the plaintiffs' agents.

LORD ESHER, M. R. (on May 22), after stating the facts, continued: It was at the trial admitted on behalf of the plaintiffs that the request to Rose, Murison & Thompson to instruct Rose, Thompson, Young & Co. constituted Rose, Murison & Thompson the plaintiffs' agents to effect insurance for the plaintiffs. This authority lasted until the plaintiffs were put into direct communication with Rose, Thompson, Young & Co., when it of course ceased. In like manner Rose, Thompson, Young & Co. were agents of the plaintiffs to effect insurance for them until their authority ceased by reason of the plaintiffs' refusal at 4:53 on the 1st of May to extend the limit given to them. The insurance on which the action was brought was effected through an entirely independent agent, Roxburgh, Currie & Co., instructed after the authority given to the others had ceased. But it appears that the information from Liverpool was given to Rose, Murison & Thompson whilst by admission they were agents of the plaintiffs to effect insurance for them. The ship was in fact lost before the policy sued on was effected. But it was admitted that the plaintiffs themselves had no knowledge of the information given at Liverpool until after the policy was effected; and it is clear, therefore, that they and the defendant and Roxburgh, Currie & Co. negotiated and effected the insurance on the bona fide view by all of them that the ship was no more than an overdue ship. No part of the negotiations with the defendant passed in any way through Rose, Murison & Thompson.

The defendant relies on the want of communication to him of the information obtained by Rose, Murison & Thompson of a material fact, which information came to them whilst they were agents of the plaintiffs to effect insurance for them; and he insists on the application of a doctrine in the form that "the knowledge of an agent is the knowledge of his principal." The plaintiffs insist that the only true doctrine is that the assured is bound by the knowledge of his agent who effects the insurance for him, or through whom the insurance is effected, as if he, the assured, had himself that knowledge at the time of the insurance; but that he is bound only to this extent, that in case of misconduct of the agent in effecting the insurance, he, the assured, cannot enforce the contract any more than if he himself had been guilty of the same misconduct.

The question thus raised is really, what is the true meaning of the phrase, "the knowledge of the agent is the knowledge of the principal"? Those who have used it could not have meant to say that what is known to an agent is necessarily in fact known to his principal. The phrase is only used in cases in which the principal is admitted to be in fact ignorant. The suggested meaning would therefore be an absurd contradiction of the assumption on which it is founded. The phrase is therefore figurative. It was used by the first person who used it as a means

of expressing tersely the idea which that person intended to convey with regard to the case then before him. It has been used in the same sense by those who have subsequently adopted it in precisely the same or in similar circumstances. It is meant to be tersely descriptive rather than strictly accurate. One can only arrive at its more accurate and unfigurative meaning by considering carefully the circumstances with regard to which it has been used by persons whose authority is to bind or guide us.

By these observations I wish to guard against a danger which always arises from the use in law of these figures of speech. Their terseness prevents them, as I have said, from expressing accurately the proposition they are used to enunciate. They are generally larger than that proposition. If, then, the terse expression is afterwards applied as an accurate expression of a legal proposition, it may be, and often is, used so as to embrace a case which, if the limitations of the real proposition are called to mind, is seen at once to be outside the more limited boundaries of the more accurate proposition, though within the larger boundaries of the picturesque phrase. As examples of what I wish to convey, I will deal with some of these oracular phrases. For instance the following: "A man is taken to intend the natural consequences of what he does." If this were strictly adhered to, nine-tenths of the cases of manslaughter would be cases of murder; an unskillful doctor would be a murderer; and so one acting in an uncontrollable access of passion. The phrase therefore is evidently too large. If literally applied, it would often be wickedly untrue. But as soon as you see that it has been only used as a guide in questions of evidence, you perceive at once that it expresses only a good working rule from which to draw an inference of intention, if no other evidence counteracts the prima facie inference. When used by judges charging a jury it has always easily been understood in its more limited and accurate sense; when used by judges explaining the process of reasoning by which they have drawn a particular inference of intention, it has been used in the same sense. So the phrase: "A man is to be taken to know that which he willfully abstains from knowing, or against which he willfully shuts his eyes." It is a still more inaccurate phrase than the former; yet its meaning is sufficiently obvious. It cannot mean that a man does not know what it states he does know. It means that if a man asserts that he did not know a certain fact, and evidence is given which shows that he did know it, unless, if such a thing could be, he must have what is picturesquely called willfully shut his eyes against the knowledge, the true inference is that, although he may not have been told the exact circumstances, or may not have seen with his eyes the exact details, he did in truth know the fact with his mind as much as if he had been told or had seen every particular of it. Again: "A man who states that which is in fact untrue, reckless whether it is true or false, is to be taken to be malicious." It is a good working rule upon which prima facie to found an inference of malicious intent; but the want of such an intention may be demonstrated by counter evidence, as that the story was carelessly told to amuse, or in order to divert from an apprehended danger or otherwise. One has therefore to extract from such phrases the real legal proposition contained in them. In making this search, one must recollect that every general proposition laid down by judges as a principle of law, as distinguished from an enactment by statute, is the statement of some ethical principle of right and wrong applied to circumstances arising in real life—that is, in the life of social intercourse or in the life of business. If the suggested principle is not obviously a rule of right and wrong, or if the suggested application cannot be supported by the suggested principle, the proposed application must be wrong, or must be supported by some other principle of right and wrong, or cannot be supported at all.

These observations must be brought to bear upon the phrase with which we have to deal in the present case. That it expresses a properly limited proposition of law has been above alleged to be absurd. Let us try it in one or two obvious instances. It cannot mean that the law holds that the principal does in fact know what his agent knows, but what the law at the same time admits that the principal in fact does not know. The law is never founded on absolute nonsense. The law does not hold that for every purpose the principal is to be deemed to know whatever becomes known to an agent of his in the course of the agent's employment. A merchant sells goods at sea or in warehouse with a statement, not intended by him to be or taken by the other party as a warranty, that the goods are sound. If when he makes such statement he knows that it is untrue, he is guilty of fraud. If he does not know or suspect the contrary of what he has stated, but his correspondent or captain or warehouseman does know the contrary, is the merchant guilty of fraud? Certainly not. Is he deemed to be guilty of fraud so as that an action could be maintained against him to recover damages for a fraudulent misstatement? Certainly not. The principal does not in fact always know all that his agent knows. If the law held that he was in all cases for all purposes to be deemed to know all that his agent knew, the law would in some cases mark him with gross injustice, with an unwarranted stigma: the law would countenance a gross violation of a simple rule of right and wrong. The law does not deem that to be which in truth is not. All that the law does is that in some cases it regulates the rights and liabilities of a principal by the knowledge of his agent. But then it does so, not by virtue of

a proposition that the knowledge of the agent is the knowledge of the principal, but upon another principle. In many kinds of contract, as of purchase and sale or hiring and letting, if a man, instead of himself negotiating and making the contract, entrusts those acts to an agent, he, the principal, cannot enforce the contract made on his behalf by his agent if the contract is brought about by conduct of the agent which would invalidate the enforcement of the contract if the conduct had been pursued by the principal himself had he himself made the contract. If the agent procures the contract by fraudulent misstatement or a misstatement, or by a fraudulent concealment or by a concealment which makes false the statements he has expressly or impliedly made, such contract cannot be enforced by the principal. It is treated as void if sued upon at common law, or it is set aside upon application in equity. But under neither procedure could damages be recovered against the innocent principal upon an allegation of actual fraud by him. It is obvious, then, that the law does not say in such cases that the principal does know, or is to be deemed to know, what his agent knows. The principle of law applied to the case is a rule of right and wrong, immediately recognised to be just when it is stated, that "a man cannot, by delegating to an agent to do what he might do himself, obtain greater rights than if he did the thing himself." This rule and its application is obvious, and was as well known and applied before as after the phrase now in question was invented—namely, that "what is known to an agent is known to his principal." This phrase, when examined, is seen to contain no principle of law whatever.

In insurance law, if a contract of insurance is made directly between an assured and an underwriter, the contract cannot be enforced if in the course of the negotiations the assured has made a misstatement of a material fact, whether he has done so fraudulently or innocently, or if he has concealed a material fact known to himself and not known to the underwriter, or which the underwriter ought to have known, whether he, the assured, has done so fraudulently or innocently. If, then, the agent of the assured, to make the contract of insurance, does that which if the assured himself had done it would have precluded him from insisting on the contract, the application of the principle above enunciated will prevent the principal from in such case being able to insist on the contract. The result is not the consequence of the phrase treated as a principle of law, though the phrase, in a certain sense, makes a sufficient picture of the result. The principle which is applied is one which can only be applied to the conduct of an agent by or through whom the contract is made, although the phrase in its terms would apply to other agents. Apply the phrase to other agents, as if it were a principle of law, and it will be seen to produce as manifest injustice in the case of insurance principals and agents as it has been shewn it would produce in other cases. This alleged principle is not the law of England in every case, although in the case of certain agents the principal is held to warrant the honesty of the agent, and is thereby liable in respect of the agent's dishonesty.

From these observations the conclusion is that the phrase in question cannot really be used as a guide to determine the question of the defendant's liability or nonliability in the present action. We must seek elsewhere for the principle which is to govern the case. We have to see whether any true principle of insurance law will make the defendant liable in the present case. In order to determine this question, we must see what circumstances have been held to prevent the enforcement of a contract of insurance, and what are the principles under which those circumstances have been held to have that effect. Then we shall see whether any of those principles are applicable to the circumstances of the present case. Sir Joseph Arnould says (Marine Insurance [5th Ed.] p. 514) that "the principle is now firmly established that the misrepresentation, from mistake, ignorance, or accident, of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive." And in another place (page 545): "Concealment in the law of insurance is the suppression of a material fact within the knowledge of one of the parties, which the other has not the means of knowing or is not presumed to know." "Whether such suppression of the truth arise from the fraud of the assured (that is, from a wilful intention to deceive for his own benefit), or merely from mistaken negligence or accident, the consequences will be the same." The substantial truth of these propositions is not disputed by any one. They are a statement of the circumstances which will prevent the enforcement of the contract; but they do not contain the principle whereby such circumstances produce such an effect. As to this Sir Joseph Arnould says: "The doctrine of the English courts is, that in the case supposed, although no pretence exists for anything like actual fraud, yet the policy is to be considered void on the ground of constructive or legal fraud." This is directly in contradiction of what has been said in the former part of this judgment. Duer, however, as is well known, does not adopt this principle, but holds that it is a part of the contract that full disclosure shall be made, as well as that every representation shall be accurate. But if this be correct, the contract should never be set aside or treated as void on the ground of concealment; the contract should stand, and be treated as broken by the assured. This view would raise new complications which have never yet been urged. Phillips, who is in my opinion always the more ac-

curate guide, thus treats the matter of principle (1 Phil. Ins. [3d Ed.] p. 287, c. 7, § 1, par. 537): "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the ground of a condition implied by the fact of entering into the contract, that there is no misrepresentation or concealment. Mr. Duer criticises the phraseology of the books in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of fraud. Mr. Arnould adheres to this application of that term for the sake of consistency with the general legal doctrine that what passes between the parties preliminary to a contract is not a part of it and should not be imported into it. And since a representation through mistake or inadvertence has the same effect, in reference to the underwriter, as an intentional and literally fraudulent misrepresentation or concealment—namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded—he deems it to be excusable to apply the term 'fraud,' and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts. But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case, by stating the practical doctrine in direct terms—namely, that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake." He says lower down: "The forfeiture of the insurance by misrepresentation or concealment is a forfeiture by a breach of a condition of the contract. So it seems to have been considered by Chancellor Kent." This seems to me to be the true doctrine. The freedom from misrepresentation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract.

I have thought it necessary to bring out this view, because it seems to me that the only persons who can attach a condition to a contract are those who in fact make the contract. Those who have nothing to do with the making of the contract cannot have anything to do with agreeing to a condition which is to affect the attaching of the contract. He who makes the contract agrees to the condition that it shall not be binding if he, or the person whose alter ego or representative he is, has made any misrepresentation or has been guilty of any concealment. This confines the purview of alleged misrepresentation or concealment to those persons only. It confines the consideration of an agent's conduct to the conduct of the agent by or through whom the contract is made. Sir Joseph Arnould uses the phrase, "The principle here is that what is known to the agent is impliedly known to the principal." But this is applied to the immediately preceding paragraph, which is, "If however the information so communicated by the assured to the underwriter proceeds from an agent of the assured whose duty it was to give the intelligence, the assured is just as responsible for the truth of the information as he would be for the truth of a positive representation made by himself of the same facts." It seems to me that the phrase, "the agent whose duty it was to give the intelligence," means, in this context, the agent whose duty it was to give the intelligence to the underwriter—that is, it means the agent who effects, or through whom is effected, the contract of insurance. And if so, the phrase as to knowledge is not wanted as a principle; there is another governing principle which suffices. Duer, in his Lecture 13, discusses the cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, and then states that "to these decisions, if they are to be considered as affirming the rule that the knowledge of an agent not authorized to insure may in some cases be justly imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy or exonerating the underwriters from the loss, the reasoning and authority of a very eminent judge, distinguished for his accurate and profound knowledge of commercial law" (referring to Mr. Justice Story), "are directly and irreconcilably opposed."

Duer, in section 28 (Lecture 13), gives his own view; but it is based entirely on his view that it is a part of the contract, not by way of condition, but by way of contractual undertaking, that no concealment of any kind shall occur. It will be found that Phillips in his italicised propositions, which are in my opinion always nicely accurate, confines himself entirely to the acts or omissions of agents by or through whom the contract is effected. See section 543, 1 Phil. Ins. (3d Ed.) pp. 290, 291: "A misrepresentation or concealment by the agent for effecting the insurance will defeat it, though not known to the assured." It is clear, I think, that in section 549 he prefers the reasoning of Mr. Justice Story in Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, to that of the English judges, as reported in Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35. And I think that the concluding paragraph of that section is rather forced from him by those cases, than acquiesced in by his conviction. "I accordingly cannot but conclude," he says, "that a policy made, as the case supposes, under an essential misunderstanding by both of the parties, into which they are purposely and fraudulently led by a third, whether he be agent of one or both or neither, is void." I do not think that the mind

of the writer went with that halting proposition. But then another rule is suggested in argument, partly countenanced by Arnould and Duer, though they seem to base it on the English cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, rather than on any process of reasoning, and it seems to be this: "Where any servant or agent of the assured ought, by reason of the duty imposed upon him by his position with regard to the assured, to make to him a true and immediate communication of a circumstance, which in insurance law is a material circumstance, and if he, neglecting such duty, either makes a false communication, or fails to make an immediate communication or any communication at all to his principal or employer, and by reason thereof the principal or employer, the assured, fails to disclose that which, if he had known it, he would have been bound to disclose, the contract of insurance cannot be enforced." This suggested rule would be well founded if the phrase that the knowledge of the agent is the knowledge of the principal were a legal proposition; but it is not. To support the rule some principle must be vouched. The rule contains two assertions, on which it is based: The first, that there are servants and agents of the assured who, by reason of their position as such, are bound to give not only true but immediate communication of certain facts. The second is, that the underwriter has a right to assume, as the foundation of his contract, that such servants and agents have fulfilled the suggested duty. As to the first, no one doubts but that it is the duty of a servant or agent, as it is of every one who makes a statement, to make it truthfully; but is it true to say that all servants and agents are, or even that any servant or agent is bound, by reason only of his relation as such to his employer, to make an immediate communication of everything that has happened concerning his principal's affairs? I know of no such duty arising from the mere relation of master and servant or of principal and agent. A manager of a mercantile establishment in a distant country probably makes only periodical reports. There is no apparent necessity for his making more frequent reports. There is no necessary reason why the captain of a ship should immediately report every accident to the ship, which accident would usually be already repaired. The law has no right to imply a duty as attached to the relation which does not necessarily follow from the relation. The supposed duty must exist whether the subject-matter is or is not insured, or is or is not to be insured. There is nothing on which to found the suggested implied duty. I feel certain that no such duty does in fact generally exist. As to the second, even supposing that such an implied duty does exist as between master and servant or principal and agent, is it true to say that underwriters do rely upon an undertaking by the assured that his servants or agents will fulfil their duty? Such a reliance has never yet been proved in fact to be the rule of underwriters and assured. I believe it to be incapable of proof, because it is wholly untrue in fact. The underwriter has been taught to rely, and does rely, upon the conduct of those with whom he deals, not upon the conduct of those with whom he has no relation and of whose existence in many instances he knows and can know nothing. He is entitled to uberrima fides from those with whom he deals. But the doctrine of uberrima fides is fulfilled completely if those with whom he deals deal with him in accordance with that rule. The suggested doctrine strikes an assured who has complied in every possible sense with that exceptional rule of conduct of uberrima fides. A court of law has no right to imply this reliance of an underwriter, unless the implication is a necessary implication. It remains only then to deal with the cited cases, and to deal with them in a court of error, where they are not to be followed or distinguished but to be considered. And it may be well to observe that they do not construe a contract or document so that, whether right or wrong, other contracts and documents have been formed upon them, but lay down, as it is said, principles of law. And further, they have never been absolutely acquiesced in, but have been canvassed and criticised from the time they were decided until now.

The case of Fitzherbert v. Mather, 1 Term R. 12, is difficult to appreciate so far as consists in gathering the principle which ought to be extracted from it, on which the judges founded their decision. I confess that the reported judgment of Mr. Justice Buller puzzled me for long. I think I now understand it from the gloss put upon the judge's phraseology by Duer in note 11 to Lecture 14. Buller, he says, is still more explicit. "Though the plaintiff be innocent, yet if he build his information on that of his agent [which clearly means, if he adopt the information of his agent, and by submitting it to the underwriters make it the foundation of the contract], and his agent be guilty of a misrepresentation, the principal must suffer." The gloss within the brackets, which I think is correct, shews that the case was decided on the view that the assured, who himself made the contract, made a representation, which was a misrepresentation, into which he, the assured, was led, by adopting and using innocently the misrepresentation of his agent. If this be the true interpretation of the case it is in no way exceptional, but is within the most ordinary rule of insurance law. The case of Stewart v. Dunlop, Brown, Parl. Cas. 483, is founded entirely on an inference of fact, more or less rightly inferred, that the agent who effected the insurance knew the information which had arrived in the town.

As to the case of Gladstone v. King, 1 Maule & S. 35, it is one of those cases which is differently explained by every one who deals with it. Every one points out that the resulting decision, that the fraud of the mas-

ter did not avoid the policy but only exonerated the underwriter from payment of the average loss incurred before the policy, is strange and isolated. Duer doubts whether the letter written by the captain to his owners was not shewn by the assured to the underwriters. If it was, it is again a case of innocent misrepresentation by the assured himself. The case is criticised by Phillips in section 683 (1 Phil. Ins. [3d Ed.] p. 376).

The reasoning of Mr. Justice Story in Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, seems to me to dispose of all that has been supposed to result from the case of Gladstone v. King, 1 Maule & S. 35. He first gives strong reasons for supposing that the case was in reality decided as upon an innocent misrepresentation. If not, he, on page 78, 4 Mason, Fed. Cas. No. 12,119, deals with the suggested reasoning. "The principle contended for," he says, "is new; if well founded it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be upon the ground that the act of the master binds the owner; and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guarantee the fidelity of the master to all the world, or to the insurer in particular." In this, as matter of truth and real business conduct, I entirely agree. I see no warrant for any other inference. I think it more candid to say at once that in my opinion Gladstone v. King, 1 Maule & S. 35, as reported, and certainly as relied on, is wrong. I do not think that an assured can properly be said to guarantee the fidelity of any of his agents. Certainly I cannot bring my mind to say that the underwriter is to be assumed to rely upon the diligence and accuracy of an agent of the assured, of whose existence, as in this case, he could not have had a suspicion. Even if what is said about a captain or correspondent were true, which I think it is not, the present case goes far beyond; for the defendant, the underwriter, had no reason to suppose that any other agent had been instructed to insure. I am prepared to decide this case upon the old simple, recognised and easily justified rule, that a contract of insurance is rendered abortive by an innocent misrepresentation or concealment of a material fact known to the assured, or to an agent of his by or through whom the contract is made, and which fact the underwriter neither knows nor is bound to know; but is not rendered abortive by the misrepresentation or concealment of any other person or agent, whether innocent or fraudulent. I can find a simple principle to support the first—namely, the principle I have before stated, that a man cannot by delegating to an agent to do what he might do himself obtain greater rights than if he did the thing himself. I can find no principle on which to support the contrary of the second.

There remains the case of Proudfoot v. Montefiore, 36 Law J. Q. B. 225, L. R. 2 Q. B. 511, which, on account of its importance, I reserved for minute consideration until after I had exhausted principle and all other authorities. It is made in the judgment to depend on the cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35. "Upon the above facts," the judgment says, "the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo, as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy. Two cases decided in this court—one in the time of Lord Mansfield, the other in that of Lord Ellenborough—establish the affirmative of this proposition." I have already endeavored to shew that Fitzherbert v. Mather, 1 Term R. 12, does by no means support this proposition. If Gladstone v. King, 1 Maule & S. 35, does support it, I must say that as I cannot agree with that case so interpreted, I cannot agree with this case founded on it. The chief justice then states that the reasoning of Duer fully establishes that the judgment of Mr. Justice Story in Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, is erroneous. If Mr. Duer's view is right that there is a contractual undertaking by the assured that every material fact shall be disclosed, it follows, of course, that Mr. Justice Story is wrong. But, as I have said, I look in vain in a policy in ordinary form for any such contract. The chief justice then lays down the following proposition: "If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. This condition is not complied with where, by the

fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

Now I will again examine the different parts of this proposition. The duty relied upon—namely, that of communication by an agent or servant—cannot be a duty imposed in a particular case by a specific order of the owner to his servant or agent, for, if so, the alleged infirmity in the policy will depend upon whether such order has or has uot been given; it must therefore be a duty, if any, held to arise in contemplation of law necessarily by reason of the relation between owner and agent. And, as I have before stated, the alleged duty is useless for the purpose for which it is suggested unless the duty is a duty to give immediate information. I know of no such implied duty. I know of no agent or servant of a shipowner, still less of an owner of cargo, whose implied duty it is, by any implication which a court is justified in making, to communicate immediate information of every or any accident happening to the ship or cargo in the course of a voyage. The proposition is again, I venture to say, obviously inaccurate in coupling concealment and misrepresentation as if the doctrines of insurance law were identical as to both. If the owner makes a misrepresentation, the policy no doubt cannot be enforced, however much the owuer may have been misled into making the representation. But with regard to concealment, in the sense of mere nondisclosure, the law is not the same as in the case of misrepresentation. The proposition then states "that the insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has knowledge." This is undoubtedly correct, it being the necessary consequence of the doctrine of uberrima fides. But the proposition proceeds: "That the insurer is entitled to assume that the assured will communicate to him every material fact of which the assured ought in the ordinary course of business to have knowledge." This branch assumes that the assured has not the knowledge; the doctrine of uberrima fides, therefore, does not reach it; why the insurer has a right to assume that the assured will communicate to him what the assured by the hypothesis does not know is a proposition which passes my comprehension. The proposition then lays down "that the insurer has a right to assume that the assured will take the necessary measures, by the employment of competent and honest agents, to obtain all due information." But the proposition, by using the phrase "the necessary measures," assumes that, although the assured has taken every reasonable or even possible measure to employ competent and honest agents, he may have failed to succeed, and therefore have failed to take "the necessary measures." And it fails to touch the case of there being by accident or momentary negligence of the agent a failure, although the agent is in every sense a competent and honest agent."

It seems to me that this whole proposition is a finely written deduction from the case of Gladstone v. King, 1 Maule & S. 35, but that as a business or legal proposition it will not bear close examination.

It is further suggested in this case of Proudfoot v. Montefiore, 36 Law J. Q. B. 225, L. R. 2 Q. B. 511, that the proposition laid down in it rests on a ground of public policy. But in the first place it seems difficult to see how public policy can be affected by any circumstances relating to the power between the parties of enforcing or repudiating a contract of insurance any more than of any other contract. And secondly, it seems difficult to reconcile the interference of the doctrine of public policy, in the case of a contract of insurance on ship or goods lost, or not lost, one step beyond affirming that the parties who are allowed by law to enter into this hazardous and wellnigh gambling speculation of whether a loss has or has not already happened must be equally informed or equally ignorant.

I am, for all these reasons, of opinion that in this case the plaintiff was entitled to recover, and that the appeal should be dismissed.

LINDLEY, L. J., after stating the facts. The plaintiffs' counsel conceded that if the plaintiffs had themselves known of these facts and had concealed them from the defendant, he would not be liable on the policy. The plaintiffs' counsel further conceded that if the policy in question had been effected through Rose, Murison & Co., and they had concealed from the defendant the information given by Murray to Murison, the defendant would not be liable to the plaintiffs on the policy. But the plaintiffs' counsel contended that as the plaintiffs themselves acted in good faith and in ignorance of the facts disclosed to Murison, and did not effect the policy sued on through him or his firm, but through other agents who knew no more than the plaintiffs themselves knew, the plaintiffs are entitled to recover on the policy. This was the view adopted by the learned judge who tried the action. The defendant, on the other hand, contends that the knowledge acquired by Murison, whilst he was endeavouring to effect an insurance for the plaintiffs, must in point of law be imputed to them; and that, as between the plaintiffs on the one side and the defendant on the other, the plaintiffs rather than the defendant must suffer from the omission on the part of Murison to communicate what he knew to the plaintiffs. In support of this contention certain authorities were referred to, which it is necessary to examine.

The first is Fitzherbert v. Mather, 1 Term

R. 12. That was an action on a marine policy on a cargo of oats (lost or not lost) belonging to the plaintiff. The policy was effected through a person of the name of Fisher. The oats were bought by Bundock, acting for the plaintiff, from a person named Thomas, who shipped them, and who by Bundock's orders sent a bill of lading and invoice to Fisher. Thomas also wrote to Fisher, stating that the oats had been shipped, and that the vessel on board which they were had sailed. After this letter was written, but before it could have left the town where it was posted, Thomas learned that the vessel was lost. But he said nothing about it, and sent no further letter, and Fisher knew nothing of the loss. He acted bona fide, and effected the insurance after he had received Thomas's letter above alluded to. It is not stated that this letter was shewn to the defendant, although there is some reason for supposing that it was. But even if it was not, still the information on which Fisher acted was obtained from Thomas, who was directed by Bundock, and it would seem also by the plaintiff, to communicate with Fisher, and Thomas wrote to Fisher expressly that he might insure if he liked. Moreover, the plaintiff himself instructed Fisher to insure as soon as the bills were sent him. The court construed this as meaning as soon as they came from Thomas. The court appears to have come to the conclusion that the plaintiff referred Fisher to Thomas for information, and thereby, in effect, through Thomas, supplied Fisher with defective information. The court held that the policy was effected by misrepresentation; that Thomas had been guilty, if not of fraud, at least of great negligence; that the concealment by him from Fisher, and therefore from the underwriter. of the loss of the oats vitiated the policy, although both the plaintiff and Fisher acted in perfect good faith. It is to be observed that Mr. Justice Ashurst decided this case on the ground that Thomas's knowledge was to be treated as the knowledge of the plaintiff; but the rest of the court seem to have treated the case as one of direct misrepresentation, though an innocent one so far as the plaintiff and Fisher were concerned.

The next case is Gladstone v. King, 1 Maule & S. 35. This was an action on a policy on a ship lost or not lost. The plaintiffs were her owners, and they claimed to recover damages for an injury sustained by the ship, by getting on a rock, before the policy was effected. The captain of the ship had written to the plaintiffs after the accident, and before the policy was effected, but he had not alluded to the accident, and the plaintiffs knew nothing of it until after the ship arrived home. The court, nevertheless, decided that the plaintiffs could not recover. The court held that it was the duty of the captain to inform the plaintiffs of the fact that the ship had been on a rock and sustained injury, and that his omission in this respect, by means of which the owners were prevented from disclosing the accident to the underwriters, operated as an exception of the particular risk out of the policy. Lord Ellenborough, in this case, appears to have been influenced by the consideration of the danger there would be to underwriters if captains were permitted to wink at accidents without hazard to the owners, and so always enable them to throw past losses on insurers. This case certainly went beyond Fitzherbert v. Mather, 1 Term R. 12, for the captain had nothing to do with the insurance, and he was not referred to by the plaintiffs for information. What, however, he knew, was treated as impliedly known to the plaintiffs, although he did not tell them what he knew.

The next case is Proudfoot v. Montefiore, 36 Law J. Q B. 225, L. R. 2 Q. B. 511. It was an action on an agreement to insure some madder belonging to the plaintiff. Rees was the plaintiff's agent at Smyrna to buy and ship madder for him, and Rees had bought and shipped for the plaintiff a cargo of madder on board a vessel which was lost soon after she sailed. Rees knew of the loss, and might have informed the plaintiff of it by telegram, but he purposely refrained from doing so in order that the plaintiff might be able to insure in ignorance of what had occurred. The plaintiff did in fact insure the cargo before he knew of the loss, and the slip was signed by the defendant in ignorance of what had happened. The court decided against the plaintiff, although he personally had acted in good faith and had concealed nothing within his personal knowledge. The grounds of the decision are given on page 521 of the Law Reports, and page 236 of the Law Journal Reports: "Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, were well decided, and that if an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any facts material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negli-

gence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and, through such ignorance, fails to disclose it."

The last authority which it is necessary to refer to is Stribley v. Imperial Marine Ins. Co., 45 Law J. Q. B. 396, 1 Q. B. Div. 507. It was an action by the owners of a ship for a total loss, and one point raised was whether the fact that the captain had not informed the plaintiff, and that he, therefore, had not informed the defendant, of the fact that the vessel had encountered a storm and lost an anchor before the policy was effected vitiated the policy. It was held that it did not. I understand this decision as in substance similar to Gladstone v. King, 1 Maule & S. 35.

The principle on which Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, are based has been much discussed, and stated by the court in Proudfoot v. Montefiore, 36 Law J. Q. B. 225, L. R. 2 Q. B. 511. Mr. Justice Story, in Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, declined to follow it. His view, however, is opposed to that of the supreme court of the United States (12 Wheat. 408), and to that of Phillips and Duer (section 549), and has not been adopted in this country. It appears to me to be established, by the cases to which I have referred, that in order to prevent fraud and willful ignorance on the part of persons effecting insurance, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one whose moral, if not legal, duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing those facts. The person who allows the assured to effect a policy under such circumstances as I am now supposing does not act fairly to the underwriters; and although such person may owe them no legal duty, the assured cannot in fairness hold the underwriters to the contract into which they have in fact entered under these circumstances. The assured may himself be perfectly innocent when he effects the insurance, but as soon as he is informed of the facts it ceases to be right on his part to take advantage of the concealment without which that insurance would not have been effected. In other words, the assured cannot take advantage of the ignorance in which he has been improperly kept by one who ought to have told him the truth. If it was the legal duty of the person who has so kept him in ignorance to inform him of the facts concealed, it is, I think, clearly settled that he cannot avail himself of his own personal ignorance of them. But if there is no such legal duty to him, the same consequeuce appears to me to follow if there was a moral duty to tell him the truth. He may exclude all legal duty to be informed of what has occurred by giving instructions dispensing with information, and such instructions may be given for reasons which exclude all influence of frandulent intent on his part. But in such a case it appears to me that he cannot enforce a contract of insurance obtained by such unfair means as those supposed. In my opinion Duer (volume 2, § 647) and Phillips (volume 1, § 537) are both right in contending that fraud on the part of the assured is not essential to discharge the underwriters on the ground of misrepresentation or concealment. It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a mattter of business and fair dealing to have stated or disclosed the facts to him or to the underwriter for him.

If this view of the law be correct, it follows that the plaintiffs cannot recover in this action. The omission of Murison to tell the plaintiffs what he knew, and the remarkable course his firm took of discontinuing negotiations themselves and of puttting the plaintiffs in direct communication with Rose, Thompson, Young & Co., are only to be explained upon the theory that the plaintiffs were purposely kept in ignorance in order that they might insure on more favourable terms than they otherwise might have done. It appears to me to have been clearly Murison's duty to the plaintiffs to give them the information he had, so that they might, by disclosing what they knew and increasing their offer, cover the increased risk. Murison was not a stranger under no obligations to the plaintiffs. He was employed by them to effect an insurance, and whilst so employed he acquired important knowledge respecting the ship. I cannot doubt that it was his duty to disclose this to the plaintiffs, and not to let them go on to insure in ignorance of what it was of the utmost importance they should know. The plaintiffs cannot, in my opinion, obtain any advantage from this breach of duty to themselves. As between themselves and the defendant the plaintiffs are the persons to suffer from the mistaken view their own agents took of their own duty. Their conduct vitiates this policy, although it was not effected through them nor until after their agency had ceased, for had it not been for their breach of duty the policy could never have been effected for the premium which the plaintiffs paid.

I have not based my judgment on the maxim that the knowledge of an agent is the knowledge of his principal, for, like the master of the rolls, I distrust such general expressions, which are quite as likely to mislead as not.

But, for the reasons I have stated, the decision of Mr. Justice Day was, in my opinion, erroneous, and judgment ought to be entered for the defendant, with costs here and below.

LOPES, L. J. I have arrived at the same conclusion as Lord Justice LINDLEY, but

the case is so important that I wish to give a separate judgment stating my reasons.

It is unnecessary to restate the facts of this case. They have been already fully stated, and are undisputed. I propose shortly to state the conclusion at which I have arrived after much consideration, and my reasons for that conclusion.

It is clear law that if the policy sued on in this action had been effected through the agents to whom the material communication was made, and who suppressed it, the assured, though ignorant of the communication, could not have recovered from the underwriters, because there had been a concealment of a material fact by the agent of the assured. The knowledge of the agent in such circumstances would be the knowledge of the principal—a phrase which I understand to mean, that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance as if he had acquired it himself.

In what does the present case differ from the one above stated, where the law is clear? It differs only in this, that here the policy was effected, not through the agent who had acquired and concealed the information in order that his principal might effect an insurance upon favourable terms, but through another agent subsequently employed, who, as well as his principal, was innocent of any previous concealment.

The plaintiffs' contention is that it is only the concealment of material facts by the agent who effects the policy that vitiates it, not the concealment by any other agent. And the learned judge in the court below so held.

The question raised seems to be whether, if an agent employed to effect an insurance purposely omits to communicate material facts which came to his knowledge during his employment (facts which it was his duty to communicate to his principal), it is a concealment which will avoid an insurance effected by an innocent principal through another agent ignorant of any such concealment.

Authority and principle compel me to answer that question in the affirmative.

I will first deal with the authorities. The earliest case is Fitzherbert v. Mather, 1 Term R. 12. In that case it seems to have been held that when the conduct of the assured was wholly free from blame or suspicion, his policy was avoided by the concealment and virtual misrepresentation of an agent who had no authority to procure or direct the insurance. He was the consignor and shipper of the goods insured. The judges thought the letter was a misrepresentation. The court clearly thought that it was the duty of the agent to have given information of the loss. The concealment of the agent was the ground of the decision. The insured was held to be affected by the concealment of an agent other than an agent employed to obtain an insurance.

The next is Gladstone v. King, 1 Maule & S. 35. The insurance was on a ship on a specified voyage; it was made after the risk had commenced, but by its terms (lost or not lost) it related to their commencement, and covered all prior losses. When the policy was effected no such loss was known to the owners to have occurred, but a partial loss had in fact occurred, which the master had neglected to communicate, although the information might have been given in time to have governed the terms of the insurance. He had in fact, written to his owners after the loss had happened, and they were in possession of his letter when they effected the policy; but it contained no mention of the loss; nor does it appear from the report that this letter was shewn to the underwriters, or that any representation was made to them founded upon its contents. In respect to them the case was simply that of the concealment of a loss which was unknown to the assured, but which their agent was bound to communicate, and might have communicated—and it was so treated by all the judges. It was for the recovery of the partial loss that the action was brought, and it was the opinion of the court that the concealment of the master, although, not being fraudulent, it did not operate to avoid the policy, yet exonerated the underwriters from the payment of the loss. Lord Ellenborough remarked that, unless this rule was adopted, the master would be instructed to remain silent in all similar cases, and then the underwriter would incur the certainty of being rendered liable for all antecedent average losses that he could not prove to have been known to the assured.

These decisions establish that the knowledge of an agent not authorised to insure may be imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy and exonerating the underwriters from the loss. They seem to me a fortiori cases to the present. The master had nothing to do with the insurance. His knowledge was, however, imputed to the plaintiffs, although he did not communicate to them what he knew.

Proudfoot v. Montefiore, 36 Law J. Q. B. 225, L. R. 2 Q. B. 511, is a comparatively recent case. The plaintiff, in Manchester, employed an agent at Smyrna, who purchased and shipped for him there a cargo of madder of which he advised him on the 12th of January and forwarded the shipping documents on the 19th. The ship sailed on the 23rd of that month, and went ashore the same day, whereby there was a total loss of the cargo. Next day the agent had intelligence of the loss, and might have telegraphed the casualty to his principal immediately, but refrained on purpose that his principal might insure the cargo. On the 26th, which was the earliest post-day for England, he announced the loss to his principal by letter. Meanwhile, before the arrival of that letter, but after the loss had been posted in Lloyd's Lists, the principal effected an insurance on

the cargo. It was held that the policy was void, on the ground of concealment of material facts known to the agent, and therefore known to the principal. All the cases, both English and American, were reviewed, and the judgment of the court, consisting of Chief Justice Cockburn, Mr. Justice Blackburn, and Mr. Justice Shee, was delivered by Chief Justice Cockburn; and unless that judgment is overruled it is clear that an assured cannot recover on a policy, when he has been designedly kept in ignorance of material facts by somebody whose duty it was to communicate them.

The chief justice, in his judgment, says, "There is no fraud or undue concealment by the plaintiff (the assured) of a material fact within his personal knowledge." On the other hand, it is clear that the fact of the loss of the vessel might have been communicated to him by the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo, and, looking now to the general use of the electric telegraph, to communicate with his employers by the speedier means of communication. Further, as the chief justice says, "If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment and misrepresentation." Then come these very important words: "The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

The case we are now considering is a much stronger case than Proudfoot v. Montefiore, 36 Law J. Q. B. 225, L. R. 2 Q. B. 511, for here the agent who designedly withheld material information was at the time employed by the assured to effect an insurance. The case of Stribley v. Imperial Marine Ins. Co., 45 Law J. Q. B. 396, 1 Q. B. Div. 507, does not appear to me to carry the matter beyond the cases already cited.

The authorities, therefore, support the conclusion at which I have arrived.

I fail, however, to see why in principle there should be any distinction between the case where the insurance is effected by the agent who obtained the information, and where it is effected by another agent employed about the insurance.

In both cases the assured, by a suppression of what ought to have been communicated to him, obtains an insurance which he would not otherwise have got. The underwriters are as much misled in the one case as the other. In both cases there is misconduct on the part of the agent of the assured; in both cases the underwriters are free from blame. It seems to me unjust and against public policy that a person, through whose agent's fault the mischief has happened, should profit, to the detriment of those who are in no way in fault.

On the ground of the implied contract between the parties, I am of opinion, too, the defendant is entitled to succeed. The concealment by an agent who is bound to give the intelligence violates the undertaking on which the contract is founded in the same way as a similar concealment by a principal. The underwriter has a right to believe, when he accepts the risk, that he is placed in possession of all the information which the assured himself has, or which it was the duty of any agent of his to communicate. The underwriter does not intend to insure risks concealed by some agent employed to obtain an insurance, who ought to have communicated them to his principal, any more than he does risks concealed by the agent actually effecting the insurance, or concealed by the principal himself.

It is admitted that freedom from misrepresentation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract. I entirely agree; but it is insisted now that if the misrepresentation or concealment is by an agent, it does not vitiate the policy where the principal is innocent, unless the agent be the agent employed to effect the insurance. I cannot accede to that. I think there must be a freedom from misrepresentation or concealment, not only so far as the agent by or through whom the policy is effected is concerned, but in respect of any agent employed by the assured to obtain the policy whose duty it was to communicate material facts to his principal.

Any more limited construction, to my mind, would be against public policy, against principle, contrary to authority, and would tend to encourage fraud and collusion in transactions where uberrima fides is essential.

The appeal in my opinion must be allowed.

Appeal allowed.

PROUDFOOT v. MONTEFIORE.

(L. R. 2 Q. B. 511.)

Court of Queen's Bench. June 15, 1867.

Jones, Q. C. (Temple, Q. C., with him), for plaiutiff. Mr. Cohen, for defendant.

Slater & Dommett, attorneys for plaintiff. Pearce, Phillips & Pearce, attorneys for defendant.

COCKBURN, C. J. This was an action against the defendant, as chairman of the Alliance Marine Insurance Company, for the recovery of damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a vessel called the Anne Duncan, pursuant to an agreement alleged by the plaintiff to have been entered into between him and the company, and in respect of the company not having paid the sum of money which the plaintiff alleges would have become due on such policy if the same had been so delivered.

The agreement was for insurance on a cargo of madder, lost or not lost, shipped at Smyrna, on a voyage from Smyrna to Liverpool, on board the ship Anne Duncan, for and on account of the plaintiff, and consigned to him by one T. B. Rees, of Smyrna.

The plaintiff, a merchant at Manchester and Liverpool, dealt largely in madders in the Smyrna market, and Rees, being resident at Smyrna, was employed by him at a salary of £800 a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question was purchased and shipped by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st of January, 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23rd, but was stranded in the course of that day, and became a wreck. The cargo became a total loss. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plaintiff the loss of the vessel; and the fact that though the cargo had been got out, yet as the vessel had had 12 feet of water in the hold, the greater part of the cargo would be seriously damaged. Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th instant I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th instant, inclosing bill of lading.[1] I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st of January the plaintiff, after receipt of the letters from Rees of the 12th and 19th of January, but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on the same day by the company's agent at Manchester.

There was, therefore, no fraud or undue concealment by the plaintiff of a material fact within his personal knowledge. On the other hand, it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication. From the letter of the agent it appears that, but for the fraudulent motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose.

Upon the above facts, the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy.

Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, established the affirmative of this proposition. In the case of Fitzherbert v. Mather, 1 Term R. 12, 16, where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an assurance, an omission on the part of the former, who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J., observes: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows. And there is no hardship on the plaintiff; for if the fact had been known the policy could not have been effected." Buller, J., says: "Though the plaintiff be innocent, yet if he built his information on that of his agent, and his agent

[1] The telegram was received, and the loss published in Lloyd's List of the 29th of January; but neither the plaintiff nor the company's agent was aware of it.

be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must therefore take the consequences."

In the case of Gladstone v. King, 1 Maule & S. 35, 38, which was an action on a policy on a ship "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident and stating that the ship's bottom must have been chafed; and the owners, in ignorance of the accident, had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs, the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment will not alter the case."

An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case (Ruggles v. Insurance Co., 4 Mason, 74, Fed. Cas. No. 12,-119) tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of the loss, that learned judge held that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent. The case being taken to a court of error (12 Wheat. 408), the latter upheld the decision; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment, it may be inferred that if the court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from. The ruling of Mr. Justice Story has been discussed by Mr. Duer, in his admirable work on Insurance (volume 2, p. 418), and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of the opinion that the cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: First, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured, shall be made known to him—is not fulfilled; secondly, as was said by the court in Fitzherbert v. Mather, 1 Term R. 12, 16, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party

by whom the person guilty of the fraud or negligence has been trusted or employed.

By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of prinicpals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant.

Judgment for the defendant.

CONTINENTAL INS. CO. v. RUCKMAN.

(20 N. E. 77, 127 Ill. 364.)

Supreme Court of Illinois. Jan. 26, 1889.

Appeal from appellate court, Fourth district.

Baker, McNulty & Baker, for appellant. Wise & Davis, for appellee.

BAILEY, J. This was a bill in chancery, brought by Stephen Ruckman against the Continental Insurance Company of the city of New York, praying for the reformation of a policy of insurance, and for a decree for the amount of the complainant's loss and damage by fire to the property insured. The policy in question bore date March 24, 1884, and insured the complainant, for the term of three years, against loss or damage by fire, in the sum of $400, on his one-story, frame, shingle-roof dwelling-house, and $600 on his log barn, situate in St. Charles county, Mo.

The following facts, shown by the complainant's evidence, are in no way contradicted:

The policy was obtained by the complainant from the defendant through the agency of one Milne, an employé of Whipple & Smiley, the defendant's local agents at Alton, Ill. On the day next prior to the date of the policy Milne came to the complainant at his place in St. Charles county, Mo., and solicited said insurance. The complainant expressed a willingness to take out a policy on said buildings, but told Milne that he expected to have them rented, and that sometimes they might be vacant 5, 10, or 15 days, and asked him if that would make any difference with the insurance. Milne assured him that, if they did not remain vacant to exceed 30 days, the insurance would not be affected, and agreed that the policy should so provide; but that, if the vacancy should continue for a longer period, it would be necessary for the complainant to notify the company, and get a permit for a further period of 30 days. On these terms the complainant agreed to take the policy. The next day he went to the office of Whipple & Smiley for the policy, and found Milne there alone, no other person being in the office. Milne thereupon took a blank policy, filled it up, and delivered it to the complainant, and received from him the premium. The complainant is an illiterate man, not being able to read or write, and that fact was known to Milne at the time he filled up and delivered the policy. On receiving it, the complainant asked Milne whether the clause in relation to the vacancy of the buildings was in it, and was told by him that it was, and the complainant had no knowledge that the contrary was the fact until after the destruction of the buildings by fire.

In point of fact, the condition agreed upon was not in the policy, but among its conditions was one providing that, if the buildings insured became unoccupied without the consent of the company indorsed thereon, the policy should be void. A tenant who went into possession March 1, 1885, continued to occupy the premises, using the house for a dwelling, and the barn for keeping therein his domestic animals, his hay, and other personal property, until October 21, 1886, at which date he moved out of the house, leaving it unoccupied, and moved into another house about a quarter of a mile distant therefrom. On the 1st day of November, 1886, the house and barn were both destroyed by fire, the house at that time remaining unoccupied; the former tenant, however, still retaining the key to the barn, which he kept locked, and having therein a load of hay, a hay frame, 12 bushels of potatoes, and some lumber. Proofs of loss were furnished by the complainant to the insurance company, showing that the house was unoccupied at the date of the loss, and the defendant thereupon refused to pay the loss, basing its refusal upon the alleged breach of the condition of the policy relating to the occupancy of the buildings.

The cause was heard on pleadings and proofs, and a decree rendered reforming the policy by inserting therein a provision that the buildings insured might remain vacant and unoccupied 30 days, but no longer, without notice to the defendant; and also decreeing that the defendant pay the complainant, within 10 days, the sum of $1,049.50, with legal interest thereon from the date of the decree, together with costs of suit, and that, in default of such payment, execution issue therefor. From this decree the defendant appealed to the appellate court, where said decree was affirmed, and by a further appeal the defendant has brought the record to this court.

It is urged, as a ground for the reversal of the decree, that the complainant failed to perform the condition of the policy in relation to preliminary proofs of loss. It is not disputed that proofs were served, consisting of a statement in relation to the circumstances of the loss made by the complainant under oath, and a certificate by a justice of the peace residing in the vicinity of the buildings destroyed. It may be that these proofs failed in some particulars to answer all the requirements of the policy, but whether they did or not is wholly immaterial, since the defendant, on receiving the proofs, instead of pointing out the deficiencies therein, and requiring a further statement and certificate, refused to pay the loss; placing its refusal wholly upon the ground that the condition prohibiting a vacancy of the buildings, without notice and consent, had been broken.

Where proofs of loss are served, and retained by the insurance company without objection, and the company refuses to pay the loss, placing its refusal upon some ground other than defects in the proofs, any further performance of the condition in relation to

proofs is waived, and the company is estopped, when sued on its policy for the loss, to make any formal objections to the proofs. Insurance Co. v. Dunmore, 75 Ill. 14; Insurance Co. v. Cary, 83 Ill. 453; Insurance Co. v. Ward, 90 Ill. 550; Insurance Co. v. Tucker, 92 Ill. 64; Grange Mill Co. v. Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Scammon v. Insurance Co., 20 Ill. App. 500.

The ground, however, for a reversal of the decree, upon which reliance is chiefly placed by the defendant, is that Milne was not the defendant's agent, and had no authority to stipulate on its behalf for a clause in the policy permitting the buildings insured to become and remain vacant and unoccupied for 30 days without invalidating the insurance. The contention is that Milne was merely an agent or employé of Whipple & Smiley, and that the maxim, "delegatus non potest delegare," applies.

Whipple & Smiley, though representing their principal in a particular locality, or within a limited territory, and therefore called "local agents," were in fact general agents of the defendant in the matter of issuing policies. They were not only appointed agents, but supplied with blank policies, properly signed by the company, which they were authorized to fill up, countersign, and deliver to the assured. The rule is well established that this constituted them the general agents of the insurers in the matter of soliciting and accepting risks, agreeing upon and settling the terms of insurance, and carrying the same into effect by issuing the policies. Pitney v. Insurance Co., 65 N. Y. 6; Insurance Co. v. Kinnier's Adm'x, 28 Grat. 88; Viele v. Insurance Co., 26 Iowa, 9; Carroll v. Insurance Co., 40 Barb. 292; Insurance Co. v. Maguire, 51 Ill. 342; May, Ins. § 126.

Whipple & Smiley, possessing, as they did, the powers of general agents in the matter of making contracts of insurance and issuing policies, will be presumed to have possessed competent authority to stipulate for the insertion in the insurance contract with the complainant of the clause in question relating to the occupancy of the buildings to be insured. Such stipulation was clearly within the apparent purview of their agency, and, unless there were limitations upon their authority, of which the complainant had notice at the time the contract was made, the defendant cannot now set up want of authority in them. But it is said that the complainant was notified by the terms of the policy which he received that no agent of the insurance company had authority to enter into a contract of insurance upon any other terms or conditions than those embodied in the blank policies furnished by the defendant to Whipple & Smiley. Those blanks, it is true, contained the following condition: "It is further understood and made a part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions." That this clause cannot have the effect here contended for is apparent from either of two considerations.

At the time the contract of insurance was agreed upon, which was the day next prior to the delivery of the policy, the complainant, so far as the evidence shows, had no notice that any such clause was contained in the company's blanks. And it is doubtful whether even the delivery of the policy to him was notice of its contents, when that fact is taken in connection with his inability to read it, and Milne's assurance that it was drafted in accordance with the contract.

The other reason is that the clause above quoted, when the printed conditions of the policy are subjected to the strict rule of interpretation which properly applies to them, neither is, nor purports to be, a limitation upon the power of the company's agents in agreeing upon and settling the terms of the contract of insurance. It is a limitation upon the powers of agents to waive, modify, or strike from the policy any of its printed conditions. A waiver is the voluntary yielding up by a party of some existing right, but, until the contract is consummated, the company has no rights which are susceptible of waiver, nor can any condition be properly said to be modified or stricken from a policy until there is a policy; that is, until after the terms of the contract have been agreed upon, and the policy issued. Clearly, the clause in question was intended as a limitation upon the powers of agents to waive or modify the terms of a policy after it has been issued, and not upon their power to agree upon and settle the terms of the policy prior to its issue.

Whipple & Smiley being general agents, could they employ Milne to perform the duties of their agency, and make his acts binding on the defendant? The facts are that Whipple was a gentleman advanced in years, who gave but little attention to the duties of the agency. Smiley was an employé in the Alton National Bank, and during banking hours his duties usually required his attendance at the bank. Under these circumstances, Milne was employed by the firm to assist them in their insurance business. He did the general office work; kept the books of the firm; conducted their correspondence; received the premiums paid at the office, and to some extent collected those which were paid elsewhere; filled up policies, all except countersigning; and the evidence tends to show that, whenever he could, he acted as solicitor for the firm in procuring insurance, and that when he had negotiated a policy with any particular person, and expected him to call for it, he would so inform the firm, and a blank policy, duly countersigned, would be left with him, to be by him filled up and delivered. The employment of Milne by the firm, and the general nature of his duties, seems to have been known to the defendant,

as the defendant's state agent is shown to have frequently visited the office of the firm while Milne was in its employ.

As to whether, under these circumstances, general agents can delegate their authority, so as to bind their principal by the acts of their sub-agent, the authorities are not altogether agreed. The position taken by defendant's counsel which is entitled to most consideration is that agents to whom are committed duties which require the exercise of judgment and discretion cannot delegate their authority, for the reason that such agency is from its nature personal; the principal having contracted for the personal skill and judgment of the agents selected. In support of this view, we are cited to a very able discussion in McClure v. Insurance Co., 4 Mo. App. 148, where it is held that a general agent, with power to issue policies of insurance, the signing and delivery of which involve passing upon the character of risks, and consequently call for the exercise of discretion and judgment, cannot delegate his powers as such agent to another.

Without expressing any dissent from the doctrine of that decision, and others which take a similar view, we are of the opinion that the present case falls within a quite different rule. In that case the question was whether any valid policy had been issued by the defendant to the plaintiff. The acts there challenged as having been performed by virtue of a delegated authority embraced the passing upon the character and desirability of the risk, and its acceptance on behalf of the insurer,—acts clearly involving the exercise of discretion and judgment. In the present case no question is raised as to the validity of the policy as issued. No fault is found with the character of the risk, nor is the validity of Milne's acts, by which it was accepted and the policy executed, in any way challenged. The defendant received the premium, and keeps it, and proceeds upon the assumption that the policy was properly issued, and correctly embraces the terms of a valid contract of insurance with the complainant. The defense is based solely upon an alleged breach of one of the conditions of the policy, and the question raised, involving a consideration of Milne's authority to bind the defendant, relates merely to the clause as to the occupancy of the buildings which he agreed to insert in the policy.

We have to determine, then, whether Whipple & Smiley could properly delegate their authority to Milne to that extent only, no other question as to the delegation of their authority being in issue. We are unable to see that this was a matter specially calling for the exercise of discretion or judgment. The complainant's buildings, so far as the question of non-occupancy was concerned, differed in no material respect from all other buildings similarly situated. The case comes now nearly within the principle of Bodine v. Insurance Co., 51 N. Y. 117. There the original policy provided that no insurance, original or continued, should be binding until the actual payment of the premium. The defense was based upon the non-payment of the premium upon a renewal receipt, and the plaintiff's claim was that the clerk of the insurance agent who delivered to him the receipt waived the prepayment of the premium. The only question was as to the authority of the clerk to make such waiver. He was the son of the insurance agent, and had for several years been assisting his father in his insurance business, among other things, by procuring policies and renewal receipts from the company, and delivering them to the insured. In various cases, including the one in question, he had, with the presumed consent and authority of his father, waived the prepayment of premiums. Such delegation of authority was held to be proper, upon the principle that the act of the clerk was the act of the agent, binding on the company just as effectually as if it were done by the agent in person. The doctrine of the foregoing case was cited with approval by this court in Insurance Co. v. Fahrenkrug, 68 Ill. 463. See, also, Lingenfelter v. Insurance Co., 19 Mo. App. 252.

In the present case the act of Milne, by which he agreed to insert in the policy the clause in question, relating to the non-occupancy of the buildings, may be regarded as the act of Whipple & Smiley, and therefore binding on the company, the same as though they had made the agreement themselves. The fact that they knew nothing of the agreement, and gave no actual assent to it, is immaterial, so long as it was within the apparent purview of their powers as agents, and also within the apparent purview of Milne's employment as their clerk and assistant.

But there is another, and we think a conclusive, reason why the agreement of Milne must be held to be binding on the defendant. The defendant is an insurance company organized under the laws of the state of New York, and doing business by its agents in this state under and by virtue of our statute in relation to such companies. The twenty-third section of the statute, in relation to fire insurance companies, after fixing and defining the terms and conditions upon which insurance companies organized under the laws of other states may take risks or transact insurance business by their agent or agents in this state, provides as follows: "The term 'agent' or 'agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." 1 Starr & C. St. p. 1322. The general assembly, having power to impose upon foreign insurance companies coming

into this state to do business such reasonable terms and conditions as it saw fit, had an undoubted right to make such companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business. That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in People v. Insurance Exch. (decided in November last) 18 N. E. 774.

Similar statutes have been upheld in other states, and have there received the same construction we are disposed to place upon our own. A statute of Wisconsin provided that whoever solicited insurance on behalf of an insurance company, or made any contract of insurance, or in any manner aided or assisted in making such contract, or transacted any business for the company, should be held to be an agent of such company, to all intents and purposes. In Schomer v. Insurance Co., 50 Wis. 575, 7 N. W. 544, the court, in construing said statute, say: "The obvious intention of the legislature is to make an insurance company responsible for the acts of the person who assumes really to represent and act for it in these particulars, and to change the rule of law that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority." Said statute was upheld, and the same construction adhered to, in Knox v. Insurance Co., 50 Wis. 671, 7 N. W. 776; Alkan v. Insurance Co., 53 Wis. 136, 10 N. W. 91, and Body v. Insurance Co., 63 Wis. 157, 23 N. W. 132.

A statute of Iowa provided that any person who should solicit insurance, or procure applications therefor, should be held to be the soliciting agent of the insurance company. In Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948, it appeared that an agent of the company, who had authority to solicit insurance and issue policies, sent his clerk to solicit a risk, and take an application, and the clerk knew that there was other insurance on the property, but the agent, who was ignorant of such other insurance, issued a policy, and collected the premium; and it was held that the company was bound by the knowledge of the agent's clerk, who, for the purposes of that policy, must, by virtue of the provisions of the statute, be regarded as the company's soliciting agent.

An attempt is made to distinguish our statute from those considered and construed in the cases above cited, because of the use of the word "acknowledged" in the phrase, "acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business ot any insurance company," etc. The contention is that the word "acknowledged" qualifies the entire clause, and that the statute, therefore, applies to no person who is not acknowledged by the insurance company as having authority to act for it in its insurance business. It is sufficient to say that the construction contended for is so forced and unnatural as not to possess even the virtue of plausibility. It would render the statute impotent and unmeaning, by limiting its operation to those who would be agents of insurance companies without it. The manifest intention was to make such companies responsible for the acts not only of its acknowledged agents, etc., but also of all other persons who in any manner aid in the transaction of their insurance business. Nor do we see anything inequitable or oppressive in such provision. Doubtless the mere assumption of authority to act for an insurance company will not of itself charge the company with responsibility for the acts of the assumed agent. The company must in some way avail itself of such acts, so that the person performing them may be said to aid the company in its insurance business. But after a company has availed itself of the acts of an assumed agent, and thus adopted them as its own, there is nothing oppressive in assuming, as against such company, the existence of the relation of principal and agent, and charging the company with responsibility for such acts.

We are of the opinion that the circuit court properly decreed a reformation of the policy, and, the property insured having been destroyed by fire, it was also proper for the court to enter a decree in favor of the complainant for the amount of his loss.

We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

EAGLE FIRE CO. OF NEW YORK v. GLOBE LOAN & TRUST CO.

(62 N. W. 895, 44 Neb. 380.)

Supreme Court of Nebraska. April 3, 1895.

Error to district court, Douglas county; Doane, Judge.

Action on a policy of insurance by Henry G. Hubbard against the Eagle Fire Company of New York, wherein the Globe Loan & Trust Company was made a party. From the judgment rendered, defendant brings error. Affirmed.

Frank T. Ransom and Howard B. Smith, for plaintiff in error. J. Fawcett, for defendant in error.

RAGAN, C. This is a suit brought to the district court of Douglas county against the Eagle Fire Company (hereinafter called the "insurance company") upon an ordinary policy of fire insurance issued by the insurance company to one Ida W. Brown, insuring certain property of hers against loss or damage by fire from noon of the 13th day of March, 1890, to noon of the 13th day of March, 1895. The suit was brought by Henry G. Hubbard, Mrs. Brown's assignee. Pending the action, Hubbard died, and the suit was revived in the name of his executors. The connection of the Globe Loan & Trust Company with the case need not be stated. Hubbard's executors had a verdict and judgment, and the insurance company has prosecuted to this court a petition in error. In our examination of the case we shall not confine ourselves to a consideration of the errors assigned in the order of their assignment, but consider them under the following heads.

1. That the verdict is not sustained by sufficient evidence.

The policy sued upon contained this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." As a defense to the action the insurance company pleaded that after the issuance of the policy in suit, and without its consent indorsed in writing on the policy, Mrs. Brown procured additional insurance on the insured property. Hubbard's executors, by their reply to this defense, admitted that Mrs. Brown procured additional insurance on the insured property without the consent of the insurance company having been first indorsed in writing on the policy in suit, but pleaded in avoidance of the defense that the company had waived Mrs. Brown's violation of the policy in that respect, in this: That prior to the loss the company had notice of the procuring of such additional insurance, and failed to exercise its right to cancel the policy by reason of such additional insurance, and thereby elected to carry the risk notwithstanding such additional insurance; that after the loss occurred the insurance company, with full knowledge of the existence of the additional insurance, in pursuance of an agreement with Mrs. Brown, submitted the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured property by fire to arbitration, the insured and the insurer paying the expenses of such arbitration; that the loss occurred on the 9th day of November, 1890, and on the 24th of November, 1890, after arbitration of the amount of the loss, the company elected to and did cancel its policy,—such cancellation taking effect only from and after the day of the date of the loss,—and repaid to the insured the unearned premium for carrying the risk from the day after the date of the loss until the expiration of the policy by its terms. The evidence is undisputed that the company canceled the policy on the 24th of November, 1890, and repaid to Mrs. Brown the unearned premium, and took from her a receipt of that date, in words and figures as follows: "Received of the Eagle Fire Company twenty-nine dollars, return premium on policy number 474, in consideration of which said policy is canceled. Said cancellation dates from November 9th, 1890, subject, however, to claim for loss up to and including November 9th, 1890." The evidence is also undisputed that after the loss had occurred the insurance company, with knowledge of the fact that Mrs. Brown had procured additional insurance upon the property subsequent to the date of the policy in suit, submitted the amount of the loss or damage to the insured property to arbitration. The evidence as to the knowledge or notice which the insurance company had of the additional insurance prior to the loss is contained in the following testimony given by Brown, the husband of the insured: "Q. After * * * this insurance had been taken out that is being sued on here, did you visit Ringwalt Bros., agents for the Eagle Company, for the purpose of taking out further insurance? A. I did; yes, sir. Q. Who did you find in the office? A. Mr. Ringwalt,—the same that is sitting right near the desk in the court room. Q. At the present time? A. Yes, sir. Q. What transpired between you and Mr. Ringwalt? A. I told Mr. Ringwalt that I was going to take out some more insurance. I asked him to give me a list of the insurance, as Mr. Devries had changed the amount of the policies. I was not sure about the amount. He said, 'All right'; and he went and got some large book from a bookcase, and he put it down with a lead pencil. Q. Who put it down? A. Mr. Ringwalt put down the amount of the insurance and the name of the company, and handed that to me. Q. Look at the paper I hand you now, and state whether that is the memorandum Mr. Ringwalt made and handed you at the time you are speaking of? A. That is the memorandum. Q. When did you first speak to Mr. Ringwalt, after

that, about additional insurance, and when did he first learn about it, to your knowledge,—about the additional insurance? A. After the time I got this paper from him? Q. Yes. A. Why, on the morning of the 10th—I think it was—of November. That was the day after the fire, on Monday morning. Q. Where did you see him? A. Out there at the house. Q. What was said there about additional insurance? A. He wanted to know if I had that insurance written I was speaking about, and I told him 'Yes.' He said, have I notified those companies. He wanted to know if they had been out there; and I said, 'No; not so far.' Q. Was anything said about the amount of additional insurance? A. Yes; I told him the amount. Q. Was anything further said about it? A. No, sir; Mr. Ringwalt seemed to be in a hurry. He didn't stop there more than ten minutes, probably, all together."

What is the effect of this evidence? We think that the evidence of Brown amounts to this: (1) That about the 5th of November, prior to the destruction of the property by fire, Mr. Brown, husband and agent of the insured, went to the agents of the insurance company, asked them for certain information, and told them that he intended to place additional insurance upon the insured property; but we do not think that this evidence shows, nor that the jury would have been justified in inferring from it, that the insurance company or its agents knew, at any time before the loss made the subject of this suit, that Mrs. Brown had procured additional insurance upon the insured property. (2) That the conduct of the insurance company, after the loss, in submitting the amount of the loss or damage sustained by Mrs. Brown by reason of the destruction of the insured property by fire to arbitration, was evidence which tended to show that the insurance company at that time, having knowledge of the existence of the additional insurance, had elected to waive a cancellation of the policy on account of such additional insurance. It is true that the contract between the insured and the insurer, under which this arbitration took place, provided that the arbitration should not be construed as a waiver of any of the rights or defenses of either party, nor as either an admission or denial of liability on the part of the insurance company. But this only meant that the arbitration should not be conclusive evidence of a waiver on the part of the insurance company of any legal defense it might have to a suit upon the policy. The arbitration, then, while not conclusive evidence, was, we think, competent evidence for the jury to consider in determining whether or not the insurance company waived the violation of the policy by Mrs. Brown in taking out additional insurance. (3) That the act of the insurance company in canceling the policy on the 24th of November, 1890, and repaying to Mrs. Brown the unearned premium to which the insurance company would have been entitled for carrying the risk from the 10th of November, 1890, until noon of the 13th of March, 1895,—both dates inclusive,—was evidence which tended very strongly to show that the insurance company at that time recognized the policy as being in force up to and including the day that the loss sued for occurred. Whether the insurance company waived the provision in the policy which made it voidable, at the election of the insurance company, in case the insured should procure additional insurance without the consent of the company thereto having been first indorsed on the policy, was a question of fact for the jury. And this question of fact was to be found one way or the other by the jury from the facts and circumstances in evidence in the case which went to show the intention of the insurance company in the premises. If the insurance company did not intend to waive, and had not waived, its right to cancel the policy by reason of Mrs. Brown's procuring additional insurance, it is very difficult to understand its conduct in going to the expense of having the amount of the loss or damage sustained by Mrs. Brown determined by arbitration; and it is still more difficult to understand why the insurance company paid her the unearned premium from the 10th day of November, 1890, to the expiration of the policy by its terms. Mrs. Brown having violated the policy by procuring additional insurance thereon without the knowledge or consent of the insurer, it was entitled, on discovering such violation, to cancel the policy by reason thereof,—such cancellation to take effect from and after the date of its violation. But the insurance company did not do this. By its own act it canceled the policy on the 24th of November,—the cancellation to take effect on and after the 10th day of November, the day after the date of the loss. The evidence, then, on which this verdict rests, is not very satisfactory. It is slight. But we are constrained to say we think it is sufficient.

2. That the judgment is contrary to the law of the case.

The argument under this contention is that the notice given by the insured to the insurance company's agents of his intention to procure additional insurance on the insured property was not notice to the company; in other words, that notice to an agent is not notice to his principal. In view of what we have already said as to the effect of the evidence of Brown, we might dispense with any further consideration of this evidence, and would do so, but for the fact that counsel seems to misapprehend the decision of this court in Insurance Co. v. Heiduk, 30 Neb. 288, 46 N. W. 481. In that case the defense was the same as it is here,—additional insurance without the knowledge or consent of the insurer,—and the reply that the insurance company had waived the violation of the policy in that respect, in this: that the local agent of the insurance com-

pany orally consented to such additional insurance. The policy provided that "no consent or agreement by any local agent should affect any condition of the policy until such consent or agreement is indorsed thereon." And the court held—the present chief justice (Norval) writing the opinion—that the oral consent of the local agent to taking out the additional insurance was not binding on the company. But that case does not hold, nor does any other case in this court hold, that a notice given to a duly-authorized and acting agent of a principal about a matter within the scope of such agent's authority is not notice to the principal. In the case at bar it is not claimed that the agent of the insurance company consented that the insured might procure additional insurance upon the property. The claim made is—though, as we have seen, the evidence does not sustain it—that the insured notified the agent that he had taken out additional insurance upon the insured property, and that such notice to the agent was notice to the principal. Without a doubt, the conclusion contended for would be correct if the evidence established the fact that the insured did give the insurance company's agent notice that additional insurance had been procured upon the property. It would seem unnecessary to cite an authority in support of this rule. Insurance companies, for the most part, are corporations. They act, and can only act, through agents. Some of the insurance companies doing business in this state hold charters from the parliament of Great Britain. Their domicile is in England. It will not do to say that a notice, to be effective and binding upon such a company, must be served by the insured on the company at its home office, in London or Liverpool. Again, it is to be remembered that the violation of this provision by the assured, in procuring additional insurance on the property without the knowledge or consent of the first insurer, did not render the policy issued by it void, but voidable, at the election of such first insurer; that this provision was inserted in the insurance contract for the benefit of, and might be waived by, the insurer. Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112. The evidence in this record shows that Ringwalt Bros. were the agents of this insurance company at the time the policy in suit was issued, and that they continued to be the agents of this company, so far as this record shows, until the present time, and that they had authority not only to issue, but to cancel, policies, when, in their judgment, it was for the interest of their principals to do so. In Insurance Co. v. Covey, 41 Neb. 724, 60 N. W. 12, this court said: "Where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void because consent to such concurrent insurance was not given in writing." In other words, the case last cited holds that the knowledge of the insurance company's agent of the existence of insurance on the property on which he issued the policy was the knowledge of the insurance company. This rule is supported by the overwhelming weight of authority. In Gans v. Insurance Co., 43 Wis. 108, it was held: "Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company." In Bennett v. Insurance Co., 31 N. W. 948, the supreme court of Iowa said, "Where the clerk of a duly-appointed agent of a fire insurance company solicits insurance on property which he knows to be insured already in another company, and his employer, the agent, issues the policy upon the application so obtained, the insurance company is bound by the knowledge of the clerk." In McEwen v. Insurance Co., 5 Hill, 101, it is said, "Notice given to an agent, relating to business which he is authorized to transact, and while actually engaged in transacting it, will, in general, inure as notice to the principal." See, also, Insurance Co. v. Gallatin (Wis.) 3 N. W. 772; Mattocks v. Insurance Co. (Iowa) 37 N. W. 174.

3. Another assignment of error here is that the court erred in admitting the evidence of the witness Brown, the husband and agent of the insured. We cannot review this assignment of error. Brown's testimony covers several pages of the bill of exceptions, and the petition in error does not specifically point out any particular part of his evidence which it is alleged the court erred in permitting to go to the jury. Nor does it appear from the bill of exceptions that any exception was taken to the rulings of the court in permitting Brown to give the testimony which we have quoted above. An assignment of error in this court that the district court erred in admitting the evidence of a certain witness will be overruled if any of the evidence given by the witness was competent.

4. Another error assigned is "that the court erred in giving instructions numbered one, two, three, and four given by the court upon its own motion." The first of these instructions is in the following language: "That the terms contained in the policy of insurance which has been introduced in evidence, providing for a forfeiture of the policy under certain conditions, were inserted therein for the benefit of the defendant company and such forfeiture may be waived by the company, if it chooses so to do." Certainly the court did not err in giving this instruction, and, as the assignment is that the court erred in giving all of the instructions named, it must be overruled.

5. Another assignment of error is that the court erred in modifying instructions numbered 1 and 3 asked by the insurance company. The third of these instructions was

in the following language: "You are further instructed that it appears from the evidence that one Mr. Butler, whom the evidence shows to have been an independent adjuster, residing in St. Louis, Missouri, came here, and represented the defendant in the adjustment and appraisal; but there is no evidence as to what authority, if any, he possessed, and the law will presume that his power extended coextensive with the business intrusted to him, namely, the ascertaining the amount of the loss, but it will not be presumed that he had power to alter the contract beween the parties, or to waive any of its conditions, these not being within the apparent scope of his authority." And the modification complained of was the addition by the court, at the end of the instruction, of the following words: "But such want of authority in the adjuster, if there was such want of authority, would in no way affect the authority of other officers and agents of the company to waive the conditions of the policy." The court did not err in modifying this instruction.

6. The final assignment of error is that the court erred in refusing to give instructions 2, 4, and 5 asked by the insurance company. The fourth of these instructions is in the following language: "You are instructed that, so far as the evidence discloses in this case, the Ringwalt Bros. were the agents of the defendant company who issued the policy and collected the premium. But when that was done, so far as the evidence shows in this case, their authority ceased and determined, and the defendant is not bound by any knowledge which came to them, affecting the validity of the policy subsequent thereto, unless it be shown that the same was communicated to the company; and as to such knowledge or information as may have come to their knowledge, or to the knowledge of either of them, and as to which there is no evidence to show the same was communicated to the company, the company is not bound, the burden being upon the plaintiff to show that such information or communication was delivered to the company." The court did not err in refusing to give this instruction, and, since the assignment is that he erred in refusing to give all the instructions named, the assignment must be overruled. By this instruction the insurance company requested the court to tell the jury that after Ringwalt Bros., the insurance company's agents, had issued the policy in suit, their authority as agents of the insurance company ceased. This would have been wrong. The evidence in the record shows that they were not only agents of the company at the time they issued the policy in suit, but that they were agents of the company at the time the loss occurred, at the time the arbitration of the loss took place, at the time the policy in suit was canceled, and at the time of the trial of this action, and that they had authority, not only to issue policies, but to cancel them. The agent of the insurance company said on the witness stand, in this case, that, had he known of the existence of the additional insurance prior to the occurrence of the loss, he would have canceled the policy of Mrs. Brown. But this instruction was bad for another reason. By it the insurance company requested the court to charge the jury, as a matter of law, that the insurance company was not bound by any knowledge affecting the validity of the policy which came to the insurance company's agents, unless such knowledge was communicated to the insurance company. We have already seen this is not the law. There is no error in the record, and the judgment of the district court is affirmed.

WILKINS v. STATE INS. CO. OF DES MOINES.

(45 N. W. 1, 43 Minn. 177.)

Supreme Court of Minnesota. April 24, 1890.

Appeal from district court, Rice county; BUCKHAM, Judge.

M. H. Keeley, for appellant. *A. D. Keyes*, for respondent.

MITCHELL, J. The defendant, an Iowa corporation, but doing business in this state, had an agent at Faribault, whose general duties were to solicit insurance, fill up the blanks in printed policies already signed by the general officers of the company, and left in his possession, countersign, and deliver the same, and collect and remit the premiums. It is undisputed in the evidence that this agent, having solicited the plaintiff for insurance on his stock, and the plaintiff being unable then to pay the premium, assumed to waive immediate payment, and to give plaintiff a temporary credit for the premium, and delivered to him the policy on which this action is brought. The agent subsequently called on the plaintiff at least twice for the premium, but the latter failed to pay; and some two and a half months after the policy was issued the property was burned, the premium being still unpaid.

The question is whether the company was bound by the act of the agent in waiving immediate payment of the premium, and giving plaintiff credit. The policy contains a provision that "no insurance shall be considered as binding until actual payment of the premium." The same rules apply to insurance companies as to any other case of agency. They are bound by all the acts of their agents within the scope of the real or apparent authority with which they have clothed them, and no further; and it would seem well settled by the great weight of authority that, at least in the case of stock companies, a person dealing with an agent possessing the powers exercised by this agent has a right to assume, in the absence of notice to the contrary, that he has authority, pending negotiations for a contract of insurance, to waive a provision like the one quoted, and to give a short credit for the premium. But it is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly relies. There are two provisions in the policy to which he refers in support of his contention. The first is that "no officer, agent, or representative of the company, shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon." Following Lamberton v. Insurance Co., 39 Minn. 129, 39 N. W. Rep. 76, which is abundantly supported by the authorities. This contains no limitation upon the authority of any class of agents, prohibiting them from waiving any of the terms or conditions of the policy. It applies alike to all representatives of the company,—executive or general officers as well as others; and, so far as it assumes to be a limitation at all, it is upon the company itself, to the effect that it can only waive the conditions of the policy in a certain way, or, rather, it assumes to provide what shall be the exclusive evidence of such waiver. This provision, therefore, will not support defendant's contention, but the other or second one does. It is as follows: "This policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing signed by the secretary of the company." The words "policy" and "contract" are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff that this agent at Faribault had no authority to waive the condition that no insurance would be binding until payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained. He was bound to know this; and, by accepting the policy, he is estopped from setting up powers in the agent in opposition to the express limitations contained in it. For this reason, we think the court erred in charging the jury that, if the policy was delivered by the agent to the plaintiff with the intention of giving him a temporary credit for the premium, this would be a delivery that would bind the company so that the policy would be operative, and in force. Order reversed.

KAUSAL et al. v. MINNESOTA FARMERS' MUT. FIRE INS. ASS'N.

(16 N. W. 430, 31 Minn. 17.)

Supreme Court of Minnesota. July 11, 1883.

Appeal from district court, Hennepin county.

Wilson & Lawrence, for appellants. Levi, Cray & Hart, for respondent.

MITCHELL, J. 1. On principle, as well as from considerations of public policy, agents of insurance companies authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the applications, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up these applications,—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. Insurance Co. v. Mahone, 21 Wall. 152; Insurance Co. v. Wilkinson, 13 Wall. 222; Malleable Iron Works v. Phœnix Ins. Co., 25 Conn. 465; Hough v. Insurance Co., 29 Conn. 10; Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 517; Miner v. Insurance Co., 27 Wis. 693; Winans v. Insurance Co., 38 Wis. 342; Rowley v. Insurance Co., 36 N. Y. 550; Brandup v. Insurance Co., 27 Minn. 393, 7 N. W. 735; 2 Am. Lead. Cas. (5th Ed.) 917 et seq.; Wood, Ins. c. 12; May, Ins. § 120.

2. After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact." If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation, unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle, and in accordance with public policy. Wood, Ins. § 139; May, Ins. § 140; Insurance Co. v. Ives, 56 Ill. 402; Gans v. Insurance Co., 43 Wis. 108; Insurance Co. v. Cooper, 50 Pa. St. 331.

3. It is contended by respondent that there is a distinction in this regard between "stock" and "mutual" insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and the authority of the agents employed; that in the case of a mutual company the application is in effect not merely for insurance, but for admission to membership,—the applicant himself becoming a member of the company upon the issue of the policy. By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. Such is

not this case, for the stipulations claimed to bind the insured are only in the policy. But, so far as concerns the questions now under consideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issue of the policy. But in applying and contracting for insurance the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company. Insurance Co. v. Cooper, supra; May, Ins. § 139 et seq.

4. Verbal testimony is competent to show that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. This was not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper were not his statement, though signed by him, and that the insured company, by the acts of their agent in the matter, are estopped to set up that it is the representation of the insured. Insurance Co. v. Wilkinson, supra; May, Ins. § 143, and cases cited, note 3.

5. It appears that the property covered by the policy was the several property of William Kausel, whereas the policy is a joint one to him and his wife, as if upon the joint property of the two. On this ground it is claimed that there can be no recovery, because a joint policy to two does not cover the several property of either. Had plaintiffs taken out this policy without disclosing the real nature of their interest in the property, there might be something in this suggestion. But according to the offers of plaintiffs, which must here be taken as the facts, the wife was the owner of an undivided three-fourths, and in the actual possession of the whole of the land upon which the house and other personal property covered by the policy was situate. The husband erected the house with his own money, under a license from and an agreement with his wife that he might do so, and should have the right to remove it at pleasure. At the time the application for insurance was made, defendant's agent, authorized to take such applications, was personally present on the premises, and was first fully informed by the plaintiffs of all these facts, and then himself wrote out the application, and told William Kausel that it was correct; that William Kausel then signed it, and also signed his wife's name thereto, upon the statement and representation of the agent that such was the proper mode of making the application. In short, it appears that the agent, after being informed that it was the individual property of the husband, although situated on the land of the wife, directed the making of a joint application, and upon such application the defendant issued a joint policy, insuring the two against loss by the destruction of the property by fire, and that the plaintiffs, relying upon the representations of the agent that this was, under the circumstances, the proper course, made the application in this form, and accepted the joint policy.

On this state of facts, if the policy does not cover the loss it is the fault of the defendant and not of the plaintiffs. It seems clear that plaintiffs are not without remedy. We are not prepared to say that William Kausel alone might not have maintained an action, at least upon asking to have the policy reformed; but we see no good reason why, under the facts of this case, the two plaintiffs to whom the policy was issued cannot maintain a joint action. The policy is not a wagering policy, because, between the two plaintiffs, title to the whole of the property was in the beneficiaries to whom the policy ran, and it can make no difference to the defendant in what way their interests are apportioned, or whether it all belongs to one. It brings in no new party to the contract; and by issuing the policy to the two, the defendant admits that both are proper persons to insure. It was entirely competent for all parties to treat this as joint property for the purposes of insurance, and that the loss, if any, should be payable to the two plaintiffs. This is, in effect, just what they have done, and what defendant not only assented to, but advised and directed. If the husband, who owned the property, assented to this, and if the defendant, with full knowledge of all the facts, agreed to it, we fail to see what principle, either of law or justice, is violated by enforcing the contract just as the parties have made it. Peck v. Insurance Co., 22 Conn. 575; Castner v. Insurance Co., 46 Mich. 15, 8 N. W. 554.

Order reversed.

HOME FIRE INS. CO. v. HAMMANG et al.
(62 N. W. 883, 44 Neb. 566.)

Supreme Court of Nebraska. April 4, 1895.

Error to district court, Washington county; Scott, Judge.

Action on policy of insurance by Hammang Bros. & Co. against the Home Fire Insurance Company of Omaha. Plaintiffs had judgment, and defendant brings error. Affirmed.

J. Fawcett, for plaintiff in error. W. C. Walton, W. S. Cook, and D. Z. Mummert, for defendants in error.

RAGAN, C. Hammang Bros. & Co. brought this suit to the district court of Washington county against the Home Fire Insurance Company of Omaha, Neb., hereinafter called the "Insurance Company," to recover the value of certain merchandise which they alleged they owned, which had been insured against loss or damage by fire by the insurance company, and which merchandise had been destroyed by fire. Hammang Bros. & Co. had a verdict and judgment, and the insurance company brings the same here for review.

There is no contention here but that the policy sued upon was issued, that the premium was paid, and that the property was destroyed by fire; nor is there any claim made that the actual loss sustained by Hammang Bros. & Co. was not greater than the amount of the insurance; nor is it claimed that the fire resulted from any fraud or neglect on the part of the insured. To reverse the judgment of the district court counsel for the insurance company have argued four points here, which we notice as follows:

1. One of the defenses the insurance company interposed to this action in the district court was that the insured did not furnish to the insurance company proofs of loss, as required by the insurance contract. The policy provided that, when a fire has occurred damaging the property hereby insured, the assured shall give immediate notice, and render a particular account of such loss, signed and sworn to by them. If there is other insurance, shall give a detailed account of same with copies of the written portions of all policies. Shall also give the actual cash value of the property; their interest therein; the interest of all other parties therein, if any, giving their names; the amount of the loss or damage; for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and an itemized estimate of value of the property destroyed. The fire occurred on the 31st day of October, 1890. On the 25th day of November, 1890, the assured made a statement in writing, swore to the same before a justice of the peace, and transmitted it to the insurance company. This written statement or proof of loss set out that a fire had occurred on the 31st of October, 1890, destroying and injuring the property covered by the policy in suit; that the date of such policy was the 14th of June, 1890; that the policy had been issued to Hammang Bros. & Co.; that the amount of the insurance was $1,500; that the property damaged and destroyed consisted of hardware, stoves, tinware, and other articles usually kept in a hardware store; that the loss was payable to Hammang Bros. & Co.; that the Omaha Fire Insurance Company of Omaha, Neb., had also a policy of $1,000 on the destroyed property; that the goods saved were well protected; that an inventory was being made of the goods saved; that the books of the firm of Hammang Bros. & Co. had been saved; that the fire which destroyed the insured property was communicated to the building in which it was situate from a fire in a livery barn across an alley west of the store of Hammang Bros. & Co.; that an inventory of the stock of Hammang Bros. & Co. had been taken on January 1, 1890; that the condition of the insured property saved was fairly good; and that there had been no change in the risk or its external exposure since the policy was issued.

It will be seen that this proof of loss furnished by Hammang Bros. & Co. to the insurance company is not a strict compliance with the requirements of the policy, but we think it is a substantial compliance with that provision of the insurance contract. Technical accuracy in making out a proof of loss is not essential. The proof of loss is sufficient if it shows upon its face that the insured made an honest effort to comply with the requirement of the insurance contract. Insurance Co. v. Lippold, 3 Neb. 391; Insurance Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Insurance Co. v. Gustin, 40 Neb. 828, 59 N. W. 375. The insured property was situate in the town of Arlington, and the insurance company was domiciled in the city of Omaha. Immediately after the receipt by the insurance company of the proof of loss hereinbefore mentioned the insurance company sent to Arlington its adjuster. This adjuster remained there several days, inquiring into the circumstances of the fire and the amount of the loss. He took possession of the books and invoices of the insured, and estimated the value of the property saved from the fire, the amount of stock on hand at the time the fire occurred, and the amount of the loss or damage which the insured had sustained by reason of the fire, and offered to pay the insured $900 in settlement of their loss. The insurance company, when it received the paper called a proof of loss, hereinbefore referred to, retained possession of the same; made no complaints to the insured that the proofs furnished were insufficient or defective; nor did it request the insured to furnish any other or different proof of loss at any time or place. The insurance company, then, by its conduct, waived the insufficiency of the proofs of loss furnished it by the insured, and in fact waived any proof of loss whatever. For the purpose of settling, if such a question can ever be settled, that the clause in an insurance contract requiring

the insured, in case of the destruction of the insured property, to furnish the insurer proofs of loss, is inserted in the insurance contract for the benefit of the insurer, and the furnishing of such proofs of loss may be waived by such conduct of the insurer, having knowledge of the loss, as established an intention on his part to waive the furnishing of such proofs of loss, we collate some of the authorities in point: Insurance Co. v. Schreck, 27 Neb. 527, 43 N. W. 340; Insurance Co. v. Meyer, 30 Neb. 135, 46 N. W. 292; Insurance Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137,—where it was held that "provisions of an insurance policy covering a stock of goods, for notice of loss within a specified time and in a particular manner, will be held to have been waived by the insurer where, with the knowledge of the loss of part of said stock by fire, it, by its adjusting agent, demands and obtains possession of the remainder of the goods and books of the insured, and is engaged several days, with the help of the latter, in ascertaining the amount of the loss." Insurance Co. v. Barwick, 36 Neb. 223, 54 N. W. 519; Insurance Co. v. Richardson, 40 Neb. 1, 58 N. W. 597,—where it was held: "In case the preliminary proof of loss submitted to the company is unsatisfactory, it should return the same to the insured within a reasonable time, stating in what respect it is considered defective; and if it fails to do so, but rejects such proof on the ground that it was not furnished in proper time, it cannot afterwards avail itself of the insufficiency of such preliminary proof." Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb. 21, 59 N. W. 752; Harriman v. Insurance Co. (Wis.) 5 N. W. 12; Cannon v. Insurance Co. (Wis.) 11 N. W. 11; Zielke v. Corporation (Wis.) 25 N. W. 436; Bromberg v. Association (Minn.) 47 N. W. 975; Insurance Co. v. Holthouse (Mich.) 5 N. W. 642; Green v. Insurance Co. (Iowa) 50 N. W. 558; Assurance Co. v Hocking (Pa. Sup.) 8 Atl. 589. In this last case the court held that "an insurance company which receives proofs of loss when offered, refers them to an adjuster, and retains them, without objection or complaint, for five months, will be held to waive a compliance with the conditions of the policy, even though the proofs were not made within the time nor in the form required by the policy." But, as we shall see hereafter, the insurance company refused to pay this loss, and defended this action on the ground that the policy in suit was not in force at the time the loss occurred. This, then, constituted another waiver on the part of the insurance company of the furnishing to it of proofs of loss by the insured. "The absolute denial by the insurer of all liability on the ground that the policy was not in force at the time of the loss is a waiver of the preliminary proofs of loss required by the policy." Insurance Co. v. Bachelder, 32 Neb. 490, 49 N. W. 217; Insurance Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Insurance Co. v. Dierks (Neb.) 61 N. W. 745; Insurance Co. v. Brewster (Neb.) 61 N. W. 746.

2. Another defense interposed in the court below, and argued here, is this: The policy, as already seen, provided that, in case a loss of the insured property should occur, the insured should furnish the insurance company proofs of loss; and "shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, nearest to place of fire, * * * stating that he has examined the circumstances attending the loss, knows the character and condition of the assured, and firmly believes that the assured has without fraud sustained loss on the property insured to the amount which he shall so certify." The insured furnished no such certificate as the one required by this provision, and the argument is that, therefore, the insured could not recover. Of this defense we have this to say: (1) that it was really included in the defense of the failure of the insured to furnish the insurance company proofs of loss. All that has been said above in reference to that defense applies to this defense and argument. (2) We very seriously doubt if any such provision in a contract can be enforced. Here the argument of the insurance company in effect is that: "We insured your property, and agreed with you that in case it should be lost and damaged we would pay the amount of such loss or damage. You have paid us a premium for carrying this risk, and the property has been destroyed without fault on your part; but you have not furnished us the certificate of an officer whose office is next to the place where the fire occurred, certifying that he has examined the circumstances attending the loss, knows your character and financial condition, and that he believes you have sustained loss without fault on your part, and until you furnish such certificate you cannot maintain a suit in the courts of the state on this contract." The right of a citizen to maintain an action in the courts of this state is fixed by the constitution and the laws thereof, and we do not think that right can be made to depend upon the whim of a justice of the peace or a notary public. Suppose that this justice of the peace should be the enemy of the insured, or for any other reason should refuse to furnish the insured a certificate of good moral character, and should refuse to examine into the circumstances attending the loss and the financial condition of the insured. How is the insured to compel the making of this certificate? We are aware that the supreme court of the state of Minnesota in Lane v. Insurance Co. (Minn.) 52 N. W. 649, sustained a provision like the one under consideration, and held that the furnishing of the certificate was a condition precedent to the right of the insured to recover, and that his inability to furnish the certificate because of the refusal of the magistrate to give it afforded no excuse for the insured's failure. But it is to be remembered that in that state the legislature prescribes the terms and conditions of all fire insurance policies, and such was the policy

considered in the case last cited. Furthermore, the constitution of this state provides that "all courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Section 13, Bill of Rights. It may be that the legislature has the authority to provide that before an insured can maintain an action in the courts to recover for a loss on an insurance policy he must procure the certificate of a magistrate next to where the loss occurred that he has examined into the conditions of the loss, and believes that it occurred without the fault of the insured, that the insured is of good moral character, and that he is acquainted with his financial condition. But we shall hesitate a great while before we uphold any such provision as this, in the absence of express legislation requiring it. We are also aware that provisions similar to this have been considered and upheld in other courts; and it is said that the rule announced in the Minnesota case is sustained by a line of authorities reaching back to an early date in the English courts. However this may be, and however venerable such a rule may be, however much it may be sanctioned by authority and covered with the dust and cobwebs of ages, we decline to be bound by it.

3. The policy provided it should be void "if there is now or shall hereafter be, obtained any other insurance, whether valid or not, on the said property, or any part thereof," unless the consent of the company to such other insurance was indorsed on the policy. Another defense of the insurance company in the district court was that at the time of the issuance of the policy in suit the insured had a policy of $1,000 upon the insured property, issued by the Omaha Fire Insurance Company, and that the existence of such latter policy, or the consent of the insurance company thereto, was not indorsed in writing on the policy in suit. Hammang Bros. & Co. in reply admitted the facts stated as a defense, and pleaded in avoidance thereof, or as an estoppel against the insurance company, that the insurance company wrote the policy in suit with actual knowledge of the existence of the policy held by them in the Omaha Fire Insurance Company. The evidence shows that prior to the 14th of June, 1890, one Badger, a banker in Arlington, was the agent of the insurance company. That a man named Cook, in said town of Arlington, was the agent of the Omaha Fire Insurance Company. That for the year immediately preceding June 14, 1890, the Omaha Fire Insurance Company had a risk upon the property of the insured for $1,000. That about the 13th of June, 1890, Mr. Badger went to Hammang Bros. & Co., and said to them that their policy in the insurance company would expire by the 14th of June, and asked them to permit him to write them a policy for $2,000 on their stock of merchandise. The insured responded that they were carrying $2,000 of insurance then, $1,000 in the Omaha Fire Insurance Company, and $1,000 in Badger's company,—the insurance company. Mr. Badger replied that he knew that, but that the insured, considering the amount of stock they carried, should carry more than $2,000, and asked them if they would not allow him to write a policy in his company to take the place of the one it carried, as that would expire by the 14th of June, for $1,500, thus making the total amount of insurance of the insured on their stock $2,500. The insured demurred to this somewhat, on the ground that the rate was too high, but finally they authorized Badger to write on the 14th of June, 1890, the policy in suit for $1,500 in the insurance company, to take the place of the one the insurance company was carrying for $1,000, and which would expire by the 14th of June. They also instructed Mr. Badger to make a memorandum in writing on the $1,500 policy, which he was about to issue, to the effect that they had $1,000 of insurance at that time in the Omaha Fire Insurance Company on the same stock of merchandise. Mr. Badger promised to do this, and says in his testimony that the only reason he did not do it was because he forgot it. On the 14th day of June, Badger wrote the policy in suit, and on that date, or very shortly after that, wrote a letter to the insurance company, his principal, stating to it that he had written a policy for Hammang Bros. & Co. on the 14th of June, 1890, for a year for $1,500, to take the place of their policy of $1,000, which expired on that date; and in this letter he informed the insurance company, his principal, that the Omaha Fire Insurance Company had a policy of $1,000 on the same property. The policy in suit, after it was written by Mr. Badger, was placed by him in a vault in his bank, where it appears that Hammang Bros. & Co. kept their private papers, and they, nor either of them, ever saw the policy until after the fire occurred out of which this suit arose. Badger collected from Hammang Bros. & Co. the premium for the policy in suit, and duly remitted it to the insurance company. It appears, also, from the evidence, that Badger, before he wrote the policy in suit, and before talking with Hammang Bros. & Co. of writing it, knew, through Mr. Cook, the agent of the Omaha Fire Insurance Company, that that company had a policy of $1,000 on the same property insured by the policy here. The argument of counsel for the insurance company here is not that Hammang Bros. & Co. concealed from the insurance company the existence of the policy in the Omaha Fire Insurance Company, not that Badger made any inquiries as to any other insurance outstanding on the property, and that Hammang Bros. & Co. answered falsely such inquiries or kept silent; but the entire defense and the argument here are rested upon the proposition that, because no memorandum in writing of the existence of the policy in the Omaha Fire Insurance Company was indorsed on the pol-

icy in suit, the latter never was in force. If Hammang Bros. & Co. had themselves violated the provision of the policy in reference to additional insurance on the property, such violation would not, of itself, have rendered the policy in suit absolutely void, but only voidable, at the election of the insurer. Such a provision is inserted in insurance policies for the benefit of the insurer, and is a provision which it may waive. Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112. But the evidence quoted above shows that the insured have not violated any provision of the policy with reference to other insurance than that in suit. The insured did not write the policy in suit. It was not their business to write it. They fully and fairly disclosed to the agent of the insurance company—what he already knew—the existence of the policy in the Omaha Fire Insurance Company, and requested this agent to make a memorandum in writing on the policy in suit of the existence of the other policy. The insurance company's agent intended to do this; and it must be said, in justice to Mr. Badger, that his failure to make this memorandum seems to have been the result of forgetfulness.

Here, then, was actual knowledge of the additional insurance complained of in the possession of the insurance company's agent when he solicited and wrote the insurance policy in suit. This knowledge of the agent was the knowledge of the company. Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company. Gans v. Insurance Co., 43 Wis. 108; Bennett v. Insurance Co. (Iowa) 31 N. W. 948. This precise question was before this court in Insurance Co. v. Covey, 41 Neb. 724, 60 N. W. 12. Ryan, C., writing the opinion of the court, said that "where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void, because consent to such concurrent insurance was not given in writing." This case is decisive of the question under consideration. We are satisfied with the rule as there announced, and adhere to it. That it states the rule correctly we have no doubt, and that it is sustained by the authorities, see, among others, the following cases: Insurance Co. v. Jordan, 29 Neb. 514, 45 N. W. 792; Billings v. Insurance Co., 34 Neb. 502, 52 N. W. 397; Insurance Co. v. Penrod, 35 Neb. 273, 53 N. W. 74; Insurance Co. v. Rounds, 35 Neb. 752, 53 N. W. 660; McEwen v. Insurance Co., 5 Hill, 101; Insurance Co. v. Gallatin (Wis.) 3 N. W. 772; Oshkosh Gaslight Co. v. Germania Fire Ins. Co. (Wis.) 37 N. W. 819; Reiner v. Insurance Co. (Wis.) 42 N. W. 208; Yankirk v. Insurance Co. (Wis.) 48 N. W. 798; Kitchen v. Insurance Co. (Mich.) 23 N. W. 616. In this last case the court said: "An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein." Crouse v. Insurance Co. (Mich.) 44 N. W. 496; Gristock v. Insurance Co. (Mich.) 47 N. W. 549; Cleaver v. Insurance Co. (Mich.) 39 N. W. 571; Temmink v. Insurance Co. (Mich.) 40 N. W. 469; Copeland v. Insurance Co. (Mich.) 43 N. W. 991; Tubbs v. Insurance Co. (Mich.) 48 N. W. 296; Brandup v. Insurance Co. (Minn.) 7 N. W. 735; Kansel v. Association (Minn.) 16 N. W. 430; Eggleston v. Insurance Co. (Iowa) 21 N. W. 652; Donnelly v. Insurance Co. (Iowa) 28 N. W. 607; Miller v. Insurance Co. (Iowa) 29 N. W. 411; Bennett v. Insurance Co. (Iowa) 31 N. W. 948; Mattocks v. Insurance Co. (Iowa) 37 N. W. 174; Brown v. Insurance Co. (Iowa) 38 N. W. 135; Barnes v. Insurance Co. (Iowa) 39 N. W. 122; Reynolds v. Insurance Co. (Iowa) 46 N. W. 659; Hamilton v. Insurance Co. (Mo.) 7 S. W. 261; Brumfield v. Insurance Co. (Ky.) 7 S. W. 893.

4. But it is argued that the evidence of Mr. Badger, the insurance company's agent, and the evidence of the members composing the firm of Hammang Bros. & Co. showing that at the time and before the issuance of the policy in suit Badger knew of the existence of the policy in the Omaha Fire Insurance Company, and agreed to and did write the policy sued on here, and agreed to make a memorandum in writing thereon of the existence of such Omaha Fire Insurance Company's policy, was incompetent, and that the court erred in admitting it. It is said that the effect of this evidence was to vary and contradict the terms of a written contract, to wit, the policy, between the parties. We think this evidence tended to prove that the plea of estoppel set up by the insured to the defense of other insurance on the property made by the insurance company was competent and material; and we do not think the effect of the evidence was such as counsel contend.

5. The final assignment of error is that the court erred in not sustaining the application of the insurance company for a new trial on the ground of accident and surprise. We cannot consider this assignment, for the reason that the affidavits used in the district court in support of this ground of the motion for a new trial are not preserved in the bill of exceptions. The judgment of the district court was right. It is accordingly in all things affirmed. Affirmed.

NORVAL, C. J. I concur in the result.

RUTHVEN et al. v. AMERICAN FIRE INS. CO.

(60 N. W. 663.)

Supreme Court of Iowa. Oct. 22, 1894.

Appeal from district court, Palo Alto county; George H. Carr, Judge.

Action at law upon a policy of fire insurance. Trial to a jury, verdict and judgment for plaintiffs, and defendant appeals. Reversed.

R. W. Barger and McCarty & Linderman, for appellant. B. E. Kelly and Soper, Allen & Morling, for appellees.

DEEMER, J. On the 30th day of April, 1891, the defendant issued to plaintiffs its policy of assurance, insuring them against loss or damage by fire for the period of one year upon an ice house situated in Palo Alto county. On the 15th day of October, and during the life of the policy, the building was totally destroyed by fire. The company having failed and neglected to pay the loss, this action was brought to recover the amount of the policy. Upon the trial of the case in the court below it was conceded that the property was destroyed by fire, and was worth more than the amount called for by the policy. It was also admitted by the plaintiffs that they did not give the preliminary notice and proof of loss required by the policy and by McClain's Code, § 1734, but they averred that the defendant, through its officers and agents, had waived the same. At the conclusion of the testimony for plaintiffs, defendant moved for a verdict, on the ground that no such waiver had been proved. The court overruled this motion, and this ruling is assigned as error. Ingersoll, Howell & Co., of Des Moines, were the local agents of the defendant, who issued the policy in suit. They had the power "to receive proposals for insurance against loss or damage by fire, to name rates, receive premiums, and to countersign, issue, renew, and consent to the transfer of policies of insurance, signed by the president and secretary of the company, subject to the regulations of the company and the instructions of its officers." The evidence also shows that they sometimes received notices and proofs of loss, and forwarded them to the defendant company. Shortly after the fire, and on the same day, one F. H. Giddings, through whom the policy of insurance was procured, at the request of one of the plaintiffs, sent to Ingersoll, Howell & Co. the following telegram: "Ingersoll, Howell & Co.: Ice House No. 3 & 4 burned to-day. Will write. F. A. Giddings." On the next day he wrote as follows: "Ingersoll, Howell & Co., Des Moines, Ia.—Gents: The ice house Nos. 1, 2, 3, & 4 burned to the ground yesterday. We have one thousand dollars insurance on No. 3 & 4 in American Fire of Philadelphia, policy No. 3,505. When can you have the adjuster come and look it over? Respectfully yours, F. H. Giddings." In a few days thereafter, Giddings received a reply to these communications from Ingersoll, Howell & Co., which stated, in effect, that they had received the letter and telegram, and would have the adjuster come in a few days. On receipt of the letter and telegram from Giddings, Ingersoll, Howell & Co. "mailed the usual notice of loss to the company." On the 19th day of October a man by the name of Werniemont, who was the adjusting agent of the Dubuque Fire & Marine Insurance Company, which was also interested in the loss, appeared upon the scene, and made estimates of the material and workmanship on the building, figured the dimensions of and located the buildings. The authorities and powers of this agent will be referred to hereafter. Nothing further being heard from the company, Giddings, at the request of plaintiffs, again wrote or telegraphed Ingersoll, Howell & Co. regarding the loss, and on December 11th received the following telegram: "American interest left with the Dubuque Fire & Marine. Fill proofs, and send Americans to C. E. Bliven, Manager, 218 La Salle Street, Chicago, Ills." And a few days thereafter received the following letter: "Des Moines, Ia., Dec. 11, '91. F. H. Giddings, Esq., Ruthven, Ia.—Dear Sir: Your telegram received yesterday, and we have this morning telegraphed you as follows. [Then follows a copy of the telegram above set forth.] We will say that immediately on the report of the loss last October we gave the necessary notice to the companies' managers at once. A few days after that, the special agent of the American Fire & Marine were both in Des Moines, and, it seeming unnecessary for both to go to Ruthven, the American special turned over the loss to the Dubuque Fire & Marine special, for him to settle both. We understand the American special, Mr. C. N. Miller, notified Ruthven Bros. to this effect, and also inclosed proofs of loss for them to fill out. Since that time we have paid no attention to the matter, and do not know what action has been taken by the Dubuque Fire & Marine people. We did not answer your telegram yesterday, anticipating the arrival in the city of the American special. We now suggest (if you have not already done so) that the assured make out proofs of loss, and send them by registered mail or express, to make sure that they reach the proper parties of both companies. Send proofs to C. E. Bliven, Manager, 218 La Salle Street, Chicago, Ills. As we understand, the state laws give 60 days in which to file such proofs. We do not understand, from all our conversation with the American special, that they intended to take advantage of you in any way, but it is well in all cases to take the necessary steps in matters of that kind. Do not the assured consider that the loss was due to the neglect of the Des Moines Ice Company in originating the fire, and do

they expect to make any claims in court against these people for the loss sustained? In that case, it strikes us, it might be well to confer with the insurance companies interested on your loss, and join with them in making any such claim, provided you have the proofs to substantiate it. We trust you will have no trouble in getting matters settled as they should be, and do not anticipate that you will, so far as the American is concerned. We trust this is satisfactory, and to hear from you again soon. Yours, truly, Ingersoll, Howell & Co." C. N. Miller is a special agent and adjuster of the defendant company, living at Des Moines. Whether he is a general adjuster, or acts as such in special cases, does not clearly appear. Immediately upon receipt of the notice of loss from Giddings, Ingersoll, Howell & Co. notified Miller of the loss, and a short time thereafter Miller and Werniemont came into the office of Ingersoll, Howell & Co., and it was there arranged between them that Werniemont should go and investigate the plaintiffs' loss, and report to the defendant company. Werniemont went pursuant to their arrangement, and made the investigation before stated. Some time in January, 1892, and after the 60 days had expired for making proofs of loss, Miller himself went to Ruthven, where plaintiffs lived, and there had a conversation with the plaintiffs, in which he stated in substance that he did not wish to go to the site of the property; that he had seen Werniemont before he came up, and had a talk with him after he went back, and that he was satisfied that it was all straight and right, and ought to be paid, but that plaintiffs ought to commence an action against the ice company for their negligence in destroying the property, and if they (plaintiffs) fought them they would take care of us (plaintiffs); that Werniemont had come to investigate the liability of the ice company when he was first there. Miller did not agree to pay the loss at any time, however, and did not agree to do anything until plaintiffs had tried to recover from the ice company.

The foregoing facts are established by plaintiffs' testimony, and are relied upon to prove a waiver of the provisions of the policy requiring notice and a statement of the loss within 60 days from the date of the fire, and of the statute requiring practically the same thing. The defendant introduced no testimony, and the question in the case is, do these facts establish a waiver? The policy required this statement of loss to be filed within 60 days after the fire, unless such time was extended in writing by the company, and provided that the statement should be signed and sworn to by the insured, and should state the time and origin of the fire, according to his best belief, the interest of the assured in the premises, etc. The statute (McClain's Code, § 1734) requires the assured to give notice in writing, accompanied by an affidavit stating how loss occurred, and the extent of the loss, within 60 days from the time the loss occurred. These matters were conditions precedent to a right of recovery on the policy, and, unless waived, a failure to comply with them is fatal. The policy also provided: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The plaintiffs contend that the notice which they sent to Ingersoll, Howell & Co. of the loss was sufficient, or if not sufficient, that the defendant company raised no objections thereto, and that they were led to believe that they were sufficient. They further urged that by sending Werniemont to examine into the loss after the receipt of the notice the company waived any further proofs, and accepted the notice as being sufficient. It is these claims that we now proceed to examine in the light of the facts and adjudicated cases.

Ingersoll, Howell & Co. were, as we have already stated, local agents of the defendant company. They had nothing to do with the adjustment of losses. The mere fact that an agent is shown to have authority to issue policies and countersign the same does not warrant an inference that he has authority to adjust and settle losses, or waive the performance of the conditions in the policy; and the fact that he assumes to do so does not even tend to establish his authority. 2 Wood, Ins. 915; Bush v. Insurance Co., 63 N. Y. 531; Bowlin v. Insurance Co. (Minn.) 31 N. W. 859; Smith v. Insurance Co. (Vt.) 15 Atl. 353; Kyte v. Assurance Co. (Mass.) 10 N. E. 518; Knudson v. Insurance Co. (Wis.) 43 N. W. 954; Lohnes v. Insurance Co., 127 Mass. 439. As the policy does not name the person to whom the notice may be sent, but merely provides for notice to the company within sixty days, it may be true that notice can be given to the agent who issued the policy. And where, as in this case, it is fur-

ther shown that the agent mailed a notice of loss to the company, it is more than probable that the notice was given to a proper person, and was sufficient as a notice to bind the company. Insurance Co. v. Taylor, 73 Pa. St. 342; Argall v. Insurance Co., 84 N. C. 355; Loeb v. Insurance Co. (Mo. Sup.) 12 S. W. 374; Insurance Co. v. Helfenstein, 40 Pa. St. 289; Pennypacker v. Insurance Co. (Iowa) 45 N. W. 408. This notice, however, was not accompanied by proofs of loss, and, as we have already seen, the local agents had no authority to waive them. The answer of defendant's local agents to the plaintiffs that an adjuster would be sent at once was not binding on the company, for they had no authority in matters connected with the adjustment of the loss. Von Genechtin v. Insurance Co., 75 Iowa, 544, 39 N. W. 881. Could it be said that Ingersoll, Howell & Co. had authority to waive proofs of loss, yet it is apparent from their letters and telegrams to Giddings, who was representing the assured, that they did not waive them. They both telegraphed and wrote plaintiffs within the 60 days to file proofs of loss, and directed them where to send them. It is not shown that these agents had authority to notify or to send an adjuster to examine into the loss, and the plaintiffs had no right to rely upon any statement from them that they would.

2. After notifying the local agents of defendant company of their loss, an adjusting agent of the Dubuque Insurance Company appears, and makes some figures regarding the loss, with the help of plaintiffs' clerks; and it is claimed that this is a waiver of the requirements of the statute and the terms of the policy. There is no proof that he was sent there by any general agent of the defendant company. The most that can be claimed from the testimony is that he went at the request of Miller, the special agent and adjuster for the defendant company in this state. Just what Miller's powers were does not fully appear. This much, however, is shown: that he was a special agent, had a general oversight over the local agents in this state, and was either a general adjuster or acted specially in regard to such losses as he was directed to by the company. He was not, so far as shown, empowered to delegate his authority. Whatever may have been his powers, we are clear that as to the matter of adjusting losses he had no right to delegate his authority. The business of adjusting losses, carrying with it the inherent power of waiving conditions in the policy and dispensing with proofs of loss, as well as determining the rights and liabilities of coinsurers, is one requiring special skill and peculiar fitness, and it is a matter of common business knowledge that agents are selected for this work because of their special skill and fitness. It is elementary that when an agent is so selected he cannot delegate his powers. Waldman v. Insurance Co. (Ala.) 8 South. 666; 1 Am. & Eng. Enc. Law, 368. The defendant company, so far as shown, did not direct, and had no notice of, the appointment of this subagent, and they did nothing which ought to estop them from denying his authority. As it is attempted to show a waiver by the company of the conditions of the policy by the fact that they investigated the loss, it is incumbent upon the plaintiffs to show that they were misled by some act of the defendant indicating that it had dispensed with the proof of loss. The defendant itself did no act which would indicate such a waiver, and it is certainly permitted to show that what was done was without its knowledge, consent, or authority. Werniemont was manifestly not clothed with authority, either real or apparent, to waive proofs of loss. Barre v. Insurance Co., 76 Iowa, 609, 41 N. W. 373; Hollis v. Insurance Co., 65 Iowa, 454, 21 N. W. 774. Again, if this adjuster had authority to visit the premises, and make report of the loss, he did or said nothing to indicate that formal proofs were not required. It is provided in the policy "that the company shall not be held to have waived any provision or condition thereof, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination provided for in the policy." Plaintiffs then had no right to rely upon this examination as a waiver of the proofs of loss, even if authorized. Without such a provision in the policy, it has been held that investigation by an adjuster who does not say anything to the assured is not a waiver. Busch v. Insurance Co., 6 Phila. 252; Insurance Co. v. Shimp, 16 Ill. App. 248. Whatever the true rule may be in this respect, it is clear from what has been said that Werniemont had no authority to waive proofs of loss.

3. Lastly, it is insisted that Miller, the special agent and adjuster of the company, who interviewed the plaintiffs after the expiration of the 60 days within which to make proofs of loss, waived the performance of the condition, and agreed to pay the policy. There is no evidence of any express promise to pay. The most that can be said of his testimony is that he said the loss was all right, and ought to be paid, and that he had received a statement from Werniemont regarding the loss. In the first place it is not shown, except by the alleged declarations of Miller, that he had any authority to visit the plaintiffs. The company made no representations to them that he would be sent. He was a special agent, having charge of the agencies within his state, and perhaps was the adjuster of the company for this state; these facts being the case within the rule announced in the Barre and Hollis Cases, supra. But, if this be not true, the authority of Miller, as well as of Ingersoll, Howell & Co. and Werniemont, was limited by the express terms of the policy, of which plaintiffs will be presumed to have had notice. The policy pro-

vides, in substance, that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto. There is some conflict in the authorities as to whether this kind of an agreement or provision is valid or not. But we think the decided weight is in favor of the proposition that it is. Insurance Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010; Weidert v. Insurance Co. (Or.) 24 Pac. 242; Cleaver v. Insurance Co. (Mich.) 39 N. W. 571; Quinlan v. Insurance Co. (N. Y. App.) 31 N. E. 31; Smith v. Insurance Co. (Vt.) 15 Atl. 353; Walsh v. Insurance Co., 73 N. Y. 5; Hankins v. Insurance Co. (Wis.) 35 N. W. 34; Gould v. Insurance Co. (Mich.) 51 N. W. 455; Clevenger v. Insurance Co. (Dak.) 3 N. W. 313; Enos v. Insurance Co. (Cal.) 8 Pac. 379; Kyte v. Assurance Co. (Mass.) 10 N. E. 518; and many other cases cited in these authorities. Whether this is the correct rule or not, it is the one adopted by this court in the recent case of Kirkman v. Insurance Co. (Iowa) 57 N. W. 953, decided since this cause was tried in the lower court. The principle was also recognized in Zimmerman v. Insurance Co., 77 Iowa, 691, 42 N. W. 462; Machine Co. v. Crow, 70 Iowa, 340, 30 N. W. 609. We do not mean to be understood as holding that the company could not itself, through its general agents, waive these provisions of the policy. What we do hold is that the provisions we have quoted are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had, or are presumed to have had, knowledge, and that any agreement or waiver which they attempted to make would not be binding upon the company, because not authorized. Most of the questions which we have discussed arose upon proper objections to the testimony, as it was adduced, and which were overruled, and proper exceptions taken; the others, upon the motion of the defendant to direct a verdict. What we have said sufficiently indicates our views regarding these objections, and makes it apparent that defendant's motion should have been sustained. The judgment of the district court is reversed.

KNOP v. NATIONAL FIRE INS. CO. OF HARTFORD.

(59 N. W. 653, 101 Mich. 359.)

Supreme Court of Michigan. July 5, 1894.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by August Knop against the National Fire Insurance Company of Hartford, Conn., on a fire insurance policy. There was a judgment for plaintiff, and defendant brings error. Reversed.

Elbridge F. Bacon, for appellant. Eugene S. Clarkson, for appellee.

McGRATH, C. J. Action on a fire insurance policy issued by defendant upon plaintiff's dwelling and homestead effects. It is insisted that under a clause in the policy which provided that the policy should be void "if the interest of the insured be other than unconditional and sole ownership," inasmuch as plaintiff held under a land contract, he could not recover. Plaintiff made no written application, nor is it claimed that he made any representations as to ownership. It has been repeatedly held that such a condition will not invalidate the policy in such case. Insurance Co. v. Fogelman, 35 Mich. 481; Dupreau v. Insurance Co., 76 Mich. 615, 43 N. W. 585. Nor do we think that the statement in the affidavit, made after the loss, that he was the sole and unconditional owner, would prevent a recovery. The defendant could not be prejudiced by such a statement.

A motion for a new trial was made in the court below, and a review is sought of the court's ruling denying the motion. The language of the act of 1893 is that "exception may be taken and error assigned on the decision of the circuit judge in refusing such motion, and the same shall be reviewed by the supreme court." In the present case no exception was taken, and the error, if any, must be deemed to have been waived.

An objection was made to the introduction of proof as to the contents of the dwelling, for the reason that the bill of particulars described the articles for which recovery was sought as "contents of house." Defendant had demanded a bill of particulars. That furnished was obscure and evasive. A bill of particulars is expected to be explanatory of the declaration, and in amplification of it. The paper served in the present case in response to the demand gave no additional information whatsoever, and possessed none of the qualities of a bill of items or particulars. In those cases where it has been held that it is the duty of the party demanding the bill to re-move for a more specific bill, and that an objection upon the trial comes too late, there has been some effort at compliance with the demand. Freehling v. Ketchum, 39 Mich. 299; School Dist. v. Clark, 99 Mich. 435, 51 N. W. 529.

It is urged that defendant had in his possession a list of the lost articles furnished by plaintiff, but after such list had been furnished a number of articles, corresponding in description to those named in that list, had, to plaintiff's knowledge, been discovered secreted in a barn upon the premises, and defendant was entitled to know whether plaintiff still claimed to recover for such articles. The court should have exercised its discretion, under circuit court rule No. 38. For this error the judgment must be reversed, and a new trial granted. The other justices concurred.

J. B. EHRSAM MACH. CO. v. PHENIX INS. CO.

(61 N. W. 722, 43 Neb. 554.)

Supreme Court of Nebraska. Jan. 17, 1895.

Error to district court, Franklin county; Gaslin, Judge.

Action by the J. B. Ehrsam Machine Company against the Phenix Insurance Company. From a judgment for defendant, plaintiff brings error. Affirmed.

F. I. Foss, for plaintiff in error. J. Fawcett and Fawcett, Churchill & Sturdevant, for defendant in error.

RYAN, C. On the 11th day of April, 1889, the J. B. Ehrsam Company agreed to sell to the Eagle Milling Company, of Franklin county, Neb., certain machinery for use in its gristmill. Payments were to be made as follows: $150 in cash, of which the receipt was acknowledged; $200 on receipt of machinery; $218.58 three months from shipment; $218.58 six months from shipment; $218.59 nine months from shipment. For the deferred payments, promissory notes were given by the Eagle Milling Company, in each of which was this provision, immediately following a description of the property: "And delivery of said personal property is made to the maker hereof upon the express condition that the title to the said personal property shall remain in the payee hereof, his assigns, and his legal representatives, until this note is paid in full, together with all costs of collection." These notes have not yet been paid. After the delivery of the aforesaid personal property to the Eagle Milling Company, that company insured it with defendant in error, loss, if any, being made payable to the J. B. Ehrsam Machine Company as its interest might appear. During the time covered by the policy of insurance the Eagle Milling Company transferred its interest in the insured property to Louise S. Schwartz, who was the holder thereof at the time the property was destroyed. Notwithstanding a provision in the policy that the transfer of the interest of the assured in the property would operate to avoid the policy itself, unless assented to by the defendant in error, the transfer just referred to was made without such knowledge or assent. There was no attempt to explain how this happened; neither was there evidence of any fact which would operate to suspend or avoid the provisions of forfeiture resulting from the terms of the policy. So far as the rights of plaintiff in error were concerned in this case, it is deemed sufficient to remark that by its own showing the title of the property insured was retained by it, and that the interest of the Eagle Milling Company was only that of one in the possession of personal property with the right to acquire title when payment therefor should be fully made. This right of plaintiff in error, if measured by the provisions above quoted, would bar its right of recovery, for the representation of the Eagle Milling Company that it was the owner of the property was false when made for the purpose of procuring the issuance of the policy herein sued upon. The plaintiff in error had made no showing of any reason why the forfeiture of the policy above referred to did not extend to and involve its rights thereunder. The district court properly instructed the jury to find for the defendant, and the judgment rendered on that verdict is affirmed. Affirmed.

GREEN v. HOMESTEAD FIRE INS. CO.

(82 N. Y. 517.)

Court of Appeals of New York. Nov. 16, 1880.

Action on a policy of fire insurance conditioned "that the company shall not be liable for any loss, * * * if, without written consent hereon, the property shall hereafter become incumbered in any way." Also, "or if the interest of the insured therein be changed in any manner, whether by the act of the insured or by operation of law."

F. W. Hubbard, for appellant. J. Welling, for respondent.

RAPALLO, J. The notice filed in pursuance of the mechanics' lien law clearly did not effect any change of interest in the property insured.

The only other question presented on this appeal is whether the filing of the notice of lien created an incumbrance in violation of a condition of the policy. The condition alleged to have been violated was that the company should not be liable for loss if, without written consent, on the policy, the property should become incumbered in any way. The policy was issued on the 4th of September, 1876. The notice of lien was filed on the 19th of September, 1876. The fire occurred October 14, 1876. It is not claimed that the lien was filed by the procurement of the assured. Assuming that it was an incumbrance upon the property, we do not think it was such an incumbrance as was contemplated by the condition; that the condition applied only to incumbrances created by or with the assent of the assured, and to the creation of which he might apply for the consent of the company, and that the true meaning of the condition was that the assured should not incumber the property without first obtaining the written consent of the company.

We have thus construed similar conditions in policies in other cases. Baley v. Insurance Co., 80 N. Y. 21.

The judgment should be affirmed.

All concur.

Judgment affirmed.

LOY v. HOME INS. CO.

(24 Minn. 315.)

Supreme Court of Minnesota. Dec. 13, 1877.

Appeal by defendant from an order of the district court for Olmsted county, Mitchell, J., presiding, denying a motion for a new trial in an action on a policy of insurance.

Henry C. Butler, for appellant. Start & Gove and P. M. Tolbert, for respondent.

CORNELL, J. The policy on which this action is brought contains the following among other conditions:

"If the property be sold or transferred, or any change takes place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * this policy shall be void."

The property insured consisted of a dwelling-house, and certain furniture and wearing apparel therein contained, situate upon premises belonging to the respondent. After the issuance of the policy the respondent mortgaged the premises, and the same were sold under a power of sale, upon a foreclosure of the mortgage by advertisement, pursuant to the statute. After the sale, and before the period for redemption had expired, the loss occurred, the respondent still being in possession of the premises.

The question for consideration is, whether this foreclosure sale was "a sale, transfer, or change in title," within the meaning of the foregoing condition, such as avoided the policy.

In construing a condition of this character, if, upon a consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are two-fold: the tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit and in language of his own choice. If any doubt arises as to its meaning the fault is his in not making use of more definite terms in which to express it; hence the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances. Hoffman v. Insurance Co., 32 N. Y. 405; Westfall v. Insurance Co., 2 Duer, 495; Insurance Co. v. Wright, 1 Wall. 456; Insurance Co. v. Crapper, 32 Pa. St. 351.

Applying these principles, a correct interpretation of this condition of the policy would seem to be attended with but little difficulty. In the first place it makes a sale or transfer of the property a cause for avoiding the policy. Within the meaning of the stipulation this refers to an absolute and completed, and not a conditional or incomplete, sale or transfer; in other words, a sale that wholly divests the owner of the property of all insurable interest therein.

The succeeding clause, which gives a like effect to any "change in title, * * * whether by legal process, judicial decree, or voluntary transfer or conveyance," has reference to an absolute transfer of the legal title in one of these ways, though such transfer, as in the case of a conveyance in trust, or by a deed, absolute in terms, but intended merely as a security, might not operate to divest the owner of the property of all his insurable interest therein.

In our judgment nothing short of a complete transfer of the legal title comes within the prohibition of this stipulation. The mere creation of a lien or encumbrance upon the property insured cannot be regarded as effecting "any change in title," either in the legal sense or according to the ordinary and popular understanding. "In legal acceptation," says Allen, J., in Insurance Co. v. Allen, 43 N. Y. 389, "title has respect to that which is the subject of ownership, and is that which is the foundation of ownership; and with a change of title, the right of property, the ownership, passes." As applied to real estate, it is defined to be "the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it;" "the lawful cause or ground of possessing that which is ours." 2 Bouv. Law Dict. 986.

In this sense, which is also the ordinary and popular one in which the word is used, a "change in title" is a change in ownership, which carries the legal right of possession and property, and it is in this sense we must understand the word as having been used in this clause.

Although within the meaning of the registry laws a mortgage of real estate is defined to be a conveyance, yet under our laws it is not deemed a conveyance in the sense of passing any estate or interest in lands, or transferring any legal title thereto. The only interest which a mortgagee acquires is a lien upon the land in way of security, which, prior to the foreclosure of the right of redemption, is treated as personal property that goes to the administrator or executor, and not to the heirs. The legal title, with the right of possession, remains with the mortgagor until a completed foreclosure is had by sale, and the same becomes absolute by the expiration of the period for redemption. Until this time expires the purchaser at the sale has only a chattel and equitable interest. He has no legal title to the lands, nor any conveyable estate therein. The character of his interest is the same as that of a mortgagee before foreclosure sale. Gen. St. c. 52, § 11; Id. c. 75, § 11; Donnelly v. Si-

monton, 7 Minn. 167 (Gil. 110); Horton v. Maffitt, 14 Minn. 290–292 (Gil. 216).

Neither is a foreclosure by advertisement "legal process" or a "judicial decree." The proceedings in this kind of a foreclosure are carried on wholly outside of court, and without the aid of its process or decree. It is obvious, then, that neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession in respect to the property insured, and did not, therefore, avoid the policy.

Order affirmed.

GIBB et al. v. PHILADELPHIA FIRE INS. CO.

(61 N. W. 137, 59 Minn. 267.)

Supreme Court of Minnesota. Dec. 6, 1894.

Appeal from district court, Hennepin county; Robert D. Russell, Judge.

Action by Collin Gibb and others against the Fire Insurance Company of the County of Philadelphia on a fire insurance policy. From the part of the judgment in favor of plaintiff Gibb, defendant appeals. Reversed.

Kitchel, Cohen & Shaw, for appellant. Fred W. Reed, for respondents.

CANTY, J. On February 29, 1892, the plaintiff Gibb was the owner in fee simple of the premises in question, subject to a mortgage of $1,200, held by the plaintiff Hilles. On that day defendant issued a policy of insurance insuring Gibb to the amount of $2,000, for three years from and after that day, against loss by fire to the buildings on the premises, loss, if any, payable to Hilles as her interest may appear; but providing that if, in case of loss, the insurer is not liable to the mortgagor or owner, it shall be subrogated to the rights of the mortgagee under her mortgage, and, upon paying the full amount due on the mortgage, shall receive an assignment of it. This mortgage clause also provided that the policy should not be invalidated as to the mortgagee by any act of the owner, or by any change in the title or ownership of the premises. On February 28, 1893, there was a loss by fire amounting to $1,462.62. The plaintiffs brought this action to recover this loss. The case was tried by the court without a jury, and judgment was ordered in favor of Hilles for $1,200, the amount of her mortgage, and in favor of Gibb for the balance of said amount of the loss. From the judgment entered thereon, defendant appeals.

The appellant concedes that the plaintiff Hilles is entitled to recover, but contends that a breach occurred, prior to the fire, which avoided the policy as to Gibb; that he is not entitled to recover; and that defendant is entitled, on payment to Hilles of the amount of her mortgage, to be subrogated to her rights under the mortgage. The policy contains the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." It is found by the court: That on March 23, 1892, plaintiff made a contract in writing with one Maggie J. Kelly whereby he sold and agreed to convey to her the premises, consisting of five lots, by deed of warranty, on prompt and full performance by her of the agreement, and she agreed to pay therefor the sum of $2,500,—$300 cash, and $1,000 in installments of $50 every 60 days thereafter until paid, the balance to be paid by her in assuming said mortgage,—she to have possession of the premises until default in payment; and in case of such default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. That at and from the time of making the policy of insurance, until the time of making the contract of sale, the buildings had been unoccupied, and that, on the making of said contract of sale, said Kelly entered into the possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract.

It is contended by appellant that, by the transactions with Kelly, there took place a change in the interest, title, and possession of Gibb, and the condition against any such change was broken, and the policy avoided as to him. It seems to us that there was a breach in the condition against any change of interest. It is not claimed by respondents that there was any waiver of this condition, and the authorities cited by counsel are nearly all cases where the breach claimed was not of a condition against a change of interest, but a change of title. It is held by the great weight of authority that, where the condition is against any change in the title, there is no breach unless there is a change in the legal title,—that, as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous, as contended by counsel. The word "interest" is broader than the word "title," and includes both legal and equitable rights. It is not necessary to consider the question of the change of possession, except so far as it has an influence on the change of interest by strengthening and fortifying the interest acquired by Kelly. This disposes of the case. The plaintiff Hilles is entitled to judgment for the sum awarded her, but upon payment of the same the defendant is entitled to be subrogated to her rights under her mortgage, and the defendant is entitled to judgment against the plaintiff Gibb that he take nothing by this action. The judgment appealed from should be reversed, with directions to enter judgment in conformity with this opinion. So ordered.

GILFILLAN, C. J., absent on account of sickness, took no part.

FUNKE v. MINNESOTA FARMERS' MUT. FIRE INS. ASS'N.

(13 N. W. 164, 29 Minn. 347.)

Supreme Court of Minnesota. 1882.

Appeal from district court, Hennepin county.

Levy & Cray, for appellant. Walter C. Fawcett, J. N. Steel, and Robert Van Dyke, for respondent.

DICKINSON, J. This action is to recover upon a policy of insurance issued by the defendant in June, 1874, whereby the defendant insured the dwelling-house and furniture of the plaintiff against loss by fire for a period of seven years.

The fire causing the injury complained of occurred in March, 1880. The policy contained these conditions: "If the insured shall have, or shall hereafter make, any insurance in any other company on the property hereby insured, or any part thereof, without obtaining the consent of the secretary of this association, * * * the insured shall not be entitled to recover from the association any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof." In February, 1879, while this policy was still in force, the plaintiff made application to the American Insurance Company, of Illinois, for insurance upon the same property, representing in such application that he had no other insurance upon it. Thereupon, and upon a sufficient consideration, the latter company issued its policy of insurance upon said property for the period of five years, which policy was, however, by its terms rendered "void" by reason of the prior and undisclosed contract of insurance with this defendant, although upon its fact it was a valid contract of insurance.

The plaintiff held the policy of the American Insurance Company, and after the loss in March, 1880, made proofs of loss and claimed payment from that company. The company, however, learning of the prior insurance with this defendant, refused to pay, denying its obligation. No notice was given to the defendant of the subsequent insurance in the American Insurance Company. The court below considered that the plaintiff had not been guilty of actual fraud in the premises, and upon the facts here briefly stated plaintiff was held entitled to recover.

The liability of the defendant depends upon the proper legal construction of the written contract of insurance. In the policy is expressed the agreement of the parties in terms which must be regarded as having been deliberately chosen by themselves, and which we must presume they both understood and consented to. If the condition respecting other insurance was violated, not in its letter, but within the intent and meaning of the parties, by the making of a subsequent contract of insurance, valid upon its face, but void or voidable in fact by reason of misrepresentation (not actually fraudulent) on the part of the assured, then the liability of the defendant was terminated. Otherwise it was not. We have, then, to consider the meaning and force of that stipulation in the contract. The courts have often been called upon to construe similar provisions in policies of insurance, and in the American courts, it has generally been held that policies containing conditions similar to that in this case were not avoided by the making of other contracts of insurance which were in fact void or voidable by reason of the breach of some condition therein, or by reason of misrepresentation. These decisions proceed upon a construction of the contract which makes the condition against other insurance to mean only other valid insurance, or a valid and enforceable contract of insurance; and hence it is held that other contracts of insurance, void or voidable at the election of the insurer by reason of the breach of some condition therein, or even, as some of the courts hold, by reason of the actual fraud of the insured, are not within the condition construed, and do not operate to avoid the policy. We cannot yield assent to such a construction of the contract. It involves, in our judgment, a disregard of the plain objects contemplated by the parties to the contract when it was made, and to accomplish which the condition against other insurance was adopted. It is a matter of common knowledge, which we may not ignore in construing this contract, that it is a settled policy of insurers against loss by fire to protect themselves against incendiarism and negligence by compelling the insured to bear some part of the risk, so that if the property shall be destroyed he will suffer loss, notwithstanding his insurance. To this end the insurer limits the amount of his own insurance upon the property to a sum less than its value, and guards against other insurance being effected upon the same property, without his consent, by stipulations to that effect, which are ordinarily, as in this case, embodied in the written contract of insurance. Such provisions are for the benefit of the insurer, and can have no other object or purpose than to place the insured in such a position respecting the property that, from considerations of self-interest, he not only will not willfully burn it, but will be watchful and careful in guarding against fire.

In the case before us it distinctly appears that what we have spoken of as a custom in the business of insurance was not departed from. The policy provided that the insured shall not be entitled to recover more than two-thirds of the value of the property at the time when the loss should occur, and that any misrepresentation or overvaluation in the application should avoid the policy; and in the same connection is the condition respecting other insurance, already quoted. It has never been claimed, to our knowledge, that the object of incorporating in contracts of insurance condi-

tions like that under consideration was or could possibly have been other than that which is above indicated. Considering now the purpose sought to be accomplished by this condition, and which, if we have interpreted it aright, both the parties must be regarded as having understood as we understand it, the conclusion is unavoidable that in making a subsequent contract of insurance, for the purpose of securing other or further indemnity in case of loss by fire, the plaintiff did that which, by the terms of the contract, avoided it, although he could not enforce a recovery upon such subsequent contract. We assume that the plaintiff intended to secure indemnity by the second insurance. It is not consistent with human conduct that he should have paid a premium and incurred legal obligations knowing that he secured no right and no possibility of benefit in return. So far as concerned his conduct in the care or destruction of the property, it was not important in a legal sense whether in fact the second contract was enforceable by him or not. By the very means contemplated by the parties and referred to in the contract—that is, by contracting for other indemnity in case of loss by fire—he had removed from his mind all motives of self-interest in the preservation of the property, so far as "other insurance" could have that effect. Whatever increased hazard "other insurance" could cause, was effected, to the full extent, if, in fact, plaintiff supposed the second insurance valid and enforceable; and in a less degree, perhaps, if he knew it to be void at the election of the insurer, and that he could not recover upon it if the facts avoiding it should be discovered. In either event that purpose which the parties to this contract contemplated, and deemed so important that they made express conditions respecting it, was defeated.

In the decisions which we have above referred to it has been considered that a nonenforceable contract for "other insurance" is not a breach of the condition, because, in fact, it is not insurance. The supreme court of New Hampshire expresses the idea in these words: "There is an intrinsic absurdity in holding that to be an insurance by which a party is bound to make good another's loss only in case he pleases to do it." Gale v. Insurance Co., 41 N. H. 170. Such a construction of the contract is not at all necessary from a consideration of the proper and natural import of the word "insurance"; and we are unable to comprehend how it can be regarded as expressing the agreement in the minds of the parties without disregarding what every one must understand to have been the purpose contemplated. Contracts are not to be so construed. The same construction would make a second insurance inoperative to terminate the liability of a prior insurer under conditions like that in this policy, if it should appear, after the loss had occurred, that the second insurer had been from the time of making the contract insolvent. The word "insurance," in common speech and with propriety, is used quite as often in the sense of contract of insurance, or act of insuring, as in that expressing the abstract idea of indemnity or security against loss. In that sense the word was used in this contract.

We are sustained in the interpretation of this contract, and in our conclusion, by the following authorities: Carpenter v. Insurance Co., 16 Pet. 495; Bigler v. Insurance Co., 22 N. Y. 402; Lackey v. Insurance Co., 42 Ga. 456; Allen v. Insurance Co., 30 La. Ann. 1386; Jacobs v. Insurance Co., 19 U. C. Q. B. 250; Ramsey Woolen Cloth Manuf'g Co. v. Mutual Fire Ins. Co., 11 U. C. Q. B. 516; Mason v. Insurance Co., 23 U. C. C. P. 37. See, also, Plath v. Association, 23 Minn. 479, in which, under a stipulation that if the insured should mortgage "the property" insured it should avoid the policy, a mortgage of a part only of the property was held to have that effect. In that case the act of the insured did not violate the letter of the contract, but in that case, as in this, it did violate its spirit, and tend to defeat the well-understood objects contemplated.

In some courts, in cases like this, a distinction is made resting upon the action or election of the subsequent or "other" insurance. If such insurer avails himself of his legal right and elects to treat his contract as invalid, it is held not to avoid the first contract; but if he waives the forfeiture, even after the loss by fire has occurred, and treats his contract as valid, then such "other insurance" is deemed to have been a violation of the condition. See David v. Insurance Co., 13 Iowa, 69; Hubbard v. Insurance Co., 33 Iowa, 325. Such a distinction cannot, in our opinion, be sustained. It makes the validity of the contract between two parties to depend, not upon their own agreement, nor upon their own acts, but upon what another person, a stranger to the contract, may do, even after the liability upon the contract had become absolute by the destruction of the property, if, in fact, there was any obligation. This cannot be. The making of the second contract of insurance violated the terms of the former contract, if at all, at the time such second contract was made. The subsequent affirmance or disaffirmance of that contract by the insurer, as he might elect, could not affect the validity of the former contract between other parties. Most of the authorities so hold. See Dahlberg v. Insurance Co., 6 Mo. App. 121, and cases cited.

The order appealed from is reversed.

MITCHELL, J., took no part in the decision of the above case, by reason of sickness preventing attendance at the argument. VANDERBURGH, J., having conducted the trial in the court below, took no part in the decision of the above case.

REED v. EQUITABLE FIRE & MARINE INS. CO.

(24 Atl. 833, 17 R. I. 785.)

Supreme Court of Rhode Island. July 16, 1892.

Action of *assumpsit* by Thomas D. Reed against the Equitable Fire & Marine Insurance Company on an insurance policy. On demurrers to the replication. Overruled as to first point, and sustained as to others.

Simon S. Lapham and *John W. Hogan*, for plaintiff. *Charles P. Robinson*, for defendant.

STINESS, J. The plaintiff sues upon a fire insurance policy dated January 10, 1891, for the sum of $1,300. The house and barn covered by the policy were totally destroyed by fire, November 5, 1891. The defendant's second plea sets up a condition that the policy should be void, except as to the interest of the mortgagee of the premises, in case the insured had or should afterwards have other insurance on said property without the assent of the defendant company in writing or in print, and avers that there was other insurance on said property, at the date of the policy, in the Attleboro Mutual Fire Insurance Company, without such assent, whereby the policy became void. To this plea the plaintiff replies—*First*, that the defendant had notice of the prior insurance at the time of making the contract; *second*, that there was no other insurance at the time of the loss; *third*, that as the Attleboro Company's policy had the same provision it became void upon the procurement of the policy in suit; and, *fourth*, that the plaintiff, before the issuing of the policy, informed the agent of the defendant company that the property was already insured in the Attleboro Company, as alleged in the plea. The defendant moved to strike out the first and fourth replications for certain technical defects, but, these having been amended, the case now stands on demurrer to all the replications.

The first question is whether the defendant company is estopped from setting up the clause in question by notice to itself of the prior insurance at the time the policy was issued. The notice is not pleaded strictly as an estoppel, but, since the facts set forth can be shown on trial without special pleading, we see no reason why it may not be set up in the replication with the same legal effect that the fact would have in evidence. The same question was decided in Greene v. Insurance Co., 11 R. I. 434, where it was held that a mistake in a policy, limiting the amount of insurance after due notice to the company of a larger amount, might be shown in evidence by way of estoppel. The ground of the decision was that it would be a kind of fraud for the insurer to insist upon a forfeiture for which they were more blamable than the insured. It would be taking advantage of one's own wrong. We see no reason to question that decision, and following it we must hold the first replication to be good.

As to the second replication, we think it is clear that, as the condition in question relates to the validity of the contract at its inception, it is immaterial what the facts were at the time of the loss. If the policy was invalid at its issue, for want of consent for other insurance, it was invalid altogether. If it was not invalid, then it does not appear to be void at all, and hence it is of no consequence what the fact was at the time of the loss.

To sustain the third replication, we think it must appear that "other insurance," in the sense of the policy, is valid insurance. It has been held that when a policy is void by its own terms it is no insurance and no breach of the condition relating to other insurance. See May, Ins. (2d Ed.) § 365, and cases cited. The first policy in this case was valid prior to the date of the policy in suit. If the last policy was invalid, and there has been no subsequent insurance, it is difficult to see upon what ground the first policy is avoided, and the second held, as set up in the replication. With precisely the same clause in each policy the principle is not plain which would select the second as the subsisting policy and avoid the first. There may be good reason for saying that both should be avoided, as a guard against temptation on the part of the insured to obtain what he may suppose to be other good insurance; but we see no good reason for holding that the operation of the clause avoids the first policy and holds the second. In Insurance Co. v. Schettler, 38 Ill. 166, cited by the plaintiff, it was held that other insurance on the property became void by a removal of the store insured from one lot to another, which was expressly assented to by the plaintiff in error, and hence there was no other insurance on the property to which the policy in suit attached after such consent, which was given upon the payment of a new consideration and increase of rate. The case is therefore quite distinguishable from the case at bar, and its syllabus seems to go beyond the decision. The cases of Carpenter v. Insurance Co., 16 Pet. 495, and Funke v. Insurance Co., 29 Minn. 347, 13 N. W. Rep. 164, do indeed support the plaintiff's contention that the first policy was avoided by the issuing of the second, but upon the ground, which would be fatal to the replication, that both policies were avoided. We do not need to pass upon that question in this case, since under neither class of the cases referred to would the replication be good. If both policies are avoided by the operation of the clause in question, it is no answer to the plea to say that the first is void. If the other insurance must be valid insurance, the replication is not well founded in law, since under such a rule the first policy would not be avoided because of the invalidity of the second.

The fourth replication raises a question of greater difficulty, whether the fact that the plaintiff informed the agent of the defendant company, who procured the insurance, of the existence of other insurance, is a sufficient answer to the plea setting up the clause of the policy as to other insurance, and alleging the breach of it. Upon this point we think the tendency and weight of modern decisions are in favor of the plaintiff. In some of these cases, however, it is to be observed that

the agents were general agents of the company, having full authority to make contracts of insurance and to issue policies, and consequently standing in the place of the company itself. See Insurance Co. v. Gray, 43 Kan. 497, 23 Pac. Rep. 637; Insurance Co. v. Gallatin, 48 Wis. 36, 3 N. W. Rep. 772; Berry v. Insurance Co., (N. Y. App.) 30 N. E. Rep. 254; Cross v. Insurance Co., Id. 390; Minnock v. Insurance Co., (Mich.) 51 N. W. Rep. 367, — which were cases of general agents; Hayward v. Insurance Co., 52 Mo. 181, where the notice was given to the vice president of the company; and Insurance Co. v. Crane, 16 Md. 260, where the notice was given to the president of the company. Other cases hold that an agent to procure applications for insurance, and to forward them to the company, is an agent of the company who may waive the condition of the policy. Key v. Insurance Co., 77 Iowa, 174, 41 N. W. Rep. 614; Kister v. Insurance Co., 128 Pa. St. 553, 18 Atl. Rep. 447; Farnum v. Insurance Co., 83 Cal. 246, 23 Pac. Rep. 869; Insurance Co. v. Wilkinson, 13 Wall. 222; Eames v. Insurance Co., 94 U. S. 621; Russell v. Insurance Co., 80 Mich. 407, 45 N. W. Rep. 356. Most of the decisions of this class are based upon considerations of public policy; that the insured generally look upon the agent of the company as its full and complete representative, and, in view of the apparent authority with which he is clothed, he must be so regarded, in order to protect the insured from an unconscionable advantage which the company may take from some provision of the policy. Doubtless there have been cases where the insurance companies have taken such advantage of the insured, but, doubtless, too, there have been quite as many cases where the insured have practiced imposition and fraud upon the company. The contract of insurance requires good faith on both sides. If a company cannot protect itself from fraudulent claims, either innocent stockholders must suffer, or all who have property to insure must contribute to such claims by the payment of rates sufficiently high to allow for the chances. There is much room for doubt, therefore, whether public policy requires the adoption of a rule which treats a contract of insurance differently from any other contract in writing. But, however this may be, we recognize the tendency of decision in favor of the insured, and, if this were a new question in this state, we might feel compelled to yield to the weight of authority. Opposed to this line of decisions, Massachusetts has stood almost alone, with a sturdiness characteristic of the commonwealth, and the decision of this court in Wilson v. Insurance Co., 4 R. I. 141, was in harmony with the Massachusetts cases. In that case it was held that an agent who is empowered merely to receive applications to transmit to the company, and, if they chose to take the risk, to receive the policy and to issue to the applicant on payment of the premium, is not the agent of the company for the making of applications; that if he is employed by the applicant, or acts for him in drawing up the application, he is the applicant's agent, for whose mistakes the applicant is responsible; and that the company cannot be affected with notice by verbal communications made by an applicant to an agent so authorized. Stability of decision is very important in the administration of the law, and as this doctrine has stood so long in this state, apparently without question, and as it rests upon good reason, and is, moreover, in line with the rule of the state under whose law both these policies were issued, we see no sufficient ground to depart from it. See Batchelder v. Insurance Co., 135 Mass. 449; Lohnes v. Insurance Co., 121 Mass. 439. In Massachusetts general agents and officers of a company have authority to waive conditions in a policy. Little v. Insurance Co., 123 Mass. 380; Shawmut Sugar Refining Co. v. People's Mut. Fire Ins. Co., 12 Gray, 535; Priest v. Insurance Co., 3 Allen, 602. The replication in this case simply sets out that the plaintiff informed the agent of the company who applied to him for insurance of the existence of the prior policy. In our opinion, this is not sufficient to amount to a waiver. The demurrer to the first replication to the second plea must be overruled, and the other demurrers sustained.

CONTINENTAL INS. CO. v. KYLE.

(24 N. E. 727, 124 Ind. 132.)

Supreme Court of Indiana. May 28, 1890.

Appeal from circuit court, Vigo county; WILLIAM MACK, Judge.

H. H. Boudinot and *Eggleston & Reed*, for appellant. *McNutt & McNutt*, for appellee.

BERKSHIRE, C. J. This is an action brought by the appellant to review a judgment obtained by the appellee against the appellant in an action upon an insurance policy issued by the appellant to the appellee, the said judgment having been obtained in the said Vigo circuit court. The complaint rests upon the first branch of section 616, Rev. St. 1881. The court below sustained a demurrer to the complaint, and the appellant elected to abide by the ruling upon the demurrer; and, judgment having been given for the appellee, this appeal is prosecuted. The errors of law stated in the complaint are: (1) The court erred in its conclusions of law upon the facts found, and stated in its special finding. (2) The court erred in overruling the plaintiff's motion to modify said special finding. (3) The court erred in overruling the motion for a new trial.

The first alleged error involves substantially the same questions as the third; and, as the third presents the questions more clearly and satisfactorily, we do not care to consider the first. It does not become necessary to consider the second alleged error; but see Levy v. Chittenden, 120 Ind. 37, 22 N. E. Rep. 92.

The policy sued upon in the original action contained the following conditions: "Or if the assured, without written permission hereon, shall now have, or hereafter make or procure, any other contract of insurance, whether valid or not; or if the above-mentioned building be or become vacant or unoccupied, or be used for any other purpose than is mentioned in said application, without consent indorsed hereon; or if the property shall hereafter become mortgaged or incumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title or possession (except by succession by reason of the death of the assured) of the property herein named, or if the assured shall not be the sole and unconditional owner in fee of said property; or if the policy shall be assigned, or if the risk shall be increased in any manner, except by the erection of ordinary outbuildings, without consent indorsed hereon,—then in each and every one of the above cases this policy shall be null and void." The foregoing conditions are such as the parties had a right to place in their contract, and, as they form a part of the contract, the courts cannot disregard them. It is the duty of the courts to recognize and enforce the contracts of parties, when valid and binding, according to the terms and conditions thereof as expressed therein. The portion of the policy which we have above set out is plain and easily understood. Policies of insurance, like all other contracts, are to be construed with reference to the intention of the parties, to be ascertained from the terms and conditions placed therein by the parties. Barton v. Insurance Co., 42 Mo. 156; Straus v. Insurance Co., 94 Mo. 182, 6 S. W. Rep. 698; Ripley v. Insurance Co., 30 N. Y. 136; Wells v. Insurance Co., 44 Cal. 397; Insurance Co. v. Gwathmey, 82 Va. 923, 1 S. E. Rep. 209. With this most important rule as our guide when we read and consider the policy here under consideration, we must reach the conclusion that for a breach of any one of the conditions above named on the part of the assured the insurer was, because thereof, to be absolved from all liability on account of the policy, unless its consent to such breach of condition should be obtained in advance thereof.

There is no contention that the appellant, by indorsement on the policy or otherwise, ever gave its consent that the building insured should become or stand vacant. This leaves but one further question for our consideration: Had the building become vacant before it was burned? If the evidence establishes the affirmative of this proposition beyond controversy, then the court erred in overruling the motion made in the original action for a new trial, and erred in overruling the demurrer to the complaint in the present action. In our opinion the court erred in both of its rulings. The complaint charges that the building was destroyed by fire on the 31st day of October, 1886, and the special finding states that the tenant who had occupied the building moved out on the 26th day of October, 1886, and that the fire occurred on the 31st day of the same month. The undisputed evidence is that the tenant moved out on the 26th day of March, 1886, and that the fire occurred on the 31st day of said month. We have concluded to set out the evidence as we find it in the bill of exceptions with reference to the occupancy of the building. The appellee testified: "At the time the building was insured it was occupied by myself, and afterwards by my tenant. She moved out of the house on the 26th day of March, 1886, and took everything out of it. Prior to her removal from the house I had rented it to Crabb and McClentack. After she moved out they made some repairs on the house, and when they finished repairing they left two or three planes in the house. On the 30th or 31st day of March the said Crabb and McClentack hauled some hay, and put it in the stable loft on the premises, and intended to move in on the 1st day of April, 1886. On the night of the 31st day of March, 1886, the house was totally destroyed by fire. At the time it burned, the only articles in it were the planes left there by Crabb and McClentack after they had finished the repairing." Mrs. Kyle testified: "I am the aunt of the plaintiff. I moved out of the house which was burned down, for the purpose of letting the new renters in, Crabb and McClentack. There was some hay in the stable, and some potatoes buried in the ground near the house by Crabb and McClentack. The house was a frame house. Crabb and McClentack lived about one and a quarter mile from the house." John Crabb testified: "I and Mr. McClentack, prior to March 26, 1886, rented the house belonging

to Mr. Kyle, which was burned down on the 31st day of March, 1886. After we rented it Mrs. Kyle moved out, on the 26th day of March, 1886, and took all of her things out of the house. After she moved out we made some repairs on the house, and intended to move into the house on the 1st day of April, 1886. We had moved some of our things on the premises. I put some hay in the stable loft. After we got done repairing we left a plane or two in the stable. They were the only property we had there at the time the house burned down. No one was living in the house when it burned down. It was unoccupied by any one." Henry McClentack testified: "I and Mr. Crabb rented the house that was burned down of Mr. Kyle the plaintiff. At the time we rented it his aunt, Margaret Kyle, was living in it. On the 26th day of March, 1886, she moved out, and took all of her things out. After she moved out we made some repairs on the house, and when we finished repairing we left a few planes in said house, on or about the 30th day of March, 1886. We hauled some hay, and put it in the stable loft. At the time the house burned down it was unoccupied by any one. The planes were all the property that was in it. We intended to move in the next day after the fire occurred."

We have examined the authorities to which counsel for the appellee in their brief call our attention, and other authorities which we have been able to find in the same line, but think they do not support the ruling of the court to which we have called attention. As strong a case as we have been able to find in support of the contention of the appellees is the case of Eddy v. Insurance Co., 70 Iowa, 472, 30 N. W. Rep. 808. The syllabus to that case is as follows: "A tenant moved out of the insured dwelling on Tuesday, and on Wednesday morning the owner, who lived near, took possession of the house, and with his servant began cleaning it; * * * and they were continuously engaged during the working hours of each day in cleaning and moving goods into the house until Friday evening, intending that the family should be fully domiciled there on Saturday, but on Friday night the house was burned. Held, that the house was not vacant." The facts as stated by the learned judge who delivered the opinion of the court are as follows: "The house had been temporarily occupied by a tenant, who removed therefrom on Tuesday. The fire occurred on the following Friday night. The plaintiff was residing in another house on another part of the farm, and on the next morning after the tenant moved out of the house which was burned the plaintiff took possession of it, and his employes cleaned the house, and prepared to move in. They were constantly engaged every day in cleaning the house and in moving in household goods until Friday evening. By that time there were carpets and bedding and bedsteads, cans of fruit, chairs, pictures, mirrors, and a stove, and clothing, a table and dishes, in the house, and the family were expecting to be there to remain on Saturday. The farm stock was there, and the plaintiff or his employes were in and about the house every day from six o'clock in the morning until seven or eight o'clock in the evening. The preparation for occupying the house was continuous during all the working hours of each day." The court could very well hold, as it did, from these facts, that the building was not vacant when burned. But we hereafter cite a later case from the same court, where the facts were not as favorable to the insurance company as the case before us, in which it was held that the policy could not be enforced. In most of the cases to which counsel call our attention (if the buildings insured were dwellings) were where there was a permanent occupancy, and a temporary absence of the tenant at the time of the fire; and, if mills or manufactories, where there was but a temporary suspension of business at the time of the fire. In construing a condition in an insurance policy against vacancy or non-occupancy, the courts will look to the subject-matter of the contract. Whitney v. Insurance Co., 72 N. Y. 117; American, etc., Ins. Co. v. Brighton, etc., Manuf'g Co., 125 Ill. 131, 17 N. E. Rep. 771; Insurance Co. v. Kinnier, 28 Grat. 88; Sonneborn v. Insurance Co., 44 N. J. Law, 220. The occupancy of a dwelling, of a mill, of a barn, is each essentially different in its scope and character, and the construction must have reference thereto. Sonneborn v. Insurance Co., supra; Kimball v. Insurance Co., 70 Iowa, 513, 30 N. W. Rep. 862.

The house covered by the policy here under consideration was a dwelling. It became entirely vacant on the 26th day of March, 1886, and remained so until its destruction by fire, on the 31st day of March. The prospective tenants made some repairs on the building after Mrs. Kyle vacated it, but the nature and character thereof does not appear, nor the length of time they were engaged thereat. It appears that the repairs were completed about the 30th day of March, and on that day the prospective occupants moved some hay to the loft of the stable on the premises, and then, or before, buried some potatoes on the premises; but all of the witnesses state that the building was unoccupied when burned, and had not been occupied after Mrs. Kyle moved out, and that the only thing left in it at any time after her removal was a couple of carpenter's planes, left there by Crabb and McClentack during the time they were making the repairs, and thereafter.

The contract in all of its parts was one that the parties were competent to make, and which they had a perfect right to enter into, and hence they are bound by all of its terms and conditions. From the time the building became vacant until its destruction, the risk which the appellant had assumed was increased because of the vacancy; and it was an increase of risk which the appellant had guarded against by its contract. It would be folly to contend that the building would have been consumed notwithstanding the vacancy. Most certainly the care and vigilance that would have accompanied the occupation of the property for its protection and preservation was lessened because of the vacancy. In the light of all of the authorities, the facts which the record discloses estab-

lish beyond question that the property was "vacant or unoccupied" from the 26th of March, 1886, until it was consumed by fire, on the 31st of that month.

In Insurance Co. v. Meyers, 63 Ind. 238, the condition in the policy and the circumstances of the case and in the present case do not materially differ. The following is the condition in the policy in that case: "It is hereby agreed and declared to be the true intent and meaning of the parties hereto that in case the above-mentioned building shall at any time after the making, and during the continuance, of this insurance, become unoccupied, * * * unless otherwise specially provided for, or hereafter agreed by the company in writing, and added or indorsed on this policy, then and from thenceforth, so long as the same shall be so unoccupied, * * * these presents shall cease and be of no force or effect." We copy the following from the opinion: "It appeared by the evidence that the house was occupied by tenants when it was insured; that the tenants failed to pay rent when due, and the landlord took steps to remove them. Meyers, the owner, testified: 'No one lived in the house at the time of the fire. The tenants left on Friday or Saturday. The building was burned the next Tuesday. The building was used as a tenant-house. It was a double tenement, usually occupied by two families. I put the tenants out because they would not pay rent. I had engaged it to S. C. Carney as soon as I could get them out and have the building repaired. A little plastering and whitewashing was all that was needed. Carney was living in my house across the street, and was to go into it for a year as soon as I could get the tenants out, and get Fred Meyers to fix the house. The tenant was to move in as soon as it was repaired.' In the case at bar the house was unoccupied at the time it was burned. It had been unoccupied for about four days,—some of the witnesses make the time longer; and no definite time when it was to be occupied was fixed. It was to be occupied as soon as it should be repaired by Fred Meyers. * * * As a matter of fact, as we have said, the house was unoccupied when it was burned. By its terms the company * * * was not liable on the policy sued upon. The policy was a contract. What reason appears for giving it an operation, by construction, different from that which its terms require? It seems to us that the literal meaning expresses just that the parties intended. Here, a tenant-house is insured for a year. A change of tenants, during the time, is not prohibited, and might naturally be expected. Short intervals in which the property would be vacant might naturally occur. The contract provided that, when they did occur, the policy should not operate during their existence."

In Cook v. Insurance Co., 70 Mo. 610, the condition in the policy was: "If the premises become unoccupied without the assent of the company indorsed hereon, then, and in every such case, the policy shall be void." The following is the learned judge's statement of the facts: "About two weeks before the fire the plaintiff went to Kansas City, Mo., to reside, and lived there until after the fire. She shipped a car-load of her furniture to the latter place, and left about $300 worth in the house, and instructed one Barnard to sell it, except a bed-room set, and also to rent the house. Joseph Southwick was left in possession, with instructions to remain in possession and sleep in the house until he could rent it. Delaney was to rent the house. Southwick went to Kansas City three or four days before, and was there when the fire occurred. He left no one in the house, but told Delaney, with whom he left the keys, (except the key of the bedroom he had slept in,) to take charge of the house, and rent it if he could before he returned." And, following this recital of the facts, the learned judge goes on to say: "On these facts the question arises, was the house unoccupied when it was burned? If it was, she was not entitled to recover. 'Occupation of a dwelling-house is living in it.' Paine v. Insurance Co., 5 Thomp. & C. 619. '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.' Insurance Co. v. Padfield, 78 Ill. 169. Speaking of a dwelling-house and barn, COLT, J., in Ashworth v. Insurance Co., 112 Mass. 422, observed: 'Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling-place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy.' * * * In Wood, Ins. 164, the above observations of COLT, J., are quoted and approved. In Paine v. Insurance Co., 5 Thomp. & C. 619, it was said that 'occupation of a dwelling-house is living in it, not mere supervision over it; and, while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time.'" After citing other authorities, the court says: "Applying the doctrines of the above-cited cases to this, it is clear that, within the meaning of the clause under consideration, the premises insured were unoccupied from the time plaintiff went to Kansas City until the fire occurred."

Insurance Co. v. Wells, 42 Ohio St. 519, supports the contention of the appellant. The tenant moved out with no intention of returning, leaving behind a barrel of corn and a coal-oil can. During the night following the removal the building was destroyed by fire. The court said: "The condition that the policy should be void if the building therein mentioned be 'vacated or unoccupied' was absolute. The parties to the contract were competent to make such stipulation." The court concludes by holding that the property was vacant, and the policy void, and says that the duration of the vacancy was wholly immaterial.

In the case of Sleeper v. Insurance Co., 56 N. H. 401, the condition in the policy was: "If the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company, and consent indorsed here-

on, * * * this policy shall be void." In the opinion by SMITH, J., it is said: "It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites shelter to wanderers and evil disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and for various reasons that might be enumerated an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have some one present occupying and dwelling in the buildings, and interested to preserve the roof that shelters his family or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save, perhaps, a few articles not needed for present use, and still the premises be considered occupied. * * * I cannot say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy." All of the reasoning of the court has much force when applied to the facts of the case we have before us. In the same case, LADD, J., said: "I think, when the occupant of a dwelling-house moves out with his family, taking part of his furniture and all the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as unoccupied, that is, vacated, according to the natural and ordinarily received import of those terms. It is the very situation against the hazards of which the defendants undertook to guard themselves, by an express stipulation and condition inserted in the contract, upon which this action is founded."

In the case of Moore v. Insurance Co., 64 N. H. 140, 6 Atl. Rep. 27, 10 Amer. St. Rep. 384, it is held that the words "vacant and unoccupied," when used in a policy of insurance, in connection with the idea that the insurer was stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable and equivalent in meaning; that when no one lives in the house it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove. In the learned note to the foregoing case (10 Amer. St. Rep. supra) it is said: "There is strong authority in support of the rule that a fair and reasonable construction of the term 'vacant and unoccupied' is that the house should be without an occupant; that is, without any person living in it;" citing Insurance Co. v. Zaenger, 63 Ill. 464; Insurance Co. v. Padfield, 78 Ill. 167; Insurance Co. v. Tucker, 92 Ill. 64; Fitzgerald v. Insurance Co., 64 Wis. 463, 25 N. W. Rep. 785; Alston v. Insurance Co., 80 N. C. 326; Cook v. Insurance Co., supra. And it is stated: "The same construction is given to the term 'vacant or unoccupied.'" Herrman v. Insurance Co., 85 N. Y. 163; Stupetski v. Insurance Co., 43 Mich. 373; Insurance Co. v. Kiernan, 83 Ky. 468; Sonneborn v. Insurance Co., 44 N. J. Law, 220.

As will be remembered, the words "vacant or unoccupied" are employed in the policy under consideration. In view of these authorities, we repeat, at least in substance, what we have once before said, that we cannot well imagine how it can be said that the building covered by the policy upon which the present action rests can be said not to have been vacant when the fire occurred. It was certainly without an occupant, in any sense of the term. In Sexton v. Insurance Co., 69 Iowa, 99, 28 N. W. Rep. 462, it was held that the use of a building for the purpose of storing tools, jars, etc., was not a compliance with the condition against the vacancy of the building. In Feshe v. Insurance Co., 74 Iowa, 676, 39 N. W. Rep. 87, the insured property was a dwelling-house occupied by a tenant, and the policy provided that it should become void if the building became "wholly or partially vacant or unoccupied." The tenant moved out, and five days afterwards the property was burned. The owner, who lived but a half mile distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night; and her father, who worked near, left a few tools in the house at night. It was held that the house was "vacant and unoccupied" within the meaning of the policy, and that no recovery could be had thereon. In Bennett v. Insurance Co., 50 Conn. 420, the policy provided that it should be void "if the dwelling-house hereby insured shall cease to be occupied as such." At the time of the insurance the house was occupied by a tenant, who moved out about 6 o'clock on a certain evening, and the house was burned about 2 o'clock the next morning. It was held that the policy was void, and was not saved by the fact that the fire had actually commenced, and was smouldering, unobserved, when the tenant moved out. The first of the last two cited cases is in some of its facts much like the case we have under consideration, but the facts of this case support more strongly the contention of the insurer than did the facts in those cases. For a further consideration of the questions discussed, we refer to the exhaustive note to Moore v. Insurance Co., supra. At this point it may be well to say that we do not wish to be understood as holding that a temporary absence of the occupants of an insured dwelling, the furniture and other contents remaining undisturbed during such temporary absence, would render a policy of insurance thereon inoperative because of a condition against vacancy.

The point is made by counsel for the appellee that counsel for the appellant do not discuss in their brief the ruling of the court upon the motion for a new trial, and therefore waive it. In this contention counsel are mistaken as to the fact upon which it rests. The judgment is reversed, with costs, with direction to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

DANIELS v. EQUITABLE FIRE INS. CO.

(48 Conn. 105.)

Supreme Court of Errors of Connecticut. May Term, 1880.

C. E. Perkins, for the motion. G. G. Sill and J. H. Tallman (with whom was G. Case), opposed.

CARPENTER, J. This is an action on a fire insurance policy. The cause was tried to the jury, and the plaintiff had a verdict. The defendants move for a new trial for a misdirection and for a verdict against evidence. On one point in the case we think the verdict was clearly against the weight of evidence, and we will confine our attention mainly to that.

The property insured is described in the policy as follows: "Furniture, fixtures and tools, used by the assured in his business as renovator of furniture, clothing and carpets, and on the improvements to the building put in by him." Then follows this clause: "The assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in the office." At that time there was no other stove in the building. The policy issued July 7th, 1877, for one year. About the first of January following a large stove was placed in a room used for a drying room, and was thereafter used in connection with hot water pipes for warming the naphtha in tanks in the basement. The fire occurred in April, and was caused by an explosion of gas.

The court charged the jury as follows: "The defendants claim that the plaintiff put in a stove and other apparatus, after the policy was issued, without the consent of the company, and that this materially increased the risk. Now if this was done, and materially increased the risk, it vitiated the policy. You are to decide whether putting in that additional stove and apparatus and using it increased the risk. The question is whether there would be more likelihood of danger from two stoves, with the pipes for heating naphtha, than from one stove." It was conceded that the additional stove was used in the manner and for the purpose stated, and that the use of naphtha caused an accumulation of highly inflammable gas in the room where the stove was. The defendants chose to insure property in a building in which there should be but one small stove, and that definitely located in as safe a place probably as there was in the building. By strong implication the use of any other stove was prohibited. We must presume that the defendants would have refused to insure with liberty to use two stoves in the manner they were used at the time of the fire. It will not do to say that they insured business carried on with naphtha, and that therefore the insured had a right to use the ordinary means for carrying on that business. The conditions and manner of use were clearly defined and limited, to which he agreed, and he had no right to use means which involved a violation of his agreement. Nor was it necessary; for obviously the naphtha could have been heated by means of steam or hot water pipes from a fire at a safe distance.

But the plaintiff says that it is not expressed in the policy that the use of another stove shall make it void, and therefore that such use is not of itself a defense. It may be true that such use, irrespective of the increase of risk, will not have that effect; but the policy in another part expressly provides that if the risk is increased it shall be void; so that the real question was whether the additional stove increased the risk. The court correctly instructed the jury that if it did the plaintiff could not recover. The jury therefore must have found that the risk was not increased. There was no evidence to justify such a finding. The testimony the other way was clear and conclusive. In addition to the obvious danger from the use of such materials, two witnesses, familiar with the business of insurance, testified unqualifiedly that the use of the additional stove materially increased the risk and rendered the property uninsurable; and there was no conflicting evidence. It seems very clear that the jury must have disregarded the evidence.

The case is not met by the suggestion that there was evidence tending to show that the fire caught from the office stove. The difficulty reaches back of that. The defendants not only did not insure against the risk of two stoves, but virtually refused to insure at all if the premises were subjected to that additional risk. They had a right to refuse insurance in a case in which the question would be an open one, whether a loss was occasioned by a risk insured against, or one that was not insured against. The difficulty of proving the origin of a fire, to say nothing of the inclination of juries to find against corporations, is a sufficient reason for the exercise of the right; and when a party has clearly exercised the right, as the defendants have in the present case, the court ought not to deprive him of the benefit of it by a strained interpretation of the policy.

Nor is the plaintiff's claim a tenable one that the policy continued in force during the term for which it issued, notwithstanding the increased risk, by virtue of the eleventh condition in the policy. That condition provides for a renewal of the policy at the expiration of the term, and then adds, "But in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void."

It is obvious that this is not inconsistent with the first condition, which provides that the increased risk shall avoid the policy; nor was it intended to modify that condition; but was intended to extend it to the renewal in

case one should happen to issue in ignorance of the increased risk.

Feeling constrained as we do to grant a new trial for the reason given above, it is unnecessary to consider the other questions raised by the motion.

A new trial is granted.

In this opinion the other judges concurred.

IMPERIAL FIRE INS. CO. v. COOS COUNTY.

(14 Sup. Ct. 379, 151 U. S. 452.)

Supreme Court of the United States. Jan. 29, 1894.

No. 204.

In error to the circuit court of the United States for the district of New Hampshire. Reversed.

Harry Bingham, for plaintiff. S. R. Bond and Fletcher Ladd, for defendant.

Mr. Justice JACKSON delivered the opinion of the court.

This was an action of assumpsit upon a $5,000 policy of insurance issued by the plaintiff in error November 21, 1882, insuring the courthouse of the defendant in error, at Lancaster, in the county of Coos, N. H., against loss by fire, for a period of five years from the date of the policy.

The premises insured were a two-story building, having on the first floor the offices of register of deeds and probate, clerk of court, and county commissioners. The court room was on the second floor. At the date of the policy there were two brick vaults,—one, 8 by 13 feet, for the use of the probate office; and the other, 16 by 13 feet, for the use of the offices of the register of deeds and clerk of court,—there being a partition in the center, separating the part used by the register from that used by the clerk.

The fire which destroyed the insured premises occurred about 2 o'clock in the morning of November 4, 1886.

The policy in suit contains the following: "Payment in case of loss is upon the following terms and conditions."

Among the terms and conditions are the following:

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon, * * * the premises shall be used or occupied so as to increase the risk, * * * or the risk be increased * * * by any means within the knowledge or control of the assured, * * * or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

In August, 1886, the plaintiff, without the written consent of the defendant, and without its knowledge, employed wood carpenters and brick masons, and reconstructed and enlarged the vaults, making that of the office of the register of probate 12 by 13 feet instead of 8 by 13 feet, as it was at the date of the policy, and making those of the offices of the register of deeds and clerk of court 22 by 13 instead of 16 by 13 feet, as at the date of the policy. The foundations were also reconstructed and enlarged to correspond with the enlargement of the vaults. The reconstruction and enlargement of the vaults necessitated the cutting of the floors and ceilings of the respective offices in which they were, so as to extend the vaults.

The time during which these mechanics were employed in the reconstruction and enlargement of the foundations and vaults was about five or six weeks. Some painting was also done incident to the above changes, but the extent did not distinctly appear.

In addition to the foregoing, the plaintiff below also changed the method of heating the offices of the register of probate and clerk of court, placing a hot-water coil in the furnace in the basement, from which ran pipes through the floors, and were attached to radiators in those offices. This work was commenced November 2, and completed about midnight November 3, 1886. No permission to make this change in the method of heating was either obtained or requested, and the defendant had no knowledge of its being done. In the evening of November 3d a fire was built in the furnace, to test the heating apparatus, and heat the radiators, so they might be bronzed, and the fire was left burning at about midnight, when the mechanics and some of the county officers left the building.

From the time work began upon the vaults—early in August—until the fire, the papers and records of the offices of the clerk of court and registers of probate and deeds were in the court room, or in the respective offices, unprotected by any safes or vaults.

The expense of the labor and raw material of the foregoing alterations was about $3,000.

The defendant contended that the foregoing alterations, rebuilding, and repairs were extraordinary, and not ordinary, repairs, such as were necessary in the use of the premises insured, and such as might have been contemplated by the parties when the contract was made; and the following request for a ruling was made to the presiding judge, viz.:

"The defendants request the court to rule that the building, altering, and repairing of the premises to the extent of tearing down several partitions, cutting away a portion of the floors in several rooms, tearing down the vault and enlarging and rebuilding it, and by changing the method of heating a portion of its building by putting in piping and radiators for hot water or steam, all at the expense of several thousand dollars, for the labor of mechanics, for raw materials, was a building, altering, or repairing of the premises which increased the risk, and the policy thereby became void."

The court declined to rule as requested, and the defendant excepted.

Upon the conclusion of the testimony, which proved the foregoing facts, the defendant made the following motion that a verdict be directed, viz.:

"The defendants move that a verdict be directed for them on the ground that there

is no evidence competent to be submitted to the jury that the building, altering, and repairing shown by the evidence was not such building, altering, and repairing as avoided the policy."

The motion was denied by the court, and the defendant excepted.

The defendant requested the court to instruct the jury—

"That if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover."

The court refused to give this instruction, and the defendant excepted.

The court, in the course of its charge to the jury, instructed them as follows:

"The identical question before you is whether, at the time the fire took place, what the county of Coos had done in the way of alterations and repairs increased the risk at that time, (that is, at the time of the fire; that is, on the night of November 4;) that the county of Coos had done in the way of repairs, changing the vaults, putting in additional heating apparatus,—did those things increase the risk at that particular time? Not whether mechanics, two days previously, or three days previously, or a week previously, had worked in that building. What was the condition of the building on the night of the fire? Had what the county of Coos did in making those repairs increased the risk, or had it not? Were the repairs ordinary or necessary, and accompanied by no increase of risk, or were they of such an extraordinary and material character upon that particular night—that is, the condition in which the building was upon that particular night—that the risk was increased, and therefore the assured, the county, violated this condition in the policy, and consequently the defendant company should not be held liable."

To this instruction the defendant excepted. There was a verdict and judgment for the plaintiff below for the sum of $5,505, and the present writ of error is prosecuted to reverse that judgment.

In the view we take of the case, it will be necessary to notice only the exceptions based upon the refusal of the court to instruct the jury, as requested by the defendant, "that if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recovery;" and the exception to the instruction given, to the effect that the question was whether the work and repairs done upon the building increased the risk at the time of the fire.

It is contended on behalf of the plaintiff in error that these exceptions present the following legal propositions:

(1) The court should have instructed the jury that if the work done by the mechanics increased the hazard while the work was in progress, then the assured would not be entitled to recover, because, when the hazard was increased, and the risk changed, by the acts of the assured, and without the knowledge or consent of the insurer, in that event the contract came to an end by virtue of its own expressed, unambiguous terms.

(2) The assured, the county of Coos, having made extensive repairs upon the insured premises, and having neither notified the plaintiff in error, the insurer thereof, nor obtained its consent in writing therefor, the conditions of the policy were violated, and, by its terms, the contract terminated.

(3) It was error to instruct the jury that it was immaterial what had occurred to increase the hazard during the repairs, unless such increased hazard existed at the time of the fire.

On behalf of the defendant in error it is claimed that under a proper construction of the policy the question on which the case turns is, did the repairs and alterations made by the defendant in error upon its courthouse, and completed when the fire occurred, result in an increase of risk at that time, or were they in any way the cause of the fire? The proposition is that, unless such repairs and alterations had the effect of either causing the fire, or of increasing the risk, at the time it occurred, then there was no breach of the condition contained in the contract that "this policy shall be void and of no effect if, without notice to the company, and permission therefor indorsed hereon, * * * mechanics are employed in building, altering, or repairing the premises named herein."

Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and, when called upon to pay in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and, if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms condi-

tions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

It is settled, as laid down by this court in Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men, on reading the contract, would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.

It is entirely competent for the parties to stipulate, as they did in this case, "that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, * * * the premises shall be used or occupied so as to increase the risk, or cease to be used or occupied for the purposes stated herein; * * * or the risk be increased by any means within the knowledge or control of the assured; * * * or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had a right to make the above stipulations and conditions on which the policy or the contract should terminate. These terms and conditions of the policy present no ambiguity whatever. The several conditions are separate and distinct, and wholly independent of each other. The first three of the above conditions depend upon an actual increase of risk by some act or conduct on the part of the insured, but the last condition is disconnected entirely from the former, whether the risk be increased or not. This last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation of the condition of the policy, even though the risk might not have been, in fact, increased thereby. The condition that the policy should be void and of no effect if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because, in the opinion of the court and the jury, the alterations and repairs of the building did not, in fact, increase the risk. The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract; and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk.

If the last stipulation had been so framed as to require the element of an increased risk to be incorporated into the condition that if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to the company, and its permission in writing indorsed on the policy, then there would have been presented a question of fact for the jury whether such alterations and repairs constituted an increase of the risk. But this condition being wholly independent of any increase of risk, its violation without the consent of the insurer, or waiver of the breach, annulled the policy.

This being the proper construction, as we think, of the terms and conditions of the policy, and it being shown that the insured, in August, 1886, without the knowledge or written consent of the insurer, employed carpenters and brick masons, and reconstructed and enlarged the vaults and offices of the courthouse, reconstructing the foundations corresponding to the enlargement of the vaults, which necessitated the cutting of the floors and ceilings of the different offices, and that this work occupied five or six weeks, and in connection therewith necessitated painting, and a new method of heating the offices of the register of probate and the clerk of the court, (this change in the method of heating being completed about midnight of November 3, 1886, and the fire which destroyed the building occurring some two hours thereafter,) clearly entitled the plaintiff in error to the instruction requested, that "if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover." This instruction, which the court declined to give, presented the question of fact whether there had been any violation of the condition that the premises should not be so used or occupied as to increase the risk, or that the risk should not be increased by any means within the knowledge or control of the assured.

The court not only refused this instruction, but in its charge to the jury so construed the condition that if "mechanics are employed in building, altering, or repairing the premises

named herein," without the consent of the insurer, as to make it mean that such alterations and repairs must be shown to have increased the risk in point of fact, and that such increase of risk must have existed at the time of the fire.

If the mechanics were employed in altering and repairing the building in a manner beyond what was required for its ordinary repair and preservation, and in such a material way as constituted a breach of the condition of the contract, it is difficult to understand upon what principle the charge of the court can be sustained. The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. The instruction of the court gave no validity or effect to the condition and its breach, but made it depend upon the question whether the acts done in violation of it in fact increased the risk, and whether such increased risk was operative at the date of the fire.

The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment, and the making of the alterations and repairs described, did not constitute a breach at the time of the fire; that the increased risk, which was necessary to render the policy void, must be found to have existed at the time of the fire, and not at any preceding date.

But, aside from the error of the court in refusing to give the specific charges requested, and in the general charge, as given, it appears, by the bill of exceptions, that upon the conclusion of the testimony establishing the foregoing facts, and about which there is no controversy, the defendant made the following motion: "That a verdict be directed for it on the ground that there is no evidence competent to be submitted to the jury that the building, altering, and repairing shown by the evidence was not such altering and repairing as avoided the policy." This motion was denied by the court, and the defendant excepted. Under the construction we have placed upon the last condition, above quoted, we are of opinion that the defendant was entitled, on the conceded facts, to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was, in and of itself, such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not. The principles of law applicable to this question are stated and illustrated in the following authorities:

In Ferree v. Insurance, etc., Co., 67 Pa. St. 373, the policy of insurance contained the provision that it should not "be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." The assured assigned the policy, and the court held that the condition was a perfect legal one, and that the company was not liable, although the plaintiff had redeemed the policy previously assigned, and was the holder thereof at the time of the suit.

In Fabyan v. Insurance Co., 33 N. H. 203, the policy provided that procuring other insurance without the consent of the company would avoid the policy. Other insurance was procured, and the court held "that by the terms of the policy this discharged the defendant from liability, its promise contained in the policy to pay the plaintiff in case of loss being upon the condition that, in case of double insurance, its assent thereto should be indorsed on the policy."

In Moore v. Insurance Co., 62 N. H. 240, the policy contained, among other provisions, the following conditions: "If the above-mentioned premises shall become vacant and unoccupied for a period of more than ten days * * * without the assent of the company indorsed hereon, * * * then, and in every such case, this policy shall be void." At the time the premises were destroyed they were occupied, but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of either the assured or the insurer. The court held that the conditions of the policy had been broken by the unoccupancy of the premises, and that "the contract, being once terminated, could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause."

In other New Hampshire decisions it is held that a departure from the conditions without the written consent of the insurer avoided the policy and terminated the contract. Shepherd v. Insurance Co., 38 N. H. 232; Gee v. Insurance Co., 55 N. H. 65; Sleeper v. Insurance Co., 56 N. H. 401; Hill v. Insurance Co., 58 N. H. 82; Baldwin v. Insurance Co., 60 N. H. 164; Crafts v. Insurance Co., 36 N. H. 44; Dube v. Insurance Co., 64 N. H. 527, 15 Atl. 141.

It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. May, Ins. (1st Ed.) § 223, citing Lee v. Insurance Co., 3 Gray, 583; Glen v. Lewis, 8 Exch. 607.

In Frost's Detroit Lumber, etc., Works v. Millers' & Manuf'rs Mut. Ins. Co., 37 Minn. 300, 302, 34 N. W. 35, the court was called upon to construe a contract of insurance which contained the following provision: "Such ordinary repairs as may be necessary

to keep the premises in good condition are permitted by this policy; but if the buildings hereby insured be altered, added to, or enlarged, due notice must be given, and consent indorsed hereon." The building insured was subsequently materially enlarged, and the court held, inasmuch as notice was not given to the company, that under the construction given to the clause the policy was avoided, although the risk was not increased by the alterations which had been made to the building.

In Mack v. Insurance Co., 106 N. Y. 560, 13 N. E. 343, the policy contained a condition similar to the one in the policy in this case, providing that the working of mechanics in building, altering, or repairing any building covered by the policy, without the written consent of the company indorsed thereon, would cause a forfeiture of all claim under the policy. Mechanics were at work making changes in the building at the time of the fire, without the consent of the insurer, and the court held that this effected an avoidance of the policy. The court said that "certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions, when plainly expressed in a policy, are binding upon the parties, and should be enforced by the courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute, when, by astute and subtile distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract."

The principle announced in the last-cited case was also enunciated in Lyman v. Insurance Co., 14 Allen, 329.

In Kyte v. Assurance Co., 149 Mass. 116, 21 N. E. 361, a policy was sued upon containing the provision that it should become void if the circumstances affecting the risk should be altered so as to increase the risk, or if articles subject to legal restriction should be kept in quantities or manner different from those allowed or prescribed by law. When the premises were insured they were used as a common victualing place, and subsequently intoxicating liquors were sold illegally. The judge before whom the case was tried instructed the jury, in substance, that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises during the time covered by the policy would not deprive the plaintiff of the right to maintain the action; and that his right, under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. The supreme judicial court of Massachusetts, in considering this instruction, said: "The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk." "The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid." And again: "An increase of risk which is substantial, and which is continued for a considerable period of time, changes the basis upon which the contract of insurance rests; and, since there is a provision that in case of an increase of risk which is consented to, or known by the assured and not disclosed, and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase." The decision of the supreme court reversed the lower court, which had proceeded exactly upon the same theory adopted by the circuit court in the case under consideration. The principle laid down in this and the other cases cited clearly establishes that the general instruction to the jury complained of in the present case was erroneous.

Judgment reversed, and case remanded, with instructions to set aside the verdict and to order a new trial.

Mr. Justice BREWER dissents.

FAUST v. AMERICAN FIRE INS. CO.

(64 N. W. 883, 91 Wis. 158.)

Supreme Court of Wisconsin. Oct. 22, 1895.

Appeal from circuit court, Dane county; Robert G. Siebecker, Judge.

Action by Joseph F. Faust against the American Fire Insurance Company of Philadelphia to recover on a policy of insurance. From a judgment for defendant, plaintiff appeals. Reversed.

This action was brought to recover loss sustained by the plaintiff under a standard insurance policy of the state of Wisconsin, issued by defendant. The written portion of the policy reads as follows: "Joseph Faust: Four hundred dollars ($400) on his two-story frame, shingle-roof building and one-story frame addition thereto, occupied as a furniture store and repair shop, situated on the corner of East and River streets, village of Christiana, Dane county, Wisconsin. Four hundred dollars ($400) on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store, while contained therein." The printed portion of the policy contained, among other things: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine * * *." The policy also contained in the printed portion a provision requiring immediate notice in writing to the company in case of loss, and sworn proofs of loss within sixty days after date of fire. Also the following: "The company shall not be held to have waived any provision or condition of this policy, or of any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or added hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The answer alleged a breach of the condition prohibiting the keeping or use of benzine on the premises; also the failure on plaintiff's part to furnish proofs of loss as required by the policy. The evidence shows that the assured, at the time the policy was issued, and at the time of the fire, had a small amount of benzine on the premises, kept solely for use in the repair shop, and that it was necessary for such use. The evidence also shows that notice of the loss was given to the company the next morning after the fire; that soon thereafter the company's adjuster visited the scene, and was furnished by appellant with a list of the goods burned; that he then discovered that benzine had been kept on the premises, and thereupon notified the plaintiff that such fact rendered the policy void; that he took away with him the list of the property destroyed, furnished by plaintiff, and the same has ever since been retained by him or some one for the company. From that time on the defendant has refused to communicate with plaintiff with respect to the loss. The trial court granted defendant's motion for nonsuit upon the ground that the contract of insurance was rendered void by a violation of the provision prohibiting the keeping or use of benzine on the premises, and judgment was rendered accordingly.

B. W. Jones and E. Ray Stevens, for appellant. Bashford, O'Connor & Aylward, for respondent.

MARSHALL, J. (after stating the facts). The main question presented on this appeal is whether the presence of a small amount of benzine on the premises for use in the repair shop rendered the contract of insurance void. Keeping in mind the undisputed evidence that the prohibited article was not kept as an article of merchandise for sale, but as an article usually and necessarily kept in operating the business of the repair department of the furniture store, which the policy expressly covered, we find abundant authority to support the general rule, which we adopt, that where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the contract. To that effect are Mears v. Insurance Co., 92 Pa. St. 17; Viele v. Insurance Co., 26 Iowa, 9; Collins v. Insurance Co., 79 N. C. 279,—cited by appellant's counsel, to which many may be added: Carrigan v. Insurance Co., 53 Vt. 418; Stout v. Assurance Co., 11 Biss. 313, 12 Fed. 554; Insurance Co. v. Updegraff, 43 Pa. St. 350, 353; Plinsky v. Insurance Co., 32 Fed. 47; Bryant v. Insurance Co., 17 N. Y. 200; Insurance Co. v. Taylor, 5 Minn. 492 (Gil. 393); Whitmarsh v. Insurance Co., 16 Gray, 359; Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102; Carlin v. Assurance Co. 57 Md. 515; Harper v. Insurance Co., 17 N. Y. 197; Hall v. Insurance Co., 58 N. Y. 292; and many others. In the early case of Harper v. Insurance Co., supra, it was held that the underwriters must be presumed to have been acquainted with the business and with the materials necessarily used in prosecuting

it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; that the written portion in that regard will control the printed portion prohibiting the keeping of such articles. This case has been frequently cited and approved, and may be said to be strictly in line with the great weight of authority on the subject. In Hall v. Insurance Co., supra, the court referred to Harper v. Insurance Co., supra, and several others of like character, stating, in effect, that they were all cases where the use of the prohibited article was necessary in the business; while in the case then under consideration, it was only said to be usually used. It was sought by the insurance company to avoid the policy, notwithstanding, by distinguishing between necessary and customary use, but the court held that, under a policy covering a business, permission to use all articles ordinarily, as well as articles necessarily used, must be held to be given and covered by the contract of insurance. In Carlin v. Assurance Co., supra, the policy covered a factory and machinery, and prohibited the keeping or use of petroleum. The court held, in effect, that if the engine room and machinery were included in the description of the insured premises, the keeping of petroleum, although among the prohibited articles, would not avoid the policy if the evidence showed that it was an appropriate and customary article used in the assured's trade for lubricating machinery, and that he kept it solely for that purpose; that the insurance company, when it issued the policy, knew that the factory could not be run without machinery, and it must be supposed to have contracted with reference to such use as an ordinary incident of the business; that, if petroleum oil was usual and necessary, then such use must have been contemplated, though prohibited in the printed portion of the policy. The court concluded that the rule in respect to the question under consideration as stated is well settled. It must be recognized that there is some conflict in the authorities on this subject, but the great weight of authority fully sustains the rule as above stated.

In the light of the foregoing, obviously the contract of insurance which covered the building to be used as a repair shop in connection with the furniture store permitted all things necessary to the enjoyment of the property for such use. The clause in the written portion of the policy, "Four hundred dollars on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," must be construed to cover merchandise kept in the trade in the furniture store, and the words "not more hazardous" to refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop. The words "any usage or custom of trade or manufacture to the contrary notwithstanding," contained in the printed portion of the policy, so far as they would otherwise prohibit the necessary use of benzine in the repair shop, must be held to be controlled by the written portion of the policy, which expressly insures the building in part as a repair shop; this upon the presumption, that must exist, that the parties intended that the repair shop as it was, and as it must necessarily continue to be if it continued at all, must be carried on with all usual and necessary incidents, and that as such it was protected by the contract of insurance; also by force of the well-established rule, that the written special description of the particular subject-matter, wherever inconsistent with the printed clauses of the policy, must control. Insurance Co. v. McLaughlin, 53 Pa. St. 485; Cushman v Insurance Co., 34 Me. 487; Archer v. Insurance Co., 43 Mo. 434. The construction we thus give the policy renders the contract just and reasonable, and carries out the obvious intention of the parties to it. Any other construction would lead to the absurd result that the prohibitory clause of the policy would absolutely prevent the carrying on of the business expressly permitted in the written portion. No such absurdity can be held to have been contemplated by the parties, unless the terms of the contract are such as not to permit of any other reasonable construction. As said in Carlin v. Assurance Co., supra: "Where the contrary is not expressly made to appear, it is not to be presumed that, when an insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, such a narrow and stringent construction of the provisions of the policy was intended as will necessarily cause its serious embarrassment or suspension."

The only other question which requires consideration is whether there has been a failure to comply with the condition requiring proofs of loss, so as to defeat a recovery on the policy. The circumstances of the defendant's adjuster's visit to plaintiff soon after the fire; his receiving and taking away a list of the property destroyed, furnished by plaintiff, and the retention of the same by the company or its agent; and the denial of liability for the loss on account of the presence of benzine on the premises,—are sufficient to constitute a waiver of the provisions of the policy requiring proofs of loss. Vankirk v. Insurance Co., 79 Wis. 627, 48 N. W. 798; Zielke v. Assurance Corp., 64 Wis. 442, 25 N. W. 436; McBride v. Insurance Co., 30 Wis. 562; Parker v. Insurance Co., 34 Wis. 363; King v. Insurance Co., 58 Wis. 508, 17 N. W. 297; Harriman v. Insurance Co., 49 Wis. 71, 5 N. W. 12; Insurance Co. v. Bachelder, 32 Neb. 490, 49 N. W. 217; Carson v. Insurance Co., 62 Iowa, 433, 17 N. W. 650; Boyd v. Insurance Co., 70 Iowa 325, 30 N. W. 585; O'Brien v. Insurance Co., 52 Mich. 131, 17 N. W. 726. In McBride v. Insurance Co., supra, the court held that when the agent of the insurance company, after examining up-

on the spot the circumstances attending the loss, told plaintiff he could not recommend the company to pay the loss for certain reasons, it was a denial of all liability on the part of the company, and a waiver of its right to demand the usual proofs of loss. That substantially fits this case. The adjuster visited the premises, and when he discovered the presence of benzine, according to his testimony, he did very little further, and told the assured the policy was to all intents and purposes void; that he could do nothing for him; and that he, the assured, would have to present his claim to the company as provided by the policy. That, coupled with the refusal of the company to hold any communication thereafter with the assured, constituted a denial of liability by the company on the ground of a violation of the clause prohibiting the use of benzine on the premises, and effectually waived proofs of loss. It follows from the foregoing that the judgment of the circuit court must be reversed, and a new trial granted. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

FIRST CONGREGATIONAL CHURCH OF ROCKLAND v. HOLYOKE MUT. FIRE INS. CO. SAME v. SPRINGFIELD FIRE & MARINE INS. CO. SAME v. SUN FIRE OFFICE CO. SAME v. QUINCY MUT. FIRE INS. CO. SAME v. FITCHBURG MUT. FIRE INS. CO. SAME v. NORTH BRITISH & MERCANTILE INS. CO.

(33 N. E. 572, 158 Mass. 475.)

Supreme Judicial Court of Massachusetts. Suffolk. March 17, 1893.

Report from superior court, Suffolk county; John Hopkins, Judge.

Actions by the First Congregational Church of Rockland against the Holyoke Mutual Fire Insurance Company, and five other companies, on fire insurance policies. There was a general verdict for plaintiff directed by the court on special verdicts returned by the jury, and the cases were reported. Verdicts set aside.

Gaston & Whitney, for plaintiff. Allen, Long & Hemenway, for defendants Holyoke Mut. Fire Ins. Co. and other companies.

KNOWLTON, J. The policies of insurance sued on in these six cases are all alike in containing provisions which are relied on in defense, and which are as follows: "This policy shall be void if, * * * without the assent in writing or in print of the company, * * * the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; * * * or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice built of wood, not clapboarded, but sheathed horizontally with grooved and tongued sheathing, closely matched together, and painted and sanded on the outside. The paint had peeled and curled, and at the time of the fire the plaintiff was repainting the building. Three trustees had "the control and care of all the real estate belonging to the church," and were authorized to provide for its insurance and repairs. They arranged with one Gilson, a painter, to paint the outside of the building by the day at the rate of $3 per day for himself, and $2.75 per day for his men, the trustees furnishing the paint stock, and he furnishing his own brushes, ladders, and other tools of trade. It was also arranged that he was to burn off the old paint with a torch or some such implement, preparatory to repainting. He procured for the purpose a naphtha torch so made as to hold a quart or more of naphtha, with a handle at one side of the receptacle, and a tube extending out on the opposite side, through which a flame could be emitted, produced by the gas from the naphtha and compressed air. It could be made to send this flame out in a straight line about two feet, and when in use it made a noise "similar to a steam engine." The flame could be regulated by a thumb screw so as to extend not more than six or eight inches beyond the end of the tube, and the torch was used by holding it in the left hand, and passing it along, so that the flame from the tube would blister or burn the paint, which could then easily be scraped off. The evidence tended to show that the trustees knew that Gilson was to burn off the paint, and left it to him to determine exactly in what way he would do it. One or more of them saw the torch which was used before he began to use it, and they repeatedly saw him using it before the fire. When the work had been going on about four weeks, the torch, according to the testimony, having been used daily during all the working days, the building caught fire on the edge of a board where there was a crack and where the torch had just been used, and was entirely consumed. This was on the 16th day of July, 1890, and there was evidence that the weather was hot, and the boards very dry. There was also evidence that, as a protection against fire, a pail of water was kept on hand while the work was going on. The evidence tended strongly to show that the danger of a conflagration was greatly increased by the use of the naphtha torch on the dry, inflammable, soft pine boards, with their shrunken joints. If the risk was increased by the use of the torch, it seems, on the undisputed facts, that it was by the agency and with the knowledge and consent of the insured, for the officers represented the plaintiff in the management of the property, and saw the torch in use, and they authorized the use of it before the work was begun. Bank v. Cushman, 121 Mass. 490. Gilson was their agent, acting in the exercise of his discretion and with full authority in procuring and using the naphtha, and on the uncontradicted evidence the use of naphtha by him was a use of it by the insured, within the meaning of the provision quoted from the policies. Was a change of this kind increasing the risk, with the knowledge, agency, and consent of the insured, an alteration of "the situation or circumstances affecting the risk," within the meaning of those words in the policies? These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. But this change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by the fire. We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk." In the case of Lyman v. Insurance Co., 4 Allen, 329, it was held that an alteration of a building which increased the risk for three weeks was enough to render the policy void under a similar clause.

We find no evidence that naphtha was kept on the premises. The word "kept," as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time. See Williams v. Insurance Co., 31 Me. 219; O'Niel v. Insurance Co., 3 N. Y. 122; Williams v. Insurance Co., 54 N. Y.

569; Mears v. Insurance Co., 92 Pa. St. 15; Putnam v. Insurance Co., 18 Blatchf. 368, 4 Fed. Rep. 753. For nearly four weeks naphtha was used within a few inches of the outer wall of the building to produce the flame which was brought in contact with the building. It would be a narrow and unreasonable construction of the policies, in reference to the purposes for which the words were inserted, to say that the use of naphtha was not "on the premises," because while in liquid form it was a few inches outside of the wall, when it was made to produce an effect directly on the premises by burning it in the form of gas, and directing it against the building.

On the undisputed facts, as stated in the bill of exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose. O'Niel v. Insurance Co., 3 N. Y. 122; Dobson v. Sotheby, Moody & M. 90; Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md. 102; Billings v. Insurance Co., 20 Conn. 139; Mears v. Insurance Co., 92 Pa. St. 15; Williams v. Insurance Co., 31 Me. 219; Putnam v. Insurance Co., 18 Blatchf. 368, 4 Fed. Rep. 753. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk, more or less, while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk, or to a use of an article necessary for the preservation of the property. We are therefore of opinion that if the use of naphtha at the time, and in the manner in which it was used, was reasonable and proper, in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void.

But the questions submitted to the jury on the answers to which verdicts were ordered for the plaintiff did not sufficiently present the matters of fact in issue. The only question bearing on the most vital part of the issue was as follows: "Was the method used the method ordinarily pursued to remove paint on the outside of a building, preparatory to scraping it off to repaint it?" The verdicts rendered on an affirmative answer to this question assumed that the removal of the paint from this building was reasonably necessary to the repair of the building. It also assumed that this building, in reference to the danger from moving the flaming torch all over its external surface, was like ordinary buildings. Many buildings are built of brick, and painted on the outer walls. Many others are clapboarded in such a way as to make a very close, tight covering. If this is the method ordinarily pursued when paint is to be removed from the outside of a building, it does not follow that it is ordinarily pursued when the building is covered with soft pine sheathing, tongued and grooved, and put on horizontally, and when, at the time of doing the work, the weather is very hot and dry, and the boards shrunken so that in some places there are cracks. Gilson testified that, although he had been a house painter in Rockland 25 years, he had never burned off paint from the outside of a building before. The architect who was consulted by the plaintiff in regard to repairs advised removing the old paint by the application of a paint remover, which was a preparation to be applied by a brush or a sponge. The use of naphtha and the increase of risk by an alteration of the circumstances affecting it were permitted under the implied exception only when reasonably required for the making of repairs. If it was unreasonable to use naphtha under the circumstances, at the time and in the manner disclosed by the evidence, the use was not within the exception, and the policies were avoided. The question for the jury was whether the defendants, if familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when they issued the policies that the plaintiff corporation would burn off the paint at such a time and in such a way as it did. Was such a use of naphtha a reasonably safe and proper way of making repairs on this building, under the circumstances? The questions submitted to the jury were not equivalent to these.

As bearing on the question whether the use of a naphtha torch would increase the risk, the defendants might show, if they could, by an expert, in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use. The relative rates usual for insurance under different circumstances are treated as facts which a jury may consider in determining the degree of the risk. Luce v. Insurance Co., 105 Mass. 297-301; Webber v. Railroad, 2 Metc. (Mass.) 147; Cornish v. Insurance Co., 74 N. Y. 295; Hartman v. Insurance Co., 21 Pa. St. 466; Insurance Co. v. Rowland, 66 Md. 237, 7 Atl. Rep. 257.

The other question to the witness Page, which called for his opinion as an expert as to the actual effect of the use of naphtha in reference to danger from fire, was incompetent. Lyman v. Insurance Co., 14 Allen, 329.

The testimony of experts in regard to the proper and usual way of removing paint was rightly admitted. It was with-

in the discretion of the court to exclude the question "whether the sheathing of the church was burned by the use of the torch." It might have caught fire in such a way as would have no tendency to show that the use of the torch was an unreasonable and improper method of making repairs. On the other hand, the circumstances may have been such as to make it a proper fact for the consideration of the jury. It is largely within the discretion of the court to determine how far to go into the trial of collateral issues.

Verdicts set aside.

MOULOR v. AMERICAN LIFE INS. CO.

(4 Sup. Ct. 466, 111 U. S. 335.)

Supreme Court of the United States. April 14, 1884.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

James Parsons, for plaintiff in error. Henry Hazlehurst and Isaac Hazlehurst, for defendant in error.

HARLAN, J. This is an action upon a policy of insurance issued by the American Life Insurance Company of Philadelphia. By its terms the amount insured—$10,000—is payable to Emilie Moulor, the plaintiff in error, her executors, administrators, and assigns, within 60 days after due notice and satisfactory proof of interest and of the death of her husband, the insured, certain indebtedness to the company being first deducted. Upon the first trial there was a verdict for the plaintiff, which was set aside and a new trial awarded. At the next trial the jury were peremptorily instructed to find for the company, and judgment was accordingly entered in its behalf. Upon writ of error to this court that judgment was reversed upon the ground that, as to certain issues arising out of the evidence, the case should have been submitted to the jury. Moulor v. Insurance Co., 101 U. S. 708. At the last trial there was a verdict and judgment for the defendant. Upon that trial the plaintiff offered to show, by the testimony of witnesses, that at a previous trial, in 1875, the company went to the jury upon the single issue of an alleged breach of warranty, and did not seek a verdict upon the ground that the insured had committed suicide. The offer was denied, and the action of the court thereon is assigned for error. The avowed object of the proof was to establish a waiver by the company of any defense founded upon that clause of the policy which declares that it shall be void in case the insured "die by his own hand." Undoubtedly, it was competent for the company to waive that or any other defense arising out of the conditions of the policy; but clearly, its willingness, at one trial, to risk its case before the jury, upon a single one of several issues made, did not preclude it, at a subsequent trial, from insisting upon other defenses, involving the merits which had not been withdrawn of record or abandoned in pursuance of an agreement with the plaintiff.

After the evidence was closed, the plaintiff submitted to the court a series of instructions, 23 in number, and asked that the jury be charged as therein indicated. As to instructions 11, 12, and 19, no ruling was made, nor was an exception taken for the failure of the court to pass upon them. The twenty-third, relating to the before-mentioned waiver of defense, upon the ground of self-destruction, was rightly refused, because the evidence showed no such waiver. As to the remaining instructions, the court said, generally, that the propositions announced in them could not be affirmed, because they were either unsound or irrelevant. A general exception was taken to the "answers" of the court to the application to charge the jury as indicated in plaintiff's points. That exception, however, was too vague and indefinite. Some of the instructions submitted might well have been given, while others were abstract, or did not embody a correct exposition of the law of the case. Those instructions, although separately numbered, seem to have been presented as one request, and the exception was general as to the action of the court in respect of them all. If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed. As some of the plaintiff's instructions were properly overruled, we ought not, under the general exception taken, to reverse the judgment merely because, in the series presented as one request, there were some which ought to have been given. Railroad Co. v. Horst, 93 U. S. 295; Rogers v. The Marshal, 1 Wall. 644; Harvey v. Tyler, 2 Wall. 338; Johnson v. Jones, 1 Black, 209; Beaver v. Taylor, 93 U. S. 46; Beckwith v. Bean, 98 U. S. 284.

But there were certain parts of the charge to which exceptions were taken in due form. The rulings, the correctness of which is questioned by the assignments of error, will be presently stated. It is necessary that we should first ascertain the precise nature of the case disclosed by the evidence.

The seventh question in the application for insurance required the insured to answer yes or no, as to whether he had ever been afflicted with any of the following diseases: Insanity, gout, rheumatism, palsy, scrofula, convulsions, dropsy, small-pox, yellow-fever, fistula, rupture, asthma, spitting of blood, consumption, and diseases of the lungs, throat, heart, and urinary organs. As to each the answer of the insured was, no.

The tenth question was: "Has the party's father, mother, brothers, or sisters been afflicted with consumption or any other serious family disease, such as scrofula, insanity, etc.?" The answer was, "No, not since childhood."

The fourteenth question was: "Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?" The answer was, no.

To the sixteenth question, "Has the applicant reviewed the answers to the foregoing

questions, and is it clearly understood and agreed that any untrue or fraudulent answers, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon?" the answer was, yes.

At the close of the series of questions, 19 in number, propounded to and answered by the applicant, are the following paragraphs:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

"And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealment of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid."

The policy recites that the agreement of the company to pay the sum specified is "in consideration of the representations made to them in the application," and of the payment of the premium at the time specified; further, "it is hereby declared and agreed that if the representations and answers made to this company, on the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then and in every such case the policy shall be null and void."

The main defense was that the insured had been afflicted with scrofula, asthma, and consumption prior to the making of his application, and that, in view of his statement that he had never been so afflicted, the policy was, by its terms, null and void. There was, undoubtedly, evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to his application; but there was also evidence tending to show not only that he was then in sound health, but that, at the time of his application, he did not know or believe that he had ever been afflicted with any of them in a sensible, appreciable form.,

Referring to the seventh question in the application, the court—after observing that the answer thereto was untrue, and the policy avoided, if the insured had been, at any time, afflicted with either of the diseases last referred to—instructed the jury: "It is of no consequence, in such case, whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so." Again: "That he, the insured, did not know he was then afflicted, is of no importance whatever, except as it may bear upon the question, was he afflicted? If he was, his answer (for the truth of which he bound himself) was untrue, and his knowledge, or absence of knowledge, on the subject, is of no consequence." Further: "You [the jury] must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer, in this respect, was untrue, and, notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it." To so much of the charge as we have quoted the plaintiff excepted.

Assuming—as in view of the finding of the jury we must assume—that the insured was, at the date of his application, or had been prior thereto, afflicted with the disease of scrofula, asthma, or consumption, the question arises whether the beneficiary may not recover, unless it appears that he had knowledge, or some reason to believe, when he applied for insurance, that he was or had been afflicted with either of those diseases. The circuit court plainly proceeded upon the ground that his knowledge or belief as to having been afflicted with the diseases specified, or of some one of them, was not an essential element in the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had ever been so afflicted. If, upon a reasonable interpretation, such was the contract, the duty of the court is to enforce it according to its terms; for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the court below decided were embodied in the policy in suit. The contracts involved in Jeffries v. Insurance Co., 22 Wall. 47, and Aetna Life Ins. Co. v. France, etc., 91 U. S. 510, were held to be of that kind. But, unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void, and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make a categorical answer. If those who organize

and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.

In National Bank v. Insurance Co. 95 U. S. 678,—which was a case of fire insurance, involving, among others, the question whether the statements as to the value of the property insured were warranties,—it was said: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." See, also, Grace v. Insurance Co., 109 U. S. 282, 3 Sup. Ct. 207.

These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk; that is, in matters which are of the essence of the contract.

We have seen that the application contains a stipulation that it shall form a part of the contract of insurance; also, that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, and what was the intention of the parties. Taken together, it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfillment of all the declarations embodied in the application. It is true that the word "warranted" is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control, when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

But it is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense, afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he had never been so afflicted, being untrue, avoided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such diseases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not.

Looking into the application, upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them in active form, without, at the time, being conscious of the fact, and beyond the power of any one, however learned or skillful, to discover. Did the company expect, when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters

of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain? We shall be aided in the solution of these Inquiries by an examination of other questions propounded to the applicant. In that way we may ascertain what was in the minds of the parties.

Beyond doubt the phrase "other known cause," in the fourteenth question, serves the double purpose of interpreting and qualifying all that precedes it in the same clause or sentence. For instance, the applicant was not required to state all the circumstances within his recollection of his family history, but those only which rendered the proposed insurance more than usually hazardous, and of which he had personal knowledge or of which he had information fairly justifying a belief of their existence. If he omitted to state circumstances in his "family history" of which he had no knowledge, nor any information deserving attention, that omission would not avoid the policy, although it subsequently appeared that those circumstances, if known to the company, would have shown that the proposed insurance was more than usually hazardous. Apart from other questions or clauses in the application, the tenth question would indicate that an incorrect or untrue answer as to whether the applicant's "father, mother, brothers, or sisters had been affected with consumption, or any other serious family disease, such as scrofula, insanity, etc.," would absolve the company from all liability. Yet, in the fourteenth question, the insured, being asked as to his family history and as to "hereditary predispositions,"—an inquiry substantially covering some of the specific matters referred to in the tenth question,—was, as we have seen, only required to state such circumstances as were known to him, or of which he had information, and which rendered an insurance upon his life more than usually hazardous. So, in reference to that part of the fourteenth question relating to the then physical condition of the applicant. Suppose at the time of his application he had a disease of the lungs or heart, but was entirely unaware that he was so affected. In such a case he would have met all the requirements of that particular question, and acted in the utmost good faith, by answering no, thereby implying that he was aware of no circumstance in his then physical condition which rendered an insurance upon his life more than usually hazardous. And yet, according to the contention of the company, if he had, at any former period of his life, been afflicted with a disease of the heart or lungs, his positive answer to the seventh question, that he had not been to afflicted, was fatal to the contract; this, although the applicant had no knowledge or information of the existence at any time of such a disease in his system. So, also, in reference to the inquiry in the fourteenth question as to any "constitutional infirmity" of the insured. If, in answering that question, he was required to disclose only such constitutional infirmities as were then known to him, or which he had reason to believe then existed, it would be unreasonable to infer that he was expected, in answer to a prior question, in the same policy, to guaranty absolutely, and as a condition precedent to any binding contract, that he had never, at any time, been afflicted with diseases of which, perhaps, he never had and could not have any knowledge whatever.

The entire argument in behalf of the company proceeds upon a too-literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by "true" and "untrue" answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense the word "true" is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers."

If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of "fair and true answers," the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and therefore whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far

as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted.

It results from what has been said that the judgment must be reversed, with directions to set aside the verdict, and for further proceedings consistent with this opinion. It is so ordered.

SCHULTZ v. INSURANCE CO.

(40 Ohio St. 217.)

Supreme Court Commission of Ohio. Jan. Term, 1883.

Error to district court, Hamilton county.

A. G. Collins and C. H. Blackburn, for plaintiff in error. McGuffey, Morrill & Strunk, for defendant in error.

MARTIN, J. The action below was upon a policy of life insurance issued by the defendant to the plaintiff on the life of her husband. The policy contained a proviso that it should be null and void if the insured "shall under any circumstances die by his own hand." The petition was in the usual form. The answer denied the death of the insured, and averred that if he was dead, he died of his own hand. Reply was a general denial. Trial to a jury, resulting in verdict and judgment for defendant. District court on error gave judgment of affirmance. On the trial, amongst other things, the death was proved, and plaintiff rested. Defendant introduced testimony tending to show that the insured had family troubles, was tired of life, and contemplated, prepared for and committed suicide by taking poison.

In rebuttal the plaintiff interrogated a witness as to the mental condition of the insured shortly before his death, with a view to show his insanity at the time of committing the act of suicide. Objection was made, but not to the form of the question. The court refused to allow the question to be answered, ruling the proposed testimony inadmissible. Exception was taken, and the ruling was also assigned as a ground for a new trial, which was refused. It is also one of the assignments of error here; and the only one we consider it important to notice. Was testimony tending to show the insanity of the insured at the time of his death material to the issue? The majority of this court think it was material, and that the court below erred in excluding it. We have arrived at this conclusion from a construction of the proviso, and hold that insanity of the suicide might affect its operation. The policy is a contract between the parties to this suit. Its object was to provide indemnity against the premature death of the insured. The plaintiff, before she brought her action, had duly performed all the conditions of the contract to be kept by her. Her claim upon the company could to no extent be impaired by any act of crime of the insured committed after the execution of the contract, unless it was so stipulated therein. Such stipulations are against the general intendment of the contract, and can operate only by way of forfeiture. And therefore, whilst it is entirely competent for the parties to provide such conditions of forfeiture, yet to be valid they must be reasonably precise and particular, and not against public policy. The condition of forfeiture in this policy is that if the insured "shall under any circumstances die by his own hand."

The learned counsel for the company in their argument advance two propositions:

The first is that the expression "die by his own hand," without any qualifying terms, means intentional self-destruction, whether the party is sane or insane.

The second is that if the expression is restricted to mean criminal suicide, then the effect of adding the qualifying phrase "under any circumstances," is to enlarge the meaning so as to include every case of intentional suicide, whether criminal or not, or committed by a person sane or insane. If his first position be tenable no effect whatever can be given to the qualifying phrase, unless it be to extend the proviso to every case of unintentional self-destruction. Strictly taken, the proviso is susceptible of a reading that makes the qualifying words meaningless. But such a construction is presumably not within the contemplation of the parties, and is never admissible unless required by the context or the nature of the subject. Nor is the other reading admissible which would work a forfeiture in cases of accidental death, occasioned by the direct act of the party—a condition which if plainly stated in the policy, would, to say the least, be of very questionable validity. The phrase occurs in the printed part of the policy, and was inserted by the company, no doubt, for a lawful and commendable purpose.

The perplexing state of uncertainty and conflict in the judicial holdings in this country as to the meaning of the condition in the common form, and the difficulty of making proof to the satisfaction of juries in cases of shameless frauds by suicides, present strong inducements to companies to seek protection in definite stipulations.

The object of this company in inserting the phrase under consideration, was doubtless to secure such protection; and it was probably supposed that its effect would be merely to extend the proviso to cases of intentional self-destruction, whether the party was sane or insane. But whatever the purpose may have been, to have effect it must be expressed in suitable language and be lawful. The question is, did both parties so understand the phrase, or rather is the language such that they must be held to have so understood it? And in determining this question we are entitled to the aid of, and are probably bound on principle to apply, the rule of strict construction as against the company. In National Bank v. Insurance Co., 95 U. S. 673, this rule is indicated in the third proposition of the syllabus as follows: "The policy, having been prepared by the company, should be construed most strongly

against them." Here the stipulation was not only prepared by the company, but is one of forfeiture.

However, it is sufficient to say that there is nothing in the phrase that carries an idea of any precise qualification, such as is now claimed by the defendant, or such as would be acceptable to either party or the court. Language more nearly expressive of the object could have been employed. Well-considered analogous cases lend support to the view we have expressed. In Bigelow v. Insurance Co., 93 U. S. 284, the question was as to the construction and validity of a proviso to the effect that it should be void if the insured died by suicide, sane or insane.

Justice Davis in pronouncing the opinion says, "Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite and well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties."

In Pierce v. Insurance Co., 34 Wis. 389, the same question arose on a similar proviso. The words were, "die by suicide, felonious or otherwise, sane or insane." The qualification was upheld, and in the very able opinion of the court great stress is laid on the fact that the qualification was restricted and particular, and that it was so precise and guarded as to clearly and expressly exclude a limitation to self-murder.

In Jacobs v. Insurance Co., 5 Bigelow, Ins. Cas. 42, the condition was that the policy should be void if the insured shall "die by his own hand or act, voluntary or otherwise." It was held that the words "or otherwise" were of uncertain meaning and void. In the opinion of the court it is said, "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 admitted 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."

A majority of the court are of opinion that the phrase "under any circumstances" must be disregarded as too general and uncertain to serve any purpose in the construction of the proviso under consideration.

We must consider the condition of forfeiture as if it were simply "if he die by his own hand."

Do these words, as assumed, mean criminal self-destruction? The terms "die by his own hand," "suicide," "self-murder," and the like, are synonymous. In England they involve the element of criminality, and the principle that an insane man is not responsible for the act is applied in all cases, except only in the construction given to such act when committed by the insured under a policy containing a condition of forfeiture therefor. The exception is as well established as the rule, and goes to the extent of holding that the act is within the proviso if the insured had mind enough to intend the act and knew it would kill him, although he was unable to appreciate that it was wrong, or had not the power to resist an impulse to commit it. In other words, it excludes any consideration of sanity.

In this country the conflict between the authorities is utterly irreconcilable. The decided preponderance, however, favors the general rule and rejects the English doctrine.

It is unnecessary to refer to the authorities in detail. The state of the discussion is well known to the bar; and the argument was long since exhausted. A majority of the court reject the English doctrine, and adopt the view generally prevailing in this country, which is consistent with legal analogies. We adopt, as the law of this case, the rules laid down by the supreme court of the United States in Insurance Co. v. Terry, 15 Wall. 584, as follows:

"If the assured, being in possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery.

"If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

The condition of forfeiture in that case was, "if the assured shall die by his own hand,"—the same as we have found the condition in this case to be.

The onus of showing the requisite capacity of the insured, as well as the act of self-destruction, to bring the case within the proviso, rests upon the company—the party who sets it up as a defense. Insurance Co. v. Peters, 42 Md. 414; Insurance Co. v. Gridley, 100 U. S. 614; Phillips v. Insurance Co., 26 La. Ann. 404.

In maintaining this issue the defendant will have the benefit of the presumption of sanity which obtains in a case of suicide, as in that of any other enormous crime, until it is overcome by competent testimony.

It follows from what has been said, that

the testimony proposed in rebuttal was competent, and its exclusion by the trial court was error.

Judgment reversed and cause remanded.

GRANGER, C. J., and DICKMAN, J. (dissenting). Originally the expressions "die by his own hand" and "self-murder" were not always used as synonymous terms. The latter always included the element of crime, and therefore indicated that the decedent was sane when he did the act. The former sometimes included the crime: at other times it did not. The courts have in many cases construed them as technical terms, having precisely the same meaning. If their use must therefore be limited by the decisions of courts, our language is destitute of a word that describes the act of a man who kills himself, knowing that his act would cause his death, but does not indicate that the deed was criminal. Strictly, the phrase "died by his own hand," aptly described just such a death. In our judgment, notwithstanding the decisions referred to, parties may of right use the phrase in this sense; and whenever their contracts indicate that they so intended, effect should be given to that intent. It seems to us that the words "shall under any circumstances die by his own hand" do indicate that the phrase was not used in the technical sense. They evince a purpose to widen that which judicial construction had made narrow. As that narrowing consisted in always so construing the phrase as to include the idea that the decedent was criminal and therefore sane, it is evident that the widening intended consists in excluding that idea. Hence by a reasonable construction effect can be given to the new words "under any circumstances." If we are right in thus thinking, it is the duty of the court to so construe in this case.

We think the record shows that at the moment when counsel for the plaintiff offered to prove "insanity," the evidence had presented a case in which mere "insanity" was immaterial. It was evident that counsel did not expect to show that Schultz did not know that he was taking arsenic and that it would cause his death. Hence we think the court did not err in refusing to admit the evidence offered, and that the refusal to charge the jury as the plaintiff desired was right.

BIGELOW v. BERKSHIRE LIFE INS. CO.

(93 U. S. 284.)

Supreme Court of the United States. Oct., 1876.

Error to the circuit court of the United States for the Northern district of Illinois.

This is an action on two policies issued by the defendant on the life of Henry W. Bigelow. Each contained a condition in avoidance, if the insured should die by suicide, sane or insane; and in such case the company agreed to pay to the party in interest the surrender value of the policy at the time of the death of Bigelow. The defendant pleaded that Bigelow died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended by this means to destroy his life. To this the plaintiffs replied, that Bigelow, at the time when he inflicted the pistol-wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. A demurrer to this replication was sustained by the court below, and the plaintiffs bring the case here for review.

Thomas Hoyne, for plaintiff in error. H. G. Miller, for defendant in error.

Mr. Justice DAVIS delivered the opinion of the court.

There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured "shall commit suicide," or "shall die by his own hand." But since the decision in Insurance Co. v. Terry, 15 Wall. 580, the question is no longer an open one in this court. In that case the words avoiding the policy were, "shall die by his own hand;" and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract; as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, "shall die by suicide (sane or insane)," must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. "Shall die by his own hand, sane or insane," is, doubtless, a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms "suicide" and "dying by one's own hand," in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindall, in Borradaile v. Hunter, 5 Man. & G. 668, says, "The expression, 'dying by his own hand,' is, in fact, no more than the translation into English of the word of Latin origin, 'suicide.'" Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words, "shall commit suicide," standing alone in a policy, import self-murder, so do the words, "shall die by his own hand." Either mode of expression, when accompanied by qualifying words, must receive the same construction. This being so, there is no difficulty in defining the sense in which the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties. If it had been, there was no necessity of adding anything to the general words, which had been construed by many courts of high authority as not denoting self-destruction by an insane man. Such a man could not commit felony; but, conscious of the physical nature, although not of the criminality, of the act, he could take his own life, with a settled purpose to do so. As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based, as it is, on the construction of this language, informed the holder of the policy, that, if he purposely destroyed his own life, the company would be relieved from liability. It is unnecessary to discuss the various phases of insanity, in order to determine whether a state of circumstances might not possibly arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit, it is enough to say, that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was inca-

pable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Insurance companies have only recently inserted in the provisos to their policies words of limitation corresponding to those used in this case. There has been, therefore, but little occasion for courts to pass upon them. But the direct question presented here was before the supreme court of Wisconsin in 1874, in Pierce v. Insurance Co., 34 Wis. 389, and received the same solution we have given it. More words were there used than are contained in this proviso; but the effect is the same as if they had been omitted. To say that the company will not be liable if the insured shall die by "suicide, felonious or otherwise," is the same as declaring its nonliabilty, if he shall die by "suicide, sane or insane." They are equivalent phrases. Neither the reasoning nor the opinion of that court is at all affected by the introduction of words which are not common to both policies.

It remains to be seen whether the court below erred in sustaining the demurrer. The replication concedes, in effect, all that is alleged in the plea; but avers that the insured at the time "was of unsound mind, and wholly unconscious of the act." These words are identical with those in the replication to the plea in Breasted v. Trust Co., 4 Hill, 73; and Judge Nelson treated them as an averment that the assured was insane when he destroyed his life. They can be construed in no other way. If the insured had perished by the accidental discharge of the pistol, the replication would have traversed the plea. Instead of this, it confesses that he intentionally took his own life; and it attempts to avoid the bar by setting up a state of insanity. The phrase, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences.

In the view we take of the case, enough has been said to show that the court did not err in holding that the replication was bad. Judgment affirmed.

INSURANCE CO. v. BOON.

(95 U. S. 117.)

Supreme Court of the United States. Oct., 1877.

Error to the circuit court of the United States for the district of Connecticut.

This was an action commenced in September, 1868, to recover $6,000, the amount of a policy of insurance, bearing date Sept. 2, 1864, issued to the plaintiffs below by the Aetna Fire Insurance Company of Hartford, Conn., for one year, upon certain goods, wares, and merchandise then in their store at Glasgow, Mo., which were destroyed by fire Oct. 15, 1864.

By written stipulation, a jury was waived, and the issues of fact tried by the court.

On April 28, 1874, the court filed a written opinion declaring their finding of facts upon the evidence, with their conclusions of law thereon, and rendered judgment accordingly for the plaintiffs. No other findings of fact were had, nor was a bill of exceptions tendered at that time. On the 13th of July following, the defendant applied to the circuit judge in vacation for a rule on the plaintiffs to show cause why the findings of fact and the conclusions of law thereon should not be stated by the court, and a bill of exceptions signed and filed nunc pro tunc. Leave for that purpose having been granted, execution of the judgment was stayed. August 22, the parties stipulated in writing that the rule should be heard before the district judge at chambers. Upon the hearing, he, on the twenty-fourth day of that month, granted the rule. At the September term of the court, the findings of fact and conclusions of law thereon were duly entered nunc pro tunc as of the April term, and the bill of exceptions was signed by both judges. The findings, so far as they involve any question argued by counsel here, are as follows:

"That the policy, which was duly executed by the defendant and delivered to the plaintiffs, contained the following express provisions, 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."

That the facts and circumstances showing the cause of the fire are as follows, namely: 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 of the United States, by the military forces and a 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, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' said store, three buildings, nevertheless, 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 said city, and had lawful charge and control of the military stores aforesaid. On the fifteenth day 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 one thereof penetrating the said store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of said shell 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 city.

During the battle, and when the government troops had been driven from their exterior lines of defence, 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 said rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the said 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.

It was conceded that the order of Colonel Harding was, in the exigency, a lawful and

discreet use of the military authority vested in him.

The court declared, as conclusions of law upon the facts found, that the defendant was not exempted by virtue of the said proviso from liability to the plaintiffs under said policy, and that the plaintiffs were entitled to judgment for $6,000, the value of the property destroyed, with interest thereon from July 1, 1865, and costs of suit.

On the 7th of October, 1874, the defendant sued out this writ of error.

G. W. Parsons and R. D. Hubbard, for plaintiff in error. Francis Fellowes, for defendants in error.

Mr. Justice STRONG delivered the opinion of the court.

Preliminary to any consideration of the assignments of error is the question whether the bill of exceptions and the special finding of facts can be considered as a part of the record. The issues formed by the pleadings were tried by the court, without the intervention of a jury, in September, 1873, and judgment for the plaintiffs was ordered at April term, 1874. It does not appear that any exceptions were taken to the rulings of the court during the progress of the trial, and that which is now claimed to be a bill of exceptions has no reference to any such rulings. It relates only to the judgment given on the findings of the issues of fact. The act of congress which authorizes trials by the court (13 Stat. 500; sections 649, 700, Rev. St.) has enacted that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; and that, when the finding is special, the review by the supreme court upon a writ of error may extend to the determination of the sufficiency of the facts found to support the judgment. No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and, when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up for review. But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. In this case, there was no formal finding of facts when the judgment was ordered. It is to be inferred, it is true, from the judgment and from the entry of the clerk, that the issue made by the pleadings was found for the plaintiffs, but how, whether generally or specially, does not appear. There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment; and such an amendment was made. After the close of the April term, and in the vacation next following, the judge of the court, on application of the defendants, granted an order upon the plaintiffs to show cause why the defendants should not have leave inter alia to make and serve a case or bill of exceptions, containing the evidence given at the trial, special findings of fact and law, and such exceptions thereto as the defendants might desire to make, and why such case or bill of exceptions when made and settled should not be filed, nunc pro tunc, as of the term when the judgment was entered. Upon this rule both parties were heard; and the result was an order that "a finding of facts in the cause, with the conclusions of the court thereupon, conformably to the opinion of the court theretofore filed," be prepared, to be approved by the court at the next following term (September); that the defendants have leave to prepare a bill of exceptions to be allowed and signed at said term, and that "said special finding of facts" and bill of exceptions should be made, allowed, and entered of record, nunc pro tunc, as of the April term, 1874, of the court. Such a special finding was accordingly prepared, and at the September term signed by both the judges of the circuit court, the order made in vacation was made the order of the court, and the separate findings of fact and conclusions of law, together with the bill of exceptions, also signed, were ordered to be filed, nunc pro tunc, as of April term, 1874, and made part of the record of the cause. Had the court power to make such an order respecting a special finding, and, if it had, does the order have the effect of making the special finding a part of the record? It is not necessary to inquire whether the court, at a term subsequent to the judgment, could lawfully allow and sign a bill of exceptions not noted at the trial. It may be admitted that a court has no such power; but, as already remarked, no bill of exceptions was needed to bring any thing upon the record. If the special finding of facts was properly there, or was rightfully supplied, the judgment of the court is subject to review independently of any bill of exceptions, the only office of which is to bring upon the record rulings that without it would not appear. It remains, therefore, to consider whether the court could at the September term, by an order, correct the record by incorporating into it, nunc pro tunc, a special finding of the facts upon which the judgment had been rendered. It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term. In Rhoads v. Com., 35 Pa. St. 276, Gibson, C. J., said: "The old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, con-

venience, and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors." Even judgments may be corrected in accordance with the truth. It has been held by this court that, at a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one. Matheson's Adm'r v. Grant's Adm'r, 2 How. 282. And this has been repeatedly held elsewhere. Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; but every court of record has power to amend its records, so as to make them conform to and exhibit the truth. Ordinarily, there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or any thing that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September term, that the special finding of facts and conclusions of law be signed by the judges and allowed, conformably to the opinion of the court theretofore filed, and that it, together with the order, should be filed nunc pro tunc as of April term, and made part of the record. It was but an amendment or correction of form, the form of the finding, not of its substance, and there was enough to amend by. The opinion, which was filed concurrently with the entry of the judgment, contained substantially, almost literally, the same statement of facts, and relied upon it as the foundation of the judgment given. True, that opinion is no part of the record, any more than are a judge's minutes; but it was a guide to the amendment made, and it seems altogether probable it was intended to be itself a special finding of the facts. The order of September, 1874, recites that the court had at April term filed, announced, and declared their findings of facts, with their conclusions of law thereupon, which findings and conclusions were embodied in the opinion of the court announced and filed in the cause. And all that was wanting to make it a sufficient special finding was that it was not entitled "Finding of Facts." The amendment or correction, therefore, contradicts nothing in the record as made at April term, and it is in strict accordance with the truth. We conclude, then, that the order of September term was within the discretion of the court, and that by it the special finding returned became a part of the record of the cause, and that the judgment founded upon it is subject to review in this court without any bill of exceptions.

In so holding, we do not depart from any thing we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at the trial. This is not a case of that kind. It is the case of a correction of the record, not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it. We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time. Could he allow it, the record would be made to speak falsely.

Coming, then, to the merits of the case, the main question is, whether the fire which destroyed the plaintiffs' property "happened or took place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." If it did, the loss was excepted from the risk taken by the insurers.

The policy contains this express stipulation: "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 general purpose of this proviso is clear enough, but there is controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words "military or usurped power" must be construed as meaning military and usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority, and no less reason, in support of this interpretation. In our view of the present case, however, we are not called upon to affirm positively that such is the true meaning of the words in the connection in which they were used in the policy now under review; for, if it be conceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below "happened," "took place," or occurred by means of a risk excepted in the policy. In other words, it was caused by invasion, and the usurped military power of a rebellion against the government of the United States, as the contracting parties understood the terms "invasion" and "military or usurped power."

Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured. Insurance Co. v. Stein, 5 Bush, 652. It was well said recently by the New York court of

appeals, that, in construing contracts, words must have the sense in which the parties understood them. And, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. Cushman v. Insurance Co., 70 N. Y. 76.

Apply, now, these principles to the present case. The policy was issued in 1864, while the country was convulsed by a civil war. The property insured was in a state bordering upon sections, the people of which were in insurrection against the general government, and confederated as a usurping power. The state had been the theatre of civil commotion and of armed invasion during the struggle between the confederated states and the federal government, a struggle not then ended. It was quite possible that new invasions might be made and new destruction of property might be caused by the military or usurped power then in rebellion. It is evident that the insurers were willing to assume only ordinary risks, and that, to guard against more extended liability, the excepting clause was introduced into the policy. The provision must have been intended to be a protection to the company against extraordinary risks, attendant upon the condition of things then existing. Invasion involved, of necessity, resistance by the constituted authorities of the government, and the employment of its military force. Destruction of property by fire was quite as likely to be caused by resistance to the usurping military power as by the direct action of that power itself. This must have been foreseen and considered when the insurance was effected. It is difficult, therefore, to believe that the parties intended to confine the stipulated exemption within the limits to which the assured would now confine it. That the destruction of the plaintiffs' property by fire was a consequence of the attack of the organized rebel military forces upon the forces of the United States holding possession of Glasgow, the special finding of facts clearly shows. Glasgow was a military post, and a place of deposit for the military stores of the United States, which were in the city hall. The city was guarded and defended by a military force under the command of Colonel Harding.

At an early hour of the morning of the fifteenth day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city and threw shot and shell into it, penetrating some buildings, and one thereof penetrating the store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of the shell killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and a 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 number, and drove the forces of the government from their position, compelled their surrender, and entered and occupied the city.

During the battle, and when the government troops had been driven from their exterior lines of defence, 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 rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this 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.

In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim "Causa proxima, non remota spectatur."

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule. Mr. Phillips, in his work on Insurance (section 1097), in speaking of a nisi prius case of a vessel burnt by the master and crew to prevent its falling into the hands of the enemy (Gordon v. Rimmington, 1 Camp. 123), says, the "maxim 'Causa proxima spectatur' affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe." And again, in section 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it

is or is not in activity at the consummation of the disaster." In Brady v. Insurance Co., 11 Mich. 425, Martin, C. J., in delivering the opinion of the court, said: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." In St. John v. Insurance Co., 11 N. Y. 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court, regarding the explosion, and not the fire, as the predominating cause of the loss, held the insurers not liable. Decisions are numerous to the same effect. Policies of insurance do not protect an assured against his voluntary destruction of the thing insured. Yet in Gordon v. Rimmington, supra, it was held that, when the captain of a ship insured against fire burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public enemy was regarded as the dominating cause. Vide, also, Emerig. Ins. tom. 1, p. 434. And we find the same principle followed in common practice. Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames. Yet it is not doubted all that destruction is caused by the fire, and insurers against fire are held liable for it. In Lund v. Inhabitants of Tyngsboro, 11 Cush. 563, where it appeared that a traveller had been injured by leaping from his carriage, exercising ordinary care and prudence, in consequence of a near approach to a defect in a highway, the town was held liable, though the carriage did not come to the defect. The defect was regarded as the actual, the dominating, cause. And in this court similar doctrine has been asserted. Insurance Co. v. Tweed, 7 Wall. 44, the principle of which case, we think, should rule the present. There it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In Butler v. Wildman, 3 Barn. & Ald. 398, may be found a case where the captain of a Spanish ship, in order to prevent a quantity of Spanish dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea. The suit was upon a policy insuring the dollars, and judgment was given for the plaintiff. Bayley, J., said, "It was the duty of the master to prevent any thing which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, ex justa causa. It seems to me, therefore, this is a loss by jettison. But it is not a loss by jettison: it is a loss by enemies. It clearly falls within the principle stated by Emerigon, in the case of the destruction of a ship by fire; and I think the enemy was the proximate cause of the loss." Holroyd, J., said, it seemed to him it was a loss by enemies, for the meditated attack was the direct cause of the loss. A similar doctrine was asserted in Barton v. Insurance Co., 42 Mo. 156, and in Marcy v. Insurance Co., 19 La. Ann. 388. It is a doctrine resting upon reason, and in accord with the common understanding of men. Applying it to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the causa causans which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action. It cannot be said that was not anticipated which military necessity recognized. And the insurers and the assured must have looked for such action by the federal forces as a probable and reasonable consequence of an overpowering attack upon the city by an invading rebellious force. Having excepted from the risk undertaken responsibility for such an attack, they excepted with it responsibility for the consequences reasonably to be anticipated from it.

The court below regarded the action of the United States military authorities as a sufficient cause intervening between the rebel attack and the destruction of the plaintiffs' property, and therefore held it to be the responsible proximate cause. With this we cannot concur.

The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In Railway Co. v. Kellogg, 94 U. S. 469, we said, in considering what is the proximate and what the remote cause of an injury, "The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In the present case, the burning of the city hall

and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole. The case is, therefore, clearly within the doctrine asserted by Emerigon, and held in Butler v. Wildman, and in the other cases we have cited. Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers.

Judgment reversed and record remitted, with instructions to enter judgment for the defendant below.

HUCK et al. v. GLOBE INS. CO. WALKER v. QUEEN INS. CO. STOWE et al. v. GIRARD FIRE & MARINE INS. CO et al.

(127 Mass. 306.)

Supreme Judicial Court of Massachusetts. Hampden. Sept. 3, 1879.

M. P. Knowlton, for plaintiffs in first and second cases. G. Wells, for plaintiffs in third case. M. Wilcox and J. P. Buckland, for defendants.

GRAY, C. J. The manifest intent and purpose of the clause inserted in each of these policies, by which it is provided that, "if a building shall fall except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine," is that the insurance, whether upon a building or upon its contents, shall continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and the roof of a building used as a storehouse fall, leaving nothing standing but the outer walls and perhaps a staircase or an elevator, the building must be deemed to have fallen. When several buildings or the goods therein are insured by the same policy, the fall of one building terminates the policy, at least on that building or its contents.

The report shows that the eastern and western halves of the block were substantially distinct buildings, separated from each other by a brick partition wall extending from the front to the rear of the block and from cellar to roof (though with doors of communication in each story), and each of the two parts or buildings capable of standing or falling by itself; that in each of these two parts or buildings, midway between the partition wall and the end wall, there was a beam or girder in each floor, extending from the front to the rear, supported by four brick piers in the cellar and by wooden posts in each story, and upon which the joists of the floors rested; that by the giving way of the piers in the cellar of the easterly part or building, without the agency of fire, the beam or girder resting thereon fell down near the ground, bringing with it the floors and partitions and roof above, with the goods and merchandise in each story, in a mixed and confused mass, excepting only very small portions of some of the floors and of the roof, and a single case of goods; and that only the outer walls of this building (of which the brick partition wall separating it from the adjoining building was one), and an elevator five feet square in one corner, were uninjured by the fall; that it was after the fall that the fire broke out that caused the injury, for which recovery is sought in these actions, to the goods which had fallen, and to the elevator and to the surrounding walls, with the doors and windows therein, which remained standing; and that the west half of the building remained in all its parts undisturbed and uninjured.

Of the building forming the eastern half of the block, the roof and the whole interior, with all the floors and divisions thereof, had fallen, and nothing remained standing but the outer walls and the elevator, constituting a mere shell or ruin, and not a standing building in any proper sense. It follows that neither the goods precipitated by the fall into a confused mass, nor the walls of the ruined building, nor the elevator therein, were any longer at the risk of the insurers, and that in each of these cases a jury would not have been warranted in finding a verdict for the plaintiffs.

The decisions cited for the plaintiffs are not inconsistent with this conclusion. In Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom, 80 Ill. 558, the building, though shaken by a storm so as to lean over, remained entire, and no part of it had fallen. In Breuner v. Insurance Co., 51 Cal. 101, goods exceeding in value the amount of the insurance were destroyed by fire in that part of the building which had not fallen, and the decision against the insurers was by a bare majority of the court.

The result is, that in each case there must, according to the terms of the report, be judgment for the defendant.

ERMENTRAUT et al. v. GIRARD FIRE & MARINE INS. CO.

(65 N. W. 635.)

Supreme Court of Minnesota. Dec. 24, 1895.

Appeal from district court, Hennepin county; Henry C. Belden, Judge.

Action by Charles H. Ermentraut and Charles H. Maxcy against the Girard Fire & Marine Insurance Company of Philadelphia. From an order dismissing the action, plaintiffs appeal. Affirmed.

Merrick & Merrick, for appellants. Kueffner & Fauntleroy and F. P. Lane, for respondent.

MITCHELL, J. This action was brought on a policy issued by the defendant to the plaintiff Ermentraut, insuring him, to the amount of $1,000, for one year "against all direct loss or damage by fire," on his "brick, iron-roof, grain warehouse building, and bins therein, including foundations and all permanent fixtures," etc. The only other provisions of the policy involved on this appeal are as follows: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company." "The sum for which this company is liable, pursuant to this policy, shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company, in accordance with the terms of this policy." When the plaintiffs rested, the defendant moved to dismiss the action, for the reason that plaintiffs had failed to establish their cause of action, in that—First, it did not appear that the loss or damage was the direct result of fire; second, that it did appear that the plaintiffs had not given immediate notice of the loss in writing to the company. The judge granted the motion, although placing his decision exclusively on the last ground. Of course, if the action should have been dismissed on either ground, the ruling of the court must be affirmed.

1. The insured building was adjacent to another used as a feed mill, the wall between them being a partition wall. There is no claim that any part of the insured building was actually ignited or consumed by fire. The fire was confined to the adjacent feed mill, which fell, carrying down with it the partition wall and a part of the elevator insured, and the question to which both the examination and cross-examination of plaintiffs' witnesses seem to have been directed was whether the fall caused the fire, or the fire caused the fall. While the evidence offered by plaintiff was not of the most convincing or satisfactory character, yet we think it was such that the jury might have found either way on the question. We think that, as the evidence stood when plaintiff rested, it would have justified the jury in finding that the feed mill had caught fire before it fell, and that the fall was caused by the partial consumption of the feed mill, and the weakening of the partition wall by the fire. If such were the facts, then we think the falling of the insured building was a "direct loss or damage by fire," within the meaning of the policy. The provision that, if the building fell, "except as the result of fire," the insurance thereon shall cease, was introduced into the policy by the insurer for its own benefit, and, under a familiar rule, must be construed, in case of ambiguity, most strongly against it. We think it has reference only to cases where the building might fall from some other cause than fire,—as, for example, defective construction, the withdrawal of necessary support, storm, flood, or other like cause,—and fire thereafter ensued. But it was not intended to exclude cases where fire was the immediate or proximate cause of the fall. To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. This is so well settled that the citation of authorities in support of the proposition is unnecessary. The question is, was fire the efficient and proximate cause of the loss or damage? Thus, in one case, where a house protected by a policy of insurance against damage by fire was injured by the falling of part of the wall of an adjacent house, in consequence of fire in the latter house, it was held that the fire was the proximate cause of the loss, and that the insurers were liable, although the house insured had never been on fire. Johnston v. Insurance Co., 7 Shaw & D. Scot. Ct. Sess. 52. The word "direct," in the policy, means merely "immediate," or "proximate," as distinguished from "remote." Counsel for defendant cites, in support of a contrary view, some language used by way of illustration in California Ins. Co. v. Union Compress Co., 133 U. S. 387–415, 10 Sup. Ct. 365, in which the court names "destruction through the falling of burning walls" as an instance of remoteness of agency. The question was not before the court, for in that case the insured property was physically burned by the direct action of fire. If the court meant what counsel claims, we cannot avoid the conclusion that the illustration was, to say the least of it, an unfortunate one.

2. Seeley & Co., who issued the policy, were the local agents of the defendant, with authority "to receive proposals for insurance within the county of Hennepin, and to receive premiums thereon, and to give receipts and issue policies therefor." It also appeared that these agents had authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign, and issue policies thereon, which they received from the company, signed by its president and sec-

retary. So far as appeared from the evidence, this was the extent of their actual authority, and there was no evidence tending to show that their apparent authority was other or greater than their actual authority. The only evidence of the giving of notice of loss, except the sending of proofs of loss to the general managers of the defendant at Chicago on or after October 9th (received by them on or about October 23d), was to the effect that, within a day or two after the loss, one of the plaintiffs verbally notified Seeley & Co. that "the fire had destroyed the building." Although probably not material, it does not appear that he requested Seeley & Co. to give or forward the notice to the company, or that they promised to do so, or made any reply to the plaintiff. As the loss occurred on the 12th of August, it is clear, under the authorities, that, as a matter of law, the time for giving notice of loss had expired before the proofs of loss were sent to Chicago. It is also settled law that, where the policy requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to the right of action on the policy. Hence, for their right of recovery on the policy, the plaintiffs have to rely on the verbal notice given to Seeley & Co. If Seeley & Co. were the proper parties to whom to give this notice,—in other words, if it was within the scope of their authority to receive notice of loss,—we would not feel any doubt but that if, when they received verbal notice, they made no objection to its form, they would be deemed to have waived the omission to give it in writing. But it is self-evident that if they had no authority to receive such notice, then they could waive nothing in the matter. Upon this state of facts, it was not within the scope of the authority of Seeley & Co. to receive or waive notice of loss, and hence notice to them was not notice to the company. Even if there could be any doubt of the correctness of this proposition as a new question, it has been too long and too well settled in this state to be now considered open. Bowlin v. Insurance Co., 36 Minn. 433, 31 N. W. 859; Shapiro v. Insurance Co., 51 Minn. 239, 53 N. W. 463; Id. (Minn.) 63 N. W. 614. But we think the rule is correct upon both principle and authority. It is in accordance with the general principles of the law of agency. It is elementary that a principal is only liable for acts done by his agent within the scope of the authority, actual or apparent, with which the principal has clothed him; that it rests entirely with the principal to determine the extent of the authority which he will give to his agent; also, that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority. In insurance cases courts frequently inaccurately classify agents as "local" and "general." But the extent of the territory which is to be the field of his agency is no test of the extent of an agent's authority within that field. His field of operations may include the whole United States, and yet his powers be special and limited. On the other hand, his field of operations may be confined to a single county or city, and yet his authority within that field be unlimited. In the present case there is no question of apparent, as distinguished from actual, authority. The question is simply one of actual authority, expressed or implied. Authority to act in the matter of a loss under the policy, after it has occurred, is not expressly given. All the authority expressed relates to the making of the contract of insurance. It is a fundamental principle in the law of agency that a delegation of power, unless its extent be otherwise expressly limited, carries with it, as a necessary incident, the power to do all those things which are reasonably necessary to carry into effect the main power expressly conferred. But it is equally fundamental that the power implied shall not be greater than that fairly and legitimately warranted by the facts; in other words, an implied agency is not to be extended by construction beyond the obvious purpose for which the agency was created. We do not think that mere authority to make a contract of insurance carries with it implied authority to act in the matter of a loss under the policy after it has occurred. If the implied authority extends to accepting notice of the loss, it would logically follow that it also extends to proof of loss, and even to the adjustment of the loss,—a length to which no court has ever gone. The rule which we have adopted is also in accordance with the general current of the authorities. Lohnes v. Insurance Co., 127 Mass. 439; Smith v. Insurance Co., 60 Vt. 682, 15 Atl. 353; Bush v. Insurance Co., 63 N. Y. 531. Occasional statements in some of the text-books seem to announce a different rule, but they are not borne out by the authorities cited in their support. For example, in Wood, Ins. § 419, it is stated that, "where an agent is intrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto." Upon an examination of the large number of authorities cited in support of the text, it will be found that not one of them tends to support the author's proposition as to proofs of loss, unless it be the nisi prius decision in Ide v. Insurance Co., 2 Biss. 333, Fed. Cas. No. 7,001, in which the question is not discussed, no authorities cited, and the statement of facts so meager that it cannot be ascertained what the evidence was as to the actual or apparent authority of the agent. Most, if not all, of the other cases may be classified as follows: First. Cases holding that, where an agent is authorized to make the contract of insurance and issue the policy, the company is bound by his acts, representations, or omissions preceding or accom-

panying the issuing of the policy. Considered as the statement of a general rule, this is the doctrine of all courts. Second. Cases holding that authority to make the original contract of insurance carries with it implied authority to modify or waive any of its conditions while the contract is still current, as by consenting to other insurance, change of risk, etc. This court has adopted this general rule, although some courts do not go that far. Third. Cases where the agent had, with the knowledge of the company, been in the habit of receiving notices of loss, proofs of loss, and of adjusting losses, and it had thereby clothed him with apparent authority to do these things. Fourth. Cases where the authority of the agent to do the particular acts was admitted, or not disputed, and the only question was as to the effect of his acts, as, for example, whether they constituted a waiver.

3. When the general managers received the proofs of loss in October, they wrote to plaintiffs, stating that they were in receipt of papers purporting to be proofs of loss, but adding: "This is to notify you that we deny any liability under said policy on the part of this company." They did not, however, return the proofs of loss. If the question was one of the sufficiency of the proofs of loss, we have no doubt the conduct of the general managers would have amounted to a waiver of any defect in them, either of form or substance. But this did not amount to any waiver of the prior failure of the plaintiffs to give notice of loss as required by the terms of the policy. It will be observed that by reason of this prior failure the policy was already dead when the proofs of loss were received; also, that in this letter the general managers did not place their denial of liability on any particular ground, but denied all liability generally. What would have been the effect, under the circumstances, of placing their denial of liability upon some specific ground other than the failure to give notice of loss we need not inquire. But there was nothing in the language or conduct of the general managers that could be construed as a waiver of plaintiffs' prior failure to give notice of the loss, by reason of which the policy was already dead. If the policy had been still alive, and the plaintiffs still had time within which to give the notice, or to supply defects in one already given, a different question would be presented, and many of the numerous cases cited by plaintiffs' counsel would have been in point. Our conclusion is that the court was right in dismissing the action, on the ground that plaintiffs had failed to give notice of loss as required by the policy. Order affirmed.

CANTY, J. I concur in the first division of the foregoing opinion, but not in the second. I am of the opinion that an insurance agent who has authority "to receive proposals for insurance," "receive premiums thereon," "fix the premiums or rate of insurance," and "fill up, countersign, and issue policies of insurance," should be presumed to have authority to receive notice of loss, at least when no higher local authority appears to exist. Especially is this true of the highest local representative of an insurance company in so large and populous a county as Hennepin.

It is a matter of common knowledge that every insurance company depends largely (though perhaps not exclusively) on such agents to furnish it information concerning such losses. Every company doing a considerable amount of business in any locality, especially in a commercial center of any size, must have and always does have the assistance of its local agent in ascertaining the facts concerning the loss, just as much as they have his assistance in obtaining business or determining the character of risks. It is true that an adjuster is often and quite usually sent to examine into the facts and adjust the loss, but it is almost the invariable custom for the local agent to furnish the company all the facts within his knowledge, and all the facts which he can ascertain, immediately after he learns of the loss, and usually long before the adjuster comes upon the ground. Of course most of this information from the agent to the company is secret and confidential, but it is none the less within the scope of the agent's duties to furnish it. These are things that everybody knows, and what everybody knows the courts should not refuse to know. These are duties which such agents usually perform. It should be presumed that such duties are within the scope of their authority, and if so it should be presumed that they have authority to receive information of such a loss from the insured and transmit it to the company, and that when such information is so received it is their duty so to transmit it.

As far as concerns the authority of such agents generally, there is no clear or well-defined line drawn between matters arising in connection with or accompanying the making of the policy and other matters, except as that line is being drawn by some of the courts. The line which the companies themselves have always drawn is the line between the right to receive and retain premiums and the right to refuse to pay losses. They always admit that their agents have authority to receive such premiums, and always deny that these agents have any authority to waive any forfeiture whatever, whether arising before or after loss, whether arising in connection with the issuing of the policy or in connection with the giving notice of loss.

I am of the opinion that notice to the local agent was sufficient notice of loss, and that the retention by the company of the proof of loss subsequently sent it, tended to prove waiver of prior conditions, as well as performance of the condition requiring such proof of loss.

CENTRAL CITY INS. CO. v. OATES.

(6 South. 83, 86 Ala. 558.)

Supreme Court of Alabama. May 2, 1889.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

This was an action brought by W. J. Oates against the Central City Insurance Company, and was founded on a policy of insurance issued by defendant to plaintiff on a stock of goods owned by him. Defendant pleaded the general issue, and by special pleas set up the defense that defendant had not fulfilled the conditions stipulated in the policy; had not forwarded to the company sworn proof of loss; and had not given the company a certificate of loss by a magistrate. Plaintiff filed his replication, and setting up waiver of such proof and certificate by the company, after having been given notice of the loss, on the ground that the company had made no objection to the notice as forwarded to them, and had not complained to plaintiff of not having received such proof and certificate, but that in the dealings of plaintiff with the agents of the company, and with the company itself, no objection was made as to plaintiff's failure to give such proof and certificate. Defendant demurred to this replication of plaintiff, on the ground that the facts, as set out, constituted no waiver of the conditions of said policy. The court overruled this demurrer, and defendant duly excepted. Among many charges requested by defendant was the following: "That if the jury believe the evidence they must find for the defendant." The court refused to give this charge, and defendant excepted. There was verdict and judgment for plaintiff, and defendant appeals.

Pettus & Pettus and *Troy, Tompkins & London*, for appellant. *Jones & Falkner*, for appellee.

SOMERVILLE, J. The policy of insurance sued on, among other conditions, requires three important steps to be taken by the assured in the event of a loss by fire: (1) He must "forthwith give notice of said loss to the company in the city of Selma;" (2) "and, as soon after as possible, [he must] render a particular account of such loss, signed and sworn to by him," (the assured,) stating the origin of the fire, what other insurance he has, if any, his interest in the property, its value, and by whom and for what purpose it was occupied; (3) "he must produce the certificate of the nearest disinterested magistrate that such officer has examined the circumstances of the loss, and believes that it originated without fraud, and amounted to a specified sum." These three requirements, omitting for the present all mention of others, viz.: (1) notice of loss; (2) sworn proof of loss; (3) certificate of loss by a magistrate, —have uniformly been held by the courts to be conditions precedent in policies of insurance like the present one, and satisfactory evidence of compliance with them, in proper time, has been held to be an essential prerequisite to the right of recovery by the assured, unless such compliance is waived by the insurer. Wellcome v. Insurance Co., 2 Gray, 480; May, Ins. §§ 460, 466; Insurance Co. v. Felrath, 77 Ala. 194.

"Forthwith" in all such policies means without unnecessary delay, or with reasonable diligence, under the circumstances of the particular case. Insurance Co. v. Kyle, 11 Mo. 278.

It has been held in one case that delay of 11 days, and in another of 18 days, in giving notice of loss, is not a compliance with such a requirement, in the absence of excusatory facts explaining the delay. Trask v. Insurance Co., 29 Pa. St. 198; Edwards v. Insurance Co., 75 Pa. St. 380. Where the fire occurred on the 15th, and the plaintiffs, hearing of it on the 18th, gave notice by mail on the 23d, this was held to be a sufficient compliance with a condition requiring notice to be given "forthwith." Insurance Co. v. Insurance Co., 20 Barb. 468. And notice given on the morning after the fire was held sufficient in Hovey v. Insurance Co., 2 Duer, 554. The settled rule in all cases, however, is to construe such requirements liberally in favor of the assured, and strictly against the insurer. Insurance Co. v. Young, 58 Ala. 476; Insurance Co. v. Johnston, 80 Ala. 467, 2 South. Rep. 125.

It has been held, by this and other courts, that where preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: (1) By a failure of the insurer to object to them on any ground within a reasonable time after receipt,—in other words, by undue length of silence after presentation; or (2) by putting their refusal to pay on any other specified ground than such defect of proof. The reason is that fair-dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late. Insurance Co. v. Felrath, 77 Ala. 194; Insurance Co. v. Crandall, 33 Ala. 9; Insurance Co. v. McDowell, 50 Ill. 120; Insurance Co. v. Kyle, supra; Insurance Co. v. Allen, 80 Ala. 571, 1 South. Rep. 202.

So, there are cases decided by this and other courts which hold, and properly so, we think, that an entire failure to make any formal proof of loss may sometimes be excused on the principle of waiver or estoppel *in pais*. In Martin v. Insurance Co., 20 Pick. 389, no evidence was offered of any preliminary proofs before bringing the action, but only of an abandonment not accepted, and a demand of payment of the loss. The insurer refused to pay the loss solely on account of the unseaworthiness of the vessel, and in all their communications with the plaintiff made no objection to the want of proof. The court held that the refusal to pay on the ground specified was a fact from which the jury were authorized to infer a waiver of the proof of loss. On like principle, a waiver

of preliminary proofs has been inferred from a distinct refusal of the company to pay because the assured had taken other insurance without notice, and "had in other ways acted unfairly." Insurance Co. v. Neve, 2 McMul. 237. And again, on the ground that no valid contract of insurance had ever been entered into because incomplete at the time of the loss, no objection being made to the want of such proofs. Tayloe v. Insurance Co., 9 How. 390; Insurance Co. v. Adler, 71 Ala. 518. So, where the insurance company subjected the assured to a personal examination under oath, which statement he subscribed as required by the terms of the policy, and no demand was made for formal proofs, it was held that, upon this state of facts, the jury were authorized to find a waiver of such proofs. Badger v. Insurance Co., 49 Wis. 400. The payment by the insurer of a part of the sum agreed to be paid by the policy in case of loss has also been held a waiver of the usual preliminary proofs. Westlake v. Insurance Co., 14 Barb. 206. So, the offer to pay a specified sum, accompanied by a denial of liability for some of the articles as not covered by the policy, without demand of such proofs. Insurance Co. v. Allen, 80 Ala. 571, 1 South. Rep. 202.

We can find no case, however, where the mere silence of the insurer has been construed as a waiver of the presentation of preliminary proofs by the insured, where no such proofs, defective or otherwise, have been presented. The policy itself is the most solemn notification possible of the imperative prerequisite of furnishing such proofs. It is there stipulated that they must be furnished as soon as possible after the fire, and this stipulation is a standing notice of the requirement. It stands to reason that this notice need not be reiterated by the insurer, nor any special attention of the assured called to it, unless the particular circumstances of the case render it necessary to fair and honest dealing between the parties. And the authorities accordingly hold that the mere silence of the underwriter or insurer, or his failure to specify the non-production of such preliminary proofs, as an objection to the payment of the loss, is not sufficient evidence to justify a jury in inferring a waiver of their production. Insurance Co. v. Lawrence, 2 Pet. 25; O'Reilly v. Insurance Co., 60 N. Y. 169; Keenan v. Insurance Co., 12 Iowa, 126. A like principle was applied in Insurance Co. v. Kyle, 11 Mo. 278, where there was a failure on the part of the insurer to object to a notice of loss when it was received too late. It was suggested by the court that it was not the duty of the company to make any formal objection to the want of notice, and whether they were silent, or made objections on this ground, could not alter the rights of the parties. "Such a doctrine would be in fact," it was said, "implying a new contract between the parties from the mere inaction or silence of one party." See, also, Patrick v. Insurance Co., 43 N. H. 621.

As we have said, the contract exacts (1) a notice of loss forthwith, and (2) proofs of loss as soon thereafter as possible. It is manifest that mere notice of loss is not proof of such loss, and cannot ordinarily subserve such purpose; although proof of loss, if made "forthwith," may answer, not only as proof, but as notice. Wood, Ins. § 428; May, Ins. § 460. It has been accordingly held, in recognition of this distinction, that there might be a waiver of the notice of loss, without a waiver of the proof of loss required to be furnished. Desilver v. Insurance Co., 38 Pa. St. 130.

In this case there was notice of loss, but the company received no preliminary proofs. The policy required that such proofs should be rendered to the company, meaning from the context, in the city of Selma, where the notice also was required to be given. The deposit in the post-office of a written statement of loss, made out and sworn to, and addressed to the company at Selma, but never received by them, was not a delivery of such proof to them, and could not operate to fulfill the requirement of the contract that such proofs of loss should be rendered to the company at Selma. Hodgkins v. Insurance Co., 34 Barb. 213.

Waiver is necessarily a matter of mutual intention between the contracting parties in the nature of a new contract between them. In the absence of evidence that the company had ever received any proofs of loss, or knew their contents and defects, if any, it cannot be contended that such defects were waived. There can be no waiver of anything as to the existence of which one is totally ignorant. Bennecke v. Insurance Co., 105 U. S. 355.

In Dawes v. Insurance Co., 7 Cow. 462, it was held that the president of an insurance company, as such, possessed no power to waive full preliminary proofs. In Insurance Co. v. Young, 86 Ala. 424, 5 South. Rep. 116, it was decided that a local soliciting agent has no authority, after loss, to waive the breach of any condition in a fire insurance policy. And Patrick v. Insurance Co., 43 N. H. 621, is authority for the proposition that a condition in a policy of insurance, requiring notice of loss to be given within 30 days, is not waived by a vote of the directors of the company to indefinitely postpone the consideration of the loss, which was tantamount to a refusal to pay anything on account of it, the notice not having been given in due time. The jury were probably justified in coming to the conclusion that the notice of loss, under all the circumstances of the case, was given in a reasonable time, and in proper mode. But there were no proofs of loss furnished, and no conduct on the company's part from which the jury were authorized to infer a waiver of such proof.

Under a proper application of the foregoing principles, it is our opinion that the defendant's demurrer to the plaintiff's replication should have been sustained, and that the defendant was entitled to have the general affirmative charge given as requested.

Reversed and remanded.

PEOPLE'S FIRE INS. CO. v. PULVER.

(20 N. E. 18, 127 Ill. 246.)

Supreme Court of Illinois. Jan. 25, 1889.

Appeal from appellate court, First district.

Moses & Newman, for appellant. Kraus, Mayer & Stein, for appellee.

PER CURIAM. This was an action of assumpsit on one of the three fire insurance policies, mentioned in the case of Birmingham Insurance Co. v. Pulver, in which an opinion has heretofore been filed. 18 N. E. Rep. 804. The judgment in the superior court was for appellee for $1,112.13, from which an appeal was prosecuted to the appellate court, where it and the Birmingham Case were by agreement submitted together, and both judgments affirmed. Both cases were again appealed to this court, but submitted separately.

It is first insisted that the judgment in this case is erroneous because the evidence fails to show that preliminary proofs of loss were made by the assured, as required by the terms of the policy; and that the trial court erred in refusing to instruct the jury to find for defendant for want of such proofs. It is not claimed that there is an entire want of such evidence, but the contention is that the proofs of loss furnished, and which were admitted in evidence, is not a compliance with the condition in the policy as to such proofs, in that the assured "failed to furnish an inventory of the goods claimed to be totally destroyed, showing the quantity, quality, and cost of each article claimed to be destroyed." The proofs of loss in question were made February 17, 1885, seven days after the fire. In it the actual cash value of the property destroyed is stated to be $3,929.45, as shown by an annexed schedule marked "Exhibit B," "giving a full and accurate description of each kind of property, and the value of the same, with the damage or loss on each separately." Exhibit B is a list of many articles, giving numbers and value in the following form:

8 Imported dolmans, $17.50.....	$140 00
10 Russian circulars, $8.00.....	80 00
* * * * * *	*
1 lot handkerchiefs.....	5 00

—The whole footing $3,929.45. Then follows a list of a few small articles under the heading. "Present Worth of Damaged Stock."

Conceding that the inventory furnished was not a strict compliance with the requirements of the policy, it was an attempt to do so in apparent good faith, and we think, under the proof made as to the ability of the assured to furnish a more accurate one, should be held sufficient. The evidence shows that the preliminary proofs of loss were delivered to the company about the date of its execution. No objection was made to it until March 30th. Of the three objections then made two are abandoned. She was also notified in this letter to produce her books, inventory, and other vouchers and exhibits * * * for examination, and that then the company would require her to submit to an examination under oath, etc. To the objection now urged the assured replied on April 4th: "I beg leave to inclose a certified copy of the bill of sale to me of the insured property, the original having been destroyed in the fire. The inventory was also destroyed, and I have already furnished you with a copy of it, attached to and a part of the proofs of loss. As you are aware, the fire occurred within a week after I opened the business, and I had no books of account at all except a sales-book, also destroyed, and no bills or invoices except the above bill of sale." This letter was not answered until the 14th of the same month, when she was again informed that the proofs were insufficient for the reasons stated in the letter of March 30th, and that the certified copy of the bill of sale in no way met the request of the company. In the same letter, however, she is again notified to appear for further examination. If from the destruction of books, bill of sale, invoices, and other papers the assured was unable to furnish a more specific statement than that which she did furnish, the law would hold the terms of the policy sufficiently complied with. It would not require her to do an impossible thing. 1 Wood, Ins. 709. That there is evidence in this record tending to show that she did avail herself of all the means within her control to comply with the terms of the policy and the demands of the company cannot be denied. Nor can it be seriously contended that the conduct of the company did not amount to a waiver of defects in the proofs of loss. The delay in pointing out objections alone must be so held, under the authority of Insurance Co. v. Staaden, 26 Ill. 365. At least it will be conceded that there is evidence in the record tending to prove such waiver. The court below therefore properly refused to take the case from the jury, both because the evidence tended to show compliance with the requirements of the policy in furnishing proofs of loss, and because it tended to prove a waiver of any defects therein.

In this case appellant asked 20 instructions, many of them quite lengthy, and nearly all literal copies of those asked in the Birmingham Case. As in that case all were refused, and a series prepared and given by the judge. It is contended that it was error to refuse the instructions asked, and that those given by the court did not present the law of the case fairly to the jury. By the fifteenth instruction asked by appellant its defense was stated in two propositions: First, that the plaintiff was not the actual owner of the destroyed property at the time of the insurance and fire; second, that the plaintiff committed fraud upon the company by making a fraudulent proof of loss in overstating the amount and value of the prop-

erty destroyed, and that she swore falsely, in her examination taken under the provisions of the policy, with the intent to defraud the company. In the instructions given by the court, in addition to these defenses, it is stated that the defendant claimed that the fire was collusive, and that the assured made fraudulent statements as to the origin of the fire; and it is insisted that by stating to the jury that such claim was made by the defendant its case was prejudiced. From the pleas remaining in the record (especially the tenth) and the scope of the evidence we may well suppose such defenses were insisted upon in the argument before the jury; at least, we have no means of determining that they were not. Even if the instructions given did state the defense broader than the issues and evidence made it, it would not work a reversal of the judgment, unless we could see that injury to appellant had resulted, of which there is no evidence before us. The instructions given on the issues and evidence presented the law of the case with reasonable accuracy, and therefore, whether all the points sought to be covered by appellant's instructions were met or not is immaterial. Having examined the refused instructions with care, and compared them with those given, we are clearly of the opinion that there was no error in giving and refusing instructions. The other grounds of reversal insisted upon, of sufficient importance to be noticed, are disposed of in the Birmingham Case referred to, and need not be further noticed in this. Affirmed.

LANE v. ST. PAUL FIRE & MARINE INS. CO.

(52 N. W. 649, 50 Minn. 227.)

Supreme Court of Minnesota. June 22, 1892.

Appeal from district court, Hennepin county; PONN, Judge.

Action by Freeman P. Lane against the St. Paul Fire & Marine Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant appeals. Reversed.

Kueffner & Fauntleroy, for appellant. *Freeman P. Lane, in pro. per.*

MITCHELL, J. The policy sued on contained a provision that the insured "shall, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." It also provided that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." The complaint alleged that the insured had fully complied with all the terms and provisions of the policy in such case made and provided. Defendant, in its answer, denied that the insured had complied with the terms and provisions of the policy, and alleged that after the fire it duly requested and demanded of the insured to furnish the certificate required by the policy, but that he had failed and refused to do so. The answer also set up the further defenses that the loss was caused by the fraudulent and incendiary act of the insured himself; also that he had made and served on the company false and fraudulent proofs of loss. To the first defense the plaintiff replied, admitting that the certificate referred to had been demanded, and that it had not been furnished, but by way of excuse for not furnishing it alleged, in substance, that he had made every reasonable effort to procure it, but was unable to do so for the reason that the magistrates and notaries living nearest the place of fire, because of an unjust, unreasonable, unwarranted, and groundless prejudice on their part and on part of the inhabitants of that vicinity, refused to make or furnish any such certificate, and that because of such unreasonable and unfounded prejudice it had been and was impossible to secure any such certificate. To this reply the defendant demurred, and from an order overruling the demurrer the defendant appeals.

We shall pass over the fact that the reply was clearly a departure from the complaint, and consider the case upon the merits. Provisions similar to this are as old as fire insurance policies themselves, and the doctrine has been established by a uniform current of authorities in England and this country, beginning with Oldman v. Bewicke, 2 H. Bl. 577, and Routledge v. Burrell, 1 H. Bl. 254, that the production of such certificate, unless the insurance company itself has prevented the obtaining it, or waived its want, is a condition precedent to the right of the insured to recover; that the assured, by accepting the policy, assents to the condition; that it is one which the company has a right to impose, and for which it is not bound to accept any substitute; that the inability of the insured to furnish it because of the refusal of the magistrate or notary, for any cause whatever, to give it, will not relieve him from the performance of the condition; that the case comes within the rule by which one who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party is no excuse. The inability of the insured to procure the certificate because of such refusal does not render the condition impossible in the legal sense, so as to excuse the party from performing his contract. The cases on the subject will be found cited in any text-book on fire insurance, but among a few of the leading ones are Worsley v. Wood, 6 Term R. 710; Insurance Co. v. Lawrence, 2 Pet. 25, 10 Pet. 507; Roumage v. Insurance Co., 13 N. J. Law, 110; Leadbetter v. Insurance Co., 13 Me. 265; Johnson v. Insurance Co., 112 Mass. 49. We are not aware of a single authority to the contrary, except a suggestion, in Insurance Co. v. Miers, 5 Sneed, 139, that such a condition is directory only, and a *dictum*, in Insurance Co. v. Block, 109 Pa. St. 535, 1 Atl. Rep. 523, repeated in Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. St. 73, 20 Atl. Rep. 838, that such conditions are void for the reason that an insurance company has no right to require a public officer to act in the adjustment of losses. But this was expressly overruled by the same court in Kelly v. Sun Fire Office, 141 Pa. St. 10, 21 Atl. Rep. 447. While the doctrine that such stipulations are valid and constitute a condition precedent to the insured's right to recover is unquestionably sound in principle, yet, as they often operate harshly in practice, they have, in some states, been expressly or impliedly prohibited by statutes regulating the form of policies. See Shannon v. Insurance Co., 2 Ont. App. 81; Insurance Co. v. Johnson, 46 Ind. 315. But there is no room in this state for holding such conditions void or unreasonable, for they have been incorporated into the Minnesota standard policy by the insurance commissioner, under the authority vested in him by Gen. Laws 1889, c. 217, by the provisions of which all fire insurance policies are required to conform to the form prepared by him, and any other or different form is prohibited.

A second reason assigned by the trial court for overruling the demurrer was that the nature of the other defenses set up in the answer shows that the furnishing of the certificate would not have tended in any degree to influence the defendant's conduct; that it was evident from the nature of these defenses that it would still have resisted payment of the loss, and therefore the defendant must be held to have waived compliance with this condition; and in support of his position the learned judge cites those cases in which we have held that a demand for property,

before suit, was waived by defendant's setting up title in himself, or some other defense on the merits which showed that a demand would have been unavailing. The cases are not at all in point. In the first place, it cannot be assumed that the certificate, if furnished, would not have influenced the conduct of the defendant. The fact that the nearest magistrate or notary refused to certify that in his opinion the loss was an honest one might have been the very cause that induced the defendant to set up the defenses that the fire was incendiary, and that the proofs of loss were false. But chiefly, the furnishing of this certificate was by the contract of the parties a condition precedent to plaintiff's right to sue, and consequently the failure to furnish it a defense to this action. A party has a right to set up as many defenses (if not inconsistent) as he has, and the setting up one defense cannot be construed as a waiver of another.

It was also urged on the argument that the retention, without objection by the defendant, of the "proofs of loss" furnished by plaintiff, amounted to a waiver of the certificate. But these proofs were in performance of a condition in the policy entirely distinct from and independent of that requiring the certificate, and the acceptance of the "proofs of loss" as compliance with the one condition cannot be construed as amounting to a waiver of compliance with the other.

Order reversed.

CHAPMAN v. ROCKFORD INS. CO. et. al.

(62 N. W. 422, 89 Wis. 572.)

Supreme Court of Wisconsin. March 5, 1895.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Several actions by Henry G. Chapman against the Rockford Insurance Company, the Traders' Insurance Company, the Hartford Fire Insurance Company, the American Fire Insurance Company, the Merchants' Insurance Company, the Fireman's Insurance Association of Philadelphia, and the Liverpool, London & Globe Insurance Company, to recover under fire insurance policies, are consolidated. From a judgment for plaintiff in each action, the defendant in each action appeals. Affirmed.

This action was brought to recover for loss sustained by the plaintiff under the standard insurance policy of Wisconsin, issued by the defendant on the plaintiff's stock of goods, which were wholly destroyed by fire at Oakfield, Wis., July 6, 1893, and claimed to be of the value of $13,465.12. The plaintiff held policies with six other companies, upon the same goods, for various amounts, namely, Traders' Insurance Company, Hartford Fire Insurance Company, American Fire Insurance Company, Merchants' Insurance Company, Fireman's Insurance Association of Philadelphia, Liverpool, London & Globe Insurance Company, such insurance amounting in all to $10,000. Actions were brought on each of the policies, October 8, 1893. It appeared that the plaintiff gave due notice of his loss, and proofs thereof were made and submitted to the respective companies, July 24, 1893, to which no objections have been made. By the terms of each of the policies it was provided that, "in the event of disagreement as to the amount of the loss, the same shall * * * be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage; and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of the loss; * * * and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proofs of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." It was charged in the complaint that the companies conspired together to obtain an unjust and unwarranted rebate of the plaintiff's loss, and on the 8th of August, 1893, demanded the right of appraisement of the goods destroyed, under the arbitration clauses in the policies, the validity of which the plaintiff denied; that on that day a written submission was executed for that purpose, each party selecting an appraiser, the insurer selecting a resident of Chicago, unacquainted with the value of the goods and the market and trade in the vicinage of the fire, namely, at Oakfield, Fond du Lac county, Wis.; that an effort was made by the appraiser selected by the plaintiff to select an umpire, but the appraiser selected on the part of the companies refused to select an umpire, and to enter upon an appraisement, until he could ascertain the wishes of the companies, and on the next day left Fond du Lac, and returned to Chicago, and had never since returned to the vicinage of the fire or to the state, and that all attempts thereafter to obtain the selection of an umpire had proved fruitless, by the refusal of the said appraiser for the companies to agree upon a proper and competent umpire, and would thereafter fail, unless the plaintiff would consent to an unjust rebate and compromise; that said appraiser appointed by the companies was wholly subservient to their wishes and interests, and had been selected to carry out the conspiracy of the companies by so refusing to appoint an umpire; that, having failed to get an umpire appointed, the plaintiff gave notice to the companies of revocation of the submission of August 8th, and that by reason of the premises the companies had waived the benefit of said arbitration clause and submission. The defendant companies, respectively, each answered, in the actions against it, in substance setting up, by way of plea in abatement, the said arbitration clause, and the submission under it to arbitrate, of August 8th, to wit, the selection of George Ferris and G. W. Weber as appraisers, and that they had taken and subscribed the proper oath, and that they were not able to agree upon the amount of loss or damage, and that no umpire had been chosen; that the amount of loss due the plaintiff had never been ascertained, proposed, or awarded or returned under the respective policies; that said arbitration proceedings were valid, in full force, and undetermined when each of the actions was brought, and that, therefore, they were each premature; that said stipulation and submission had not been waived, and nothing was due the plaintiff under the terms of the respective policies. The actions were all tried before the court at the same time, and submitted on the same evidence. The court found in each case, in substance, among other things: (1) That the demand for an appraisement was not made in good faith, because of any real and substantial difference between the respective companies and the plaintiff, but to prolong and postpone the adjustment and payment of plaintiff's loss, and to coerce him to make rebate from his claim, which could not otherwise be obtained. (2) That the defendants, respectively, through their appraiser, and with their approval, wantonly and unreasonably suspended the plaintiff's claim, and refused and neglected to appraise the loss, or make any attempt to do so, but hung the same up indefinitely, to prolong

and postpone the adjustment and payment of the plaintiff's loss and damages until he should be coerced into allowing an unjust rebate. (3) That no action was taken by the companies, respectively, within 60 days after receiving proofs of the plaintiff's loss, nor prior to the commencement of the actions, tending towards an appraisement and adjustment of plaintiff's loss, by arbitration or otherwise, or showing any purpose or intent to do so; that the plaintiff for that reason, October 3, 1893, revoked the agreement to arbitrate, signed August 8, 1893, and gave notice thereof to the respective companies before bringing the actions. (4) That the cash value of the plaintiff's property covered by the policies at the time of the fire was $13,465.12. Judgment was given against each of the defendants for the amount of its policy, with interest from the date of the action, and each of them appealed from the judgment against it, and the appeals were heard together upon the same record.

Barbers & Beglinger, for appellants. Duffy & McCrory and E. S. Bragg, for respondent.

PINNEY, J. (after stating the facts). 1. These appeals involve questions of considerable importance in respect to the construction and effect to be given to the appraisal clause in the standard policies now in use in this state. The policies in question provide that loss or damage shall be ascertained or estimated by the assured and the company, or, in case of difference between them, then by appraisers as therein provided, and that "the loss shall not become due and payable until sixty days * * * after an award by appraisers, when appraisal has been required." This provision furnishes a speedy, convenient, and inexpensive mode of ascertaining the loss or damages of the assured, if he is entitled to recover, and does not appear to be obnoxious to the objection that it is void as ousting the courts of their rightful jurisdiction. Under it the right of recovery is left open, and the appraisal serves only to liquidate and determine the amount of the loss or damage. The validity of such stipulations appears to be beyond doubt. We think that the question is perfectly well settled, and that it has been so considered ever since the case of Scott v. Avery, 5 H. L. Cas. 811; and that when parties to a contract agree that money shall be paid when something else happens, and that something else is that a third person named in it, or persons to be named as therein provided, shall determine the amount, then the cause of action does not arise until the amount has been so ascertained or determined, unless something has occurred which may operate as a waiver of such precedent condition, or to dispense with its performance, or that with fair and reasonable effort performance of it cannot be obtained. The rule is stated by Jessel, M. R., in Dawson v. Fitzgerald, 1 Exch. Div. 257, 260, in brief, to be this: "There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that the arbitration shall be a condition precedent to the right of action. In all other cases where there is—First, a covenant to pay; and, secondly, a covenant to refer,—the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring," etc. Here the covenant to pay is, by necessary implication, conditioned upon the appraisal, if properly claimed, and the plaintiff is in no position to claim anything until an appraisal has been made, waived, or in some manner legally dispensed with. Elliott v. Assurance Co., L. R. 2 Exch. 240. The questions to be considered are "whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one." Collins v. Locke, 4 App. Cas. 689; Edwards v. Insurance Soc., 1 Q. B. Div. 592, 598. We think that the stipulation in question is a valid and reasonable one, and not open to the objection urged against it that it ousts the jurisdiction of the courts, as it leaves the general question of liability, if any exists, to be judicially determined. The case of Hamilton v. Insurance Co., 136 U. S. 242, 254, 10 Sup. Ct. 945, seems decisive. Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Insurance Co., 138 Mass. 572, 576; Hudson v. McCartney, 33 Wis. 331. In such cases a party may not of his own mere option or volition revoke the arbitration or submission clause, any more than any other provision of the contract. A contrary view, however, obtains in Pennsylvania, in cases where the person or persons who are to make the appraisal or award are not named in the contract, but are to be chosen thereafter by the parties. Mentz v. Insurance Co., 79 Pa. St. 478; Assurance Co. v. Hocking, 115 Pa. St. 414, 8 Atl. 589. But we are unable to see any substantial ground for the distinction. Upon the other hand, the case of Hamilton v. Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, is one where the provision that an appraisal should be made was not either expressly or by necessary implication a condition precedent to the obligation to pay, but where the stipulation for an appraisal was held to be independent and collateral, and the assured entitled to sue without an appraisal; and the principal cases on this point are here collected. The cases relied on by the respondent's counsel fall within the category of Hamilton v. Insurance Co. and Reed v. Insurance Co., supra; Rowe v. Williams,

97 Mass. 165; Hood v. Hartshorn, 100 Mass. 121; Nute v. Insurance Co., 6 Gray, 181; Stephenson v. Insurance Co., 54 Me. 70. The doctrine laid down in this state in Hudson v. McCartney has not been departed from or materially qualified. In Insurance Co. v. Badger, 53 Wis. 283, 10 N. W. 504, and Vangindertaelen v. Insurance Co., 82 Wis. 112, 51 N. W. 1122, where there were provisions, in substance, as in these cases, no arbitration was demanded. In Canfield v. Insurance Co., 55 Wis. 419, 13 N. W. 252, the policy did not provide, either expressly or by necessary implication, that an award should be a condition to the right to sue; and the same is true of the contract in Retreat Ass'n v. Rathborne, 65 Wis. 177, 26 N. W. 742. We hold, therefore, that, where an appraisal has been properly demanded, an appraisal or award on the question of the amount of loss or damage is made by these policies, by necessary implication, a condition precedent to the right of the assured to sue, and he cannot maintain his action unless the condition is waived or in some way dispensed with; and that he has in such case no right, at his mere option or volition, to revoke the arbitration clause in the policy or a submission under it.

2. About two weeks after the fire, July 20th, a Mr. Berne, adjuster for the Traders' Insurance Company, and then representing some of the other companies, called on the plaintiff, and examined his books and papers, and made inquiries in regard to the loss, and he soon afterwards came to represent the other companies. The plaintiff had purchased the stock, that of a variety store in a country village, about six months before, of one Russell, and had paid a considerable, indeed the greater, part of the price in Iowa lands. He had been allowed quite a considerable discount on the goods, because some were shelfworn, and a further discount of about $1,100 was insisted on and obtained by the plaintiff. Berne, the adjuster, insisted on a considerable discount on the goods because they had been paid for by the plaintiff in land; and under this claim the difference on insured value, at the outside, amounted to about $700, and upon a fair computation did not seem to be more than $400. Berne testified that "the difference was as to the value of the stock of goods paid for by real-estate trade,—that was the point"; that they had not been bought for cash. The plaintiff claimed the full face of the policies, and he testified that Berne told him, on this occasion, that "the only way he could get anything out of me was to attack the original invoices; that he traded land for it, and did not pay cash, and he was not going to allow cash price for it." Berne denies the particular form of expression, "make anything out of you," but admits that he might have said the only way he could get along with him was to attack the inventory of Russell. Berne then notified the plaintiff he should demand an appraisal. August 8th the parties met at Fond du Lac, by appointment, Berne bringing with him from Chicago one Weber, of that city, whom he named as appraiser on behalf of the companies, the plaintiff naming one Ferris, who acted as appraiser when he purchased of Russell, and the submission was signed. The evidence is clear that no attempt was ever made by the appraisers to agree on an award; that they at once failed to agree in the choice of an umpire. Ferris proposed the names of six business men, conceded to be competent and of good character, residing in Fond du Lac county. Weber did not name any one, except three parties living in Chicago. He said he wanted to go to Chicago, though he stated that, if Ferris desired, he would stay and get through with the matter; and that about that time a boy came to the door, and called out: "Mr. Berne says, if you are going to take that train, you will have to start now"; and he took the list of names, and never returned again to meet Ferris in relation to the business. Weber testified that he thought the parties named by Ferris "too much befriended" to the plaintiff, but "did not find in looking them up that which indicated friendship"; that he made up his mind "that they were not the men we wanted"; that he did not find out anything against their integrity; that he "objected to these six men all on general principles"; "I rejected all of them"; that he "did not offer to name any one in Fond du Lac, nor any country merchant; * * * I stayed by Chicago." After Berne and Weber left Fond du Lac, correspondence occurred between Ferris and Weber, and between the plaintiff and Berne. Ferris declined to accept either of the three Chicago parties named by Weber, August 15th, and on the 25th Weber asked him to submit other names, which he did, and on the 28th Weber refused to accept any of them, and suggested that Ferris visit him in Chicago, and "we can possibly agree on the proper party." This Ferris declined to do, and, on the 5th of September, Weber refused to consent to any one Ferris had named, saying, "I do not think there is any occasion to name specific reasons for objection," and asking Ferris to submit other names. On the 16th he sent the names of three other parties in Fond du Lac county, and on the 30th Weber promised he should hear from him in a few days. Finally, on the 5th of October, he proposed one Kroeger, of Milwaukee, but in the meantime notice of revocation had been served. On the 2d of September the plaintiff wrote Berne that if he wished to proceed with the arbitration he must come to Oakfield (the place of loss) or Fond du Lac. On the 8th of September, Berne wrote the plaintiff that the appraisers had, in his opinion, "spent quite sufficient time over it to enable them to select some

good man, but neither you nor I can interfere, as the matter is left to them," but proposed to select other appraisers; to which the plaintiff responded that Weber's "reasons for not agreeing on an umpire are simply frivolous"; that in his opinion he would "reject any proposed by Mr. Ferris"; that he was "willing to do anything reasonable to get this matter settled, but to continue it in the way it has been I object." This was one month before the actions were brought, and nothing further appears to have been done by Berne, except to inform the plaintiff that he declined "to enter into any discussion of the reasons either of your or our appraisers in declining the parties proposed by each," and that he had "neither the right nor the inclination to interfere in any way with them." On the 16th the plaintiff wrote Berne asking that he and Weber come to Fond du Lac, and agree upon some qualified business man acquainted with the business and that part of the state; but on the 2d he wrote the plaintiff that a representative of Walker & Co. had called to learn about his claim, and that he had explained the situation, and "again urged Mr. Weber, in so far as I could, to try and meet Mr. Ferris with some one on whom they could agree"; and finally suggesting that he intrust his matters to Walker & Co., "and we might agree in that way, and settle everything." Both Berne and Weber were examined at considerable length at the trial, as well as the plaintiff. The uncontradicted evidence was that the goods were worth $13,465.12, and there was no claim of any defense to the actions, except the one insisted on by the plea in abatement. An examination of the evidence leaves no doubt as to the correctness of the finding of the circuit court. It shows that unfair and perverse practices were resorted to, to compel the plaintiff to abate what appears to have been a just and valid claim for an honest loss. The circuit court having heard the evidence, and observed the manner of testifying of the plaintiff, Berne, the adjuster, and Weber, could not easily be misled as to the purposes and the complicity found between the two latter. We cannot say that the finding was not in accordance with the evidence. It seems evident that there was no fair bona fide difference between the parties as to the amount of the loss. It was of no importance what the plaintiff paid for the goods, or whether in money or property, or whether they had been given to him. In either event, he would be entitled to the benefit of his bargain or gift. The only question was as to the fair cash value of the goods destroyed. By signing the submission, probably the plaintiff waived the right to object that there was no bona fide disagreement, but the facts remain in their bearing upon what ensued in the way of attempting to get an adjustment of his loss. We think he used all fair and reasonable efforts to that end, and that he did not succeed was solely the fault of Weber and the adjuster, Berne. The whole transaction is quite transparent. Weber was "standing by Chicago," and by Berne as well, and objecting, "on general principles," to any one proposed as an umpire by Ferris, arbitrarily and without any attempt to assign reasonable ground or explanation. There does not seem to be any fair criticism made or attempted against the conduct of Ferris. The plaintiff was entitled to have his goods appraised at their value in the market where they were destroyed, and not at Chicago rates on broken or bankrupt stocks. The policy of our law is in favor of the adjustment of such losses where they occur, and it is unreasonable and unfair to expect that the assured will follow up his claim into another state, or accept the arbitrament of appraisers selected from Chicago, nearly 200 miles distant; or, if from Chicago, why not from Cincinnati, New York, or Boston? We do not say that such parties are incompetent, but, in view of the effect of the submission, we do hold that the parties are bound to exercise towards each other the utmost good faith, and proceed with all reasonable diligence to procure an adjustment according to the letter and spirit of the contract. It is not permissible for the insurers, under the provisions of the standard policy, to arbitrarily or capriciously demand an appraisal, simply to suspend a claim for a loss, and select an appraiser who will perversely refuse to concur in the appointment of an umpire unless he resides in Chicago, or is the kind of man the insurers want. Such a course, if tolerated, places the assured very largely at the mercy of the insurers. Any attempt on the part of either party to misuse or pervert the provisions of the standard policy for an appraisal, so as to unreasonably delay an adjustment, or to secure an unjust abatement of an honest loss, is a breach of good faith, and should be treated as a waiver of the condition, and dispensing with the necessity of an appraisal, or warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong. The result reached in this case is in accordance with a recent case quite in point,—McCullough v. Insurance Co. (Mo. Sup.) 21 S. W. 207, 209. In Uhrig v. Insurance Co., 101 N. Y. 362, 4 N. E. 745, it was laid down that, "under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy. If either party acted in bad faith, so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either refuse to go on with the arbitration, or to procure the appointment of an umpire, so that there could be an agreement upon an appraisal, the other party is absolved; that a claimant

cannot be tied up forever without his fault, and against his will, by an ineffectual arbitration." Bishop v. Insurance Co., 130 N. Y. 488, 29 N. E. 844, is, in substance, to the same effect. And the arbitration having failed, in consequence of the perverse conduct and want of good faith of the insurance companies, represented by their adjuster and the appraiser, Weber, the plaintiff was not bound to enter into a new one, or name another appraiser, even if the companies were willing to name a new one on their part. Uhrig v. Insurance Co., supra. And this is in harmony with what was said in Davenport v. Insurance Co., 10 Daly, 538, 539. The judgments appealed from were rightly given for the plaintiff. The judgments appealed from are affirmed.

WALLACE et al. v. INSURANCE CO.

(4 La. 289.)

Supreme Court of Louisiana. Aug. 1832.

Appeal from First district court.

Mr. Pierce, for appellant. Mr. Slidell, for appellees.

PORTER, J. This is an action on a policy of insurance against fire. The case presents three questions:

1. Whether the policy was a valued one?

2. Whether if it was open, the verdict and judgment be supported by evidence?

3. Whether the defendants had not a right to discharge themselves from the payment of money by rebuilding the houses which were burned?

In arguing the question whether the contract on which this litigation has arisen, was what is denominated a valued policy, counsel have gone into the consideration of the legality of such an agreement in a fire insurance. The books are very meagre of information on this subject, and if it were necessary to decide this case on that ground, we should most probably find that authority would not stand in the way of either conclusion, which reason might suggest. Parke states, "that the insurer from the nature of the thing is obliged in a great measure to rely on the integrity and honesty of the insured, as to the representation of the value and quantity of the property. Therefore, the utmost good faith is essentially requisite to render the contract effectual." And Marshall observes, "There is reason to believe insurances against fire are often made to a large amount upon property of a very small value with a fraudulent view." These remarks, perhaps, authorize the conclusion that in the opinion of these writers, there may be a valued policy in an insurance like that now under consideration. Phillips states in the most unqualified manner, there may, and that the rules with respect to valuation are the same as those in relation to a ship and cargo. In this assertion he is supported by the case of Harris v. Fire Co., 5 Johns. 368, cited in argument. Bell, in his Commentaries, says the loss by fire is scarcely ever a total loss, and the valuation in the policy is rather the fixing of a maximum beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value. In France, where these contracts have of late years become very common, valued policies are rejected on reasons of public policy. Parke, Ins. 603; 2 Marsh. Ins. 788; Phil. Ins. 320; 5 Ivh. 371; 1 Bell, Comm. 627. Traite de l'Assurances contre l'Incendie, par Boudousquie, Nos. 9, 132, 248, and 255.

Be the law, however, on this question as it may, we do not think there was in this case a valued policy. The contract states the company have insured eight thousand five hundred dollars, on one brick house and two wooden ones. The words "valued at" are not inserted, but the former is put down at six thousand seven hundred dollars, the latter at one thousand eight hundred dollars. Then follows this clause, "and the said company do hereby promise, &c. to make good to the said insured, &c. all such loss or damage not exceeding the sum hereby insured. The said loss or damage to be estimated according to the true and actual value of the said property at the time the same shall happen."

The rules which govern the interpretation of other contracts, regulate those of insurance, and it is a cardinal rule of construction to give if possible every part of the agreement effect. It is indeed true, as observed from the bar, that the written parts of a policy control those which are printed, but this principle can only receive a proper application in cases where it is not possible to satisfactorily reconcile them. No such difficulty presents itself here. The sums placed opposite the houses respectively, may be easily accounted for as indicating an amount beyond which the company would not be responsible. The absence of the term "valued at," which is invariably used in maritime policies, where the intention of the parties is to make the estimation conclusive, strengthens this construction. We are clear there is no such repugnance between the written and printed clauses, as authorizes us to reject one of them. See Seton v. Insurance Co., 2 Wash. C. C. 175, Fed. Cas. No. 12,675.

II. We think the evidence supports the judgment below, and that a correct conclusion was drawn by the jury in relation to the value of the property destroyed by fire. Connected with this part of the case is the bill of exceptions to the judge's refusal to permit the jury to take into consideration the amount stated in the policy as insured on each house. Whether this estimation might not properly have formed an element in the calculation the jury was required to make, need not be decided. For if we were of opinion it should have been admitted we would remand the cause, and we understand the appellee prefers an affirmance of the judgment.

III. On the last point, which is as to the right of the defendants to rebuild, there is no doubt. No usage is found to sanction such a pretension. There is no law which authorizes it. The contract makes no mention of it. On the contrary it stipulates the loss shall be compensated in money. It is true rebuilding might in some cases be an indemnity for the loss. It would perhaps have been so in this instance, but then it was not the indemnity the assured paid for, and we are at a loss to conceive, how on policies where such a right is not expressly conferred, it could be supposed one of the parties had a right to change the agreement and substitute one mode of performance for another.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

HART v. CITIZENS' INS. CO.

(56 N. W. 332, 86 Wis. 77.)

Supreme Court of Wisconsin. Sept. 26, 1893.

Appeal from circuit court, Douglas county; R. D. Marshall, Judge.

Action by John H. Hart against the Citizens' Insurance Company of Pittsburgh on a policy of fire insurance. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Reed, Grace, Rock & Reed, for appellant. J. B. Douglas, for respondent.

WINSLOW, J. The action is upon a policy of insurance issued by defendant, November 11, 1890, upon plaintiff's dwelling house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly 14 months after the fire. The policy contained provisions requiring immediate notice of loss, proofs within 60 days after the fire, examination of the assured under oath, if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." It was held by the circuit court that the action was barred because not commenced within 12 months next after the date of the fire, and plaintiff appeals.

It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression "twelve months after the fire" means what it says, or something else. It is to be noticed that the parties here have not used the expression "after the loss occurs." Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established, and the right to bring an action exists. The decisions in favor of this doctrine are numerous. Steen v. Insurance Co., 89 N. Y. 315; Spare v. Insurance Co., 17 Fed. Rep. 568; Chandler v. Insurance Co., 21 Minn. 85; Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. Rep. 782; Miller v. Insurance Co., 70 Iowa, 704, 29 N. W. Rep. 411; Insurance Co. v. Fairbank, 32 Neb. 750, 49 N. W. Rep. 711; Barber v. Insurance Co., 16 W. Va. 658. There are, however, many decisions to the contrary: Chambers v. Insurance Co., 51 Conn. 17; Johnson v. Insurance Co., 91 Ill. 92; Fullam v. Insurance Co., 7 Gray, 61; Glass v. Walker, 66 Mo. 32; Bradley v. Insurance Co., 28 Mo. App. 7; Insurance Co. v. Wells, (Va.) 3 S. E. Rep. 349; Peoria Sugar Refining Co. v. Canada Ins. Co., 12 Ont. App. 418; Blair v. Insurance Co., 19 N. S. 372; Travelers' Ins. Co. v. California Ins. Co., (N. Dak.) 45 N. W. Rep. 703; Schroeder v. Insurance Co., 2 Phila. 286. Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the affirmative view of the proposition in Killips v. Insurance Co., 28 Wis. 472, and Black v. Insurance Co., 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings, and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel. Doubtless the tendency of so many courts to construe the term "loss," as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed, and an action accrues to the insured: Friezen v. Insurance Co., 30 Fed. Rep. 352; Hong Sling v. Insurance Co., (Utah,) 30 Pac. Rep. 307; Case v. Insurance Co., (Cal.) 23 Pac. Rep. 534. On the other hand, the following cases hold that the limitation begins to run from the date of the fire: Steel v. Insurance Co., 47 Fed. Rep. 863; Meesman v. Insurance Co., (Wash.) 27 Pac. Rep. 77; McElroy v. Insurance Co., (Kan.) 29 Pac. Rep. 478; Insurance Co. v. Stoffels, Id. 479; King v. Insurance Co., 47 Hun, 1. It is noticeable that all of the three cases above cited which hold that "fire" means the time

when liability is fixed rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of Case v. Insurance Co., supra, the facts were that the insured was compelled to submit to examination by the company, and to produce books, bills, and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than 13 months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation. See, to this effect, Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. Rep. 1019. The cases of Friezen v. Insurance Co. and Hong Sling v. Insurance Co., supra, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until 60 days after the amount is fixed, it may happen that more than 12 months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say. We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words, which can have but one meaning, are not subject to construction. "Twelve months next after the fire" has one certain meaning, and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of Killips v. Insurance Co., Black v. Insurance Co., and Thompson v. Insurance Co., supra; but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do anything. He had nearly 10 months in which to bring his suit. By failing to do so he must be held to be barred by his contract. The provision of section 1975 of the Revised Statutes to the effect no insurance policy shall contain a provision that no action or suit shall be brought thereon is not applicable, because the clause under consideration is plainly not such a provision. Judgment affirmed.

OMAHA FIRE INS. CO. v. DIERKS et al.[1]

(61 N. W. 740, 43 Neb. 473.)

Supreme Court of Nebraska. Jan. 15, 1895.

Error to district court, Holt county; Crites, Judge.

Action by Dierks & White against the Omaha Fire Insurance Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

J. Fawcett, for plaintiff in error. M. F. Harrington, for defendants in error.

RAGAN, C. Dierks & White brought this suit to the district court of Holt county against the Omaha Fire Insurance Company to recover the value of certain live stock which they alleged they owned, which had been insured against loss or damage by fire by the insurance company, and which live stock had been destroyed by fire. Dierks & White had a verdict and judgment, and the insurance company brings the case here for review.

1. The first error assigned is: "Irregularity in the proceedings of the court, and abuse of discretion, by which the defendant was prevented from having a fair trial." This assignment is too indefinite for consideration, and, indeed, is not referred to in the briefs of counsel for the insurance company.

2. The second error is assigned in the following language: "Irregularity in the proceedings of the jury." This assignment is also too indefinite for review.

3. The third assignment is: "Accident and surprise, which ordinary prudence could not have guarded against, in the evidence of the witness Dierks in testifying to a verbal release of a part of the property from the mortgage." This is one of the causes for a new trial permitted by the third subdivision of section 314 of the Code of Civil Procedure; but section 317 of the same Code provides that such a ground for a new trial must be sustained by affidavits showing the truth of the ground alleged. This means that the affidavits showing the truth of the facts alleged for a new trial on the grounds of accident or surprise must be filed in, and brought to the attention of, the court below. The record contains no affidavit filed by the insurance company in the district court in support of a new trial on the grounds of accident or surprise. Affidavits which tend to show that the insurance company was taken by surprise in the trial of the case below have been filed in this court, but we cannot consider them. This, as an appellate court, is authorized by law to review the action of the district courts; but in doing so this court can pass upon no question which was not presented to and passed upon by the district court, nor will this court, for the purpose of determining whether the district court came to a correct conclusion, examine any evidence which was not presented to that court.

4. The fourth assignment of error is: "Excessive damages, appearing to have been given under the influence of passion or prejudice." And the fifth assignment is: "Error in the assessment of the amount of recovery, it being in excess of the amount the plaintiffs were entitled to under the evidence." Neither of these assignments are referred to in the briefs of counsel for the insurance company, and are therefore considered waived.

5. The eighth assignment is: "Errors of law occurring at the trial, and excepted to at the time by the defendant." This assignment is too indefinite and uncertain for review.

6. The ninth assignment is: "The court erred in each of the instructions given upon its own motion, and in each of the instructions given at the request of the plaintiffs, to which exception was taken at the time." The charge of the district court contains 12 paragraphs or instructions, and the exception noted to these instructions by counsel for the insurance company is in the following language: "Comes now the defendant, and excepts to the instructions numbered from one to seven, inclusive, given to jury by the court on the trial of said cause." In McReady v. Rogers, 1 Neb. 124, the exception taken to the charge of the court was in the following language: "To all of which charge, and each and every part thereof, the defendant, by his counsel, then and there excepted." Crounse, J., speaking for the court, of this exception said: "This firing at the flock will not do. It is a well-established point of practice that when the charge of the court involves more than one single proposition, a general exception to it will be unavailing; and, if any portion of it be correct, the whole will stand. Each specific portion of it which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to." The rule as announced in that case has, so far as we know, never been consciously deviated from by this court, but has been time and again reaffirmed. Here the assignment of error is that the court erred in giving each—every one—of the instructions given by it on its own motion, but no attempt was made to except to more than seven of them; and, since the assignment is in effect that the court erred in giving all the instructions which it did give, and all the instructions were not excepted to, the assignment of error cannot be considered for that reason.

7. The tenth assignment is: "The court erred in giving each of the instructions given at the request of the plaintiff below." If the district court gave any instructions at the request of Dierks & White, they do not appear in the record. The only instructions in the record are those given by the court upon its own motion.

8. The sixth, seventh, and eleventh assignments of error are that the verdict is not sustained by the evidence, that the verdict is contrary to law, and that the court erred in overruling the motion of the insurance company for a new trial. The verdict of the jury is not contrary to the law, and the court did

[1] Portion of opinion omitted.

not err in overruling the motion for a new trial, if the verdict is sustained by sufficient evidence. Dierks & White pleaded in their petition that about the 5th of February, 1891, as provided by the policy, they gave notice of the loss in writing to the insurance company, and gave notice of said loss to one Wallace, the agent of the defendant nearest to where the loss occurred. This allegation of the petition was expressly denied by the insurance company. The insurance company, as an affirmative defense to the action, pleaded that the insurance policy provided that, if the insured property should be sold or incumbered without the consent of the insurance company indorsed on the policy, the policy should thereupon become void; and that before the fire, Dierks & White, without the knowledge or consent of the insurance company, executed a chattel mortgage upon the property; and that "said mortgage was a valid and subsisting lien upon said property so insured, and upon the property claimed to have been destroyed by said fire, at the time of the fire, on February 2, 1891." The reply of Dierks & White to this defense of the insurance company was as follows: "Denies the plaintiff mortgaged the property destroyed by fire, * * * and says that the policy sued upon covered personal property only, and no particular property was insured by the policy sued on; * * * and denies that there was a valid or subsisting lien upon said property, or any portion thereof, at the time the same was destroyed by fire." The issues of fact as made by the pleadings were: (a) The value of the property destroyed; (b) whether Dierks & White gave notice of the fire to the insurance company; (c) whether Dierks & White mortgaged the insured property, without the consent of the insurance company, prior to the fire; (d) whether the mortgage was a lien upon the insured property at the time it was destroyed by fire. The evidence sustains the value placed on the property by the jury, and the evidence in the record shows beyond dispute that the insured property, or a part of it, which was destroyed by fire, was, previous to its destruction, incumbered by a chattel mortgage; and the evidence in the record is sufficient to support the finding of the jury that such insured property at the time of its destruction by fire had been released from the lien created by the mortgage. In Insurance Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, it was held that, where personal property was incumbered by a chattel mortgage after such property had been insured, and contrary to the provisions of the insurance policy, the insured could nevertheless recover for the value of the property destroyed if at the time of the property's destruction it was free from the incumbrance. We adhere to and reaffirm the doctrine of that case. The eminent counsel for the insurance company does not controvert, as we understand him, the correctness of the decision in Insurance Co. v. Schreck, supra, but his contention is that it was incompetent for Dierks & White, under the issues made by the pleadings, to prove that the mortgage made upon the insured property had been released. Counsel says that Dierks & White, instead of denying the execution of the mortgage, and denying that the mortgage was a lien upon the insured property at the time of its destruction, should have pleaded by way of confession and avoidance that the mortgage was executed as alleged by the insurance company, but that prior to the destruction of the property by fire the mortgage had been released. Assuming, for the purposes of this case, the correctness of the argument of counsel, the answer to it is that he has not assigned in his petition in error here that the court erred in admitting the evidence offered by Dierks & White to show that the destroyed property was unincumbered at the time of its destruction. If such evidence was incompetent under the pleadings, counsel for the insurance company should have objected to its introduction on that ground, and then specifically assigned the ruling of the district court in admitting such evidence in his petition in error.

* * * * * * *

Judgment of district court affirmed.

ILLINOIS MUT. FIRE INS. CO. v. FIX.

(53 Ill. 151.)

Supreme Court of Illinois. Jan. Term, 1870.

Appeal from circuit court, Madison county; Joseph Gillespie, Judge.

Billings & Wise, for appellants. Davis & Gillespie, for appellee.

LAWRENCE, J. The appellee, Fix, being indebted to Mayer, for whose use this suit is brought, executed to him his notes, secured by mortgage on a brewery, and at the same time assigned to him a policy of insurance, issued by the appellants, upon the building and fixtures. This assignment was made with the consent of the company endorsed upon the policy. The present suit was brought in the name of Fix for the use of Mayer, and resulted in a verdict and judgment for the plaintiff, from which the company appealed.

On the trial, the company offered to prove that the building was set on fire by the plaintiff, Fix. The evidence was objected to by plaintiff's counsel, and the objection was sustained. This ruling presents the main question in the case, to wit, whether, where a policy of insurance has been assigned by the assured to one holding a mortgage on the premises, with the consent of the company endorsed upon the policy, its validity can be destroyed by acts done by the assignor in violation of its conditions.

This question has received much discussion in the courts of New York, and the decisions first made have been deliberately overruled. It was first held, in Insurance Co. v. Robert, 9 Wend. 404, that no act of the assured, after the assignment of the policy with the consent of the company, can impair the rights of his assignee. This case was approved and followed in Tillon v. Insurance Co., 5 N. Y. 406, the court holding that the assignment of a policy, with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which can not be impaired by a third person, over whom the assignee has no control. The question again came up in Grosvenor v. Insurance Co., 17 N. Y. 392, and in Buffalo Steam Engine Works v. Sun Mut. Ins. Co., Id. 401. In the first case, the policy was not assigned by the mortgagor to the mortgagee, but, by its original terms, the loss, in case of fire, was made payable to the mortgagee. The majority of the court held the case was not distinguishable from an assignment of the policy, and, overruling the cases already cited, held the policy was avoided by certain acts done by the mortgagor in violation of its terms. One of the eight judges composing the court, dissented altogether, and two others concurred only on the ground that the case was not like one in which the policy had been assigned. In the other case, decided at the same term, and which was one of assignment, the majority of the court held the policy avoided by the acts of the assignor, the three judges dissenting.

In these two cases, the question involved received a much fuller discussion than was given to it when the former decisions were rendered. In reply to the argument of the court in 9 Wend. that the assignor could not be permitted to execute a release to the insurance company which would impair the rights of the assignee, and that he should not be permitted to do indirectly what he could not do directly, the court very justly say, this argument fails to distinguish between acts done for the purpose of discharging a liability, and acts which, by the terms of the contract, were necessary to be done or omitted, in order to continue the liability in force. The principle, however, laid down in the case in 4 Selden, that the assignment of a policy, with the assent of the company, creates new relations and rights between the assignee and the company, is not wholly repudiated as never applicable, for it is admitted that, in cases where there has been an absolute sale of the insured property, the assured retaining no interest in it, and there has been an assignment of the policy to the purchaser, with the consent of the company, such purchaser may be considered as becoming a party to the contract, taking upon himself the performance of its conditions, while the assignor, ceasing to be a substantial party, and having no interest in the subject-matter, could do no act affecting the rights of the assignee. The court insist, however, that this principle can not be applied to an assignment to a mortgagee, because, in such cases, the mortgagor retains his interest in the property and in the policy, and whenever the mortgage debt is paid, the benefit of the policy reverts to him, or in case the policy exceeds the amount of the mortgage, the surplus, in the event of a loss, would be payable to the mortgagor. The court further say, that the rule of the former cases would make insurance companies liable for risks which they never assumed, and against which their policies are intended to guard them, for, under this rule, a mortgagor, remaining in possession, might convert a building, insured as a dwelling house, to a use vastly more hazardous, as by making it a place for manufacturing fire works, and still the company be required to pay, although one of the material terms of its contract was that its liability should cease in the event of such a change in the uses of the property.

The supreme court of Pennsylvania, in Insurance Co. v. Roberts, 31 Pa. St. 438, adopts the rule of these cases, in a well considered opinion.

The supreme court of the United States in Carpenter v. Insurance Co., 16 Pet. 495, lays down a similar principle.

This rule is also followed in People v. Resolute Ins. Co., 17 Wis. 378.

On the other hand, the earlier New York cases were followed in Pollard v. Insurance Co., 42 Me. 226.

In this state the question is an open one. Counsel for appellee cite Insurance Co. v. Wetmore, 32 Ill. 242, and Insurance Co. v. Marks, 45 Ill. 482, as adopting the rule of the earlier New York cases. But in the first of these cases, the policy was issued directly to the mortgagees, and assigned by them with the note and mortgage, and the question, in regard to which the case in 5 N. Y. was cited, was as to the right of the assignee to bring suit in the name of the assignors. In the case in 45 Ill. the assured had sold the stock of goods insured, and the policy had been assigned to the purchaser with the consent of the company. The court, in its opinion, cites the earlier New York cases only, but even under the rule laid down in the last case, in 17 N. Y., the assignee was entitled to recover, the transaction being a sale and not a mortgage.

This court has shown, in various cases, a disposition to hold insurance companies to a full measure of responsibility, but we are of opinion that the cases in 17 N. Y. stand upon the better reason.

The consent of insurance companies to an assignment of the policy by a mortgagor to a mortgagee, should not be construed as imposing upon them, as a consequence of such mere naked assent, a liability which they never would intentionally assume, and against which they take all possible pains to guard themselves, and must guard themselves in order to preserve their solvency. The principle contended for by counsel for appellee, and laid down in the earlier New York cases, is, that no act of the assignor, done without the consent of the assignee, can invalidate the policy, so far as relates to the assignee. If this be true without limitation, then, as said by the New York court of appeals, a risk taken by a company at the lowest rates, because in the least hazardous class, might be changed, by the mortgagor remaining in possession, and without the concurrence of the mortgagee, to the class of extra-hazardous, and the liability of the company would remain the same. A detached dwelling house might be converted into a powder magazine, or to some other use which would prevent any sound insurance company from taking the risk on any terms, and still, under the rule claimed by appellee, the company would remain responsible. The mortgagor might go further, and not only convert his building to extra-hazardous uses, but absolutely set it on fire, with a view of defrauding the company, as the appellants offered to prove was done in the present case.

We can not adopt a rule which would lead to such results. In analogy to the case of absolute sales by the assured, we should be much inclined to hold to the rule announced in 5 N. Y., if it were possible to separate the interest of the mortgagor and mortgagee. But it is not, for the mortgagor is not only interested in the payment of the mortgage, but, where he pays the premium, the fruits of the policy absolutely belong to him, subject to the lien of the mortgagee. Where there is an absolute sale, there is no difficulty in determining the measure of the assignee's rights and the company's liabilities, for he stands in the position of receiving a new policy as owner, and becomes responsible for any extra-hazardous uses to which the building may be applied, a responsibility he can not evade on the ground that the building is not under his control. But where there is no sale, but the policy is merely assigned as security, we are obliged to hold, either that the company is bound absolutely to the assignee, no matter how far the conditions of its contract may have been violated, which would be a very unreasonable ruling, or that there is such identity of interest in regard to both the property and the policy, that there can be no recovery, even for the use of the assignee, if the assignor fails to comply with the conditions.

The utmost that can be claimed for an assignee in such cases is, that he should stand in the same position as if he had taken out a new and independent policy to protect his own interest as mortgagee. But admitting such claim, we have no rule to guide us. It is impossible for us to say what conditions the company would deem it necessary to insert in such a policy for its own protection. It is very certain it would stipulate that the hazard to the building should not be increased, and thus would compel the mortgagee to take upon himself the responsibility of the mortgagor's acts, from which he could not escape by saying that his rights should not be prejudiced by the acts of a third person. It would necessarily result, from the nature of the interest insured, that its owner might be damnified by the acts of the mortgagor in possession, although beyond his control. Whether a company would also stipulate, in such a policy, that neither the mortgagor nor the mortgagee should obtain further insurance, without its consent, we do not know, though it is evident such a stipulation would be a wise precaution.

The history of the Robert Case, in 9 Wend., singularly illustrates the injustice of attempting to base a judgment against an insurance company, in favor of the mortgagor, upon the equities of his assignee. In that case, the judgment was rendered in favor of Robert, the mortgagor, for the use of Bolton, his assignee, on the ground that, though Robert had violated the policy, this could not prejudice Bolton. After the rendition of the judgment, and before its payment, Robert paid off the mortgage, and threatened the insurance company with an execution. The company moved the court for a perpetual stay, which was granted, the court holding, consistently with its former ruling, that Robert had no equitable rights under the policy. 9 Wend. 404 and 474. From this order an appeal was

taken to the court for the correction of errors, and that court held, as the original judgment was unreversed, it was conclusive upon the rights of the parties, and, as the mortgage had been paid, the benefit of the judgment reverted to Robert, the mortgagor. He thus received the full benefit of the policy, although he had forfeited all rights under it, and a judgment had been rendered in his favor only in consequence of the equities of his assignee. 17 Wend. 631.

It is, in our opinion, very clear, if we attempt to dispose of cases of this character on the theory that the assignment is to be treated as a new policy, issued directly to the mortgagee, for his exclusive benefit, and to adjust the rights of these parties in accordance with what we may suppose such a policy would contain, we shall be wandering in a labyrinth where there would be but one thing certain, and that is, that great injustice would be done these companies. We should practically be enforcing liabilities against them which they never intended to incur, and giving to the mortgagor the benefit of a policy in which he has forfeited all his rights.

We deem it safer and more just to say, that where a policy is assigned as collateral to a mortgage, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face, or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract.

The evidence, offered to show that the plaintiff set the building on fire, should have been admitted, and the instruction asked for defendants, in regard to the effect of a second insurance, should have been given.

Judgment reversed.

HALL v. NIAGARA FIRE INS. CO.

(53 N. W. 727, 93 Mich. 184.)

Supreme Court of Michigan. Oct. 4, 1892.

Error to circuit court, Wayne county; GEORGE S. HOSMER, Judge.

Action by Harry C. Hall against the Niagara Fire Insurance Company on a policy of insurance. The court directed a verdict for defendant. Plaintiff brings error. Reversed.

Keena & Lightner, for appellant. *Hanchett, Stark & Hanchett*, for appellee.

McGRATH, C. J. This is an action upon a policy of insurance dated October 13, 1888, and running for three years, issued to J. C. Hough "on his two-story frame dwelling, * * * against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property." By the terms of the policy, the assured by its acceptance "warrants that any application, survey, plan, statement, or description, connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company any information material to the risk." The policy also provided that "this policy shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances, viz.: If the insured is not the sole and unconditional owner of the property; or if any building intended to be insured stand on ground not owned in fee simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, location, or possession of the property, (except in case of succession by reason of the death of the assured,) whether by sale, transfer, or conveyance, in the whole or in part, or by legal process or judicial decree; or the title or possession be now or hereafter become involved in litigation; or if this policy be assigned or transferred before a loss." No written application for the policy was requested or made. The insurance was solicited by the company's agent, "who saw the building permit in the paper, and came to the office, [Hough's,] and wanted to write a policy on the house." No statement as to the condition of the title or as to the nature of Hough's ownership was asked for or given. Hough, in November, 1887, had bought 10 acres of land for $18,000, a large portion of which had been paid, and had subdivided the land; the house in question being, at the time the insurance was effected, in process of construction on one of the lots known as "Lot 7." He held the whole under a contract of purchase. October 13, 1888, the policy was issued. May 14, 1889, Hough contracted, in writing, to sell to one Stevens this lot 7 for $3,500, which was to be paid as follows: $25 on July 1, 1889, and the further sum of $25 in monthly payments thereafter, until the entire sum, with interest, should be paid. Stevens contracted to pay all taxes and assessments upon the property, and to pay the expenses of keeping the buildings insured against loss or damage by fire. Hough agreed, on performance of all of the covenants upon Stevens' part, to execute a good and sufficient deed to Stevens. It was further agreed that "the said party of the second part shall have possession of said premises on and after the date hereof, while he shall not be in default on his part in carrying out the terms hereof; and if said party of the second part shall fail to perform his agreements on this contract, or any part of the same, the said party of the first part shall, immediately after such failure, have a right to declare the same void, and may retain whatever may have been paid hereon, and all improvements that may have been made on said premises, to the extent of his just interest therein, and treat the party of the second part as his tenant holding over without permission." Stevens went into possession at once, and occupied the premises at the date of the fire, although he only made three monthly payments. On July 1, 1890, he was given notice to quit the premises, and that the contract had been declared void. In March, 1889, Hough assigned all his interest in the original contract held by him to plaintiff. At the time of that assignment, Hough assigned the policy to Hall, and Hough and Hall went together to the office of defendant's agent. Hall told the agent that Hough had "assigned his interest in the property" to him, (Hall,) and that he "wanted the policy to read payable to him in case it should burn," and thereupon the consent of the company was indorsed upon the policy. Upon these facts the court directed a verdict for defendant, and plaintiff appeals.

The record presents two questions: (*a*) Was this contract valid at its inception? (*b*) Conceding that the policy was vitiated by the Stevens contract as to Hough, what was the effect of the company's consent to the assignment to plaintiff? It must be conceded that Hough, at the inception of the policy, had an insurable interest in the property. It is well settled in this state, at least, that an applicant for insurance is not required to show the exact condition of his title, unless requested so to do, (Castner v. Insurance Co., 46 Mich. 15, 8 N. W. Rep. 554; Guest v. Insurance Co., 66 Mich. 98, 33 N. W. Rep. 31;) that the failure to mention incumbrances, if not inquired about, the application being oral, and no deceit being practiced, is immaterial, (O'Brien v. Insurance Co., 52 Mich. 131, 17 N. W. Rep. 726; Tiefenthal v. Insurance Co., 53 Mich. 306, 19 N. W. Rep. 9;) and that an equitable ownership will support a recital of ownership, (Insurance Co. v. Fogelman, 35 Mich. 481; Guest v. Insurance Co., supra.) See 1 May, Ins. 285–287, and 7 Amer. & Eng. Enc. Law, 1020.

In the present case, neither Hough nor Hall were asked to state the nature of their interest in the property or the condition of the title; neither made any misrepresentation or was guilty of any fraud

or concealment; and Hough, at the inception of the policy, and plaintiff, at the time of the consent of the company to the assignment to him, had such an interest in the property insured as would support the recitation in the policy that it covered "his two-story frame dwelling." Hough's contract with Stevens was not executed until after the policy had been issued, and when Hull took Stevens was in default, but, in any event, Hall had at that time an equitable interest. The provisions of the policy in the present case, respecting the sole and unconditional ownership of the property, the truthfulness of the statement as to the interest of the assured in the property, and as to any change in the title, interest, location, or possession of the property by sale or transfer, are precisely the same as were passed upon in Hoose v. Insurance Co., 84 Mich. 309, 47 N. W. Rep. 587, and the court there held that all the provisions of the contract must be taken together; that, if the insurer desired to know the interest it was insuring, it should have defined that interest in the policy; that it was the intention of the parties to make a binding contract of insurance when accepted by the insured; that the claim as to sole and unconditional ownership could only be held to relate to changes arising after the execution and acceptance of the policy, and did not apply to an existing state or condition of the property at the time that the policy was issued. That case, therefore, disposes of the first question.

The other question is the more serious one, and one upon which the authorities are by no means uniform. In Insurance Co. v. Munns, 120 Ind. 30, 22 N. E. Rep. 78, the insured had mortgaged the property, and afterwards sold it to Munns, and assigned the policy, to which assignment the company, without knowledge or notice of the mortgage, consented. The court held that a contract of insurance is a purely personal engagement, and does not run with the property insured, citing Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 13 N. E. Rep. 683, and Cummings v. Insurance Co., 55 N. H. 457. "That the policy expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company constitute an independent contract with the assignee, the same, in effect, as if the policy had been reissued to him upon terms and conditions therein expressed. * * * The contract of insurance, thus consummated, arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default." That, being a new and independent contract, both parties are subject to the same rules which govern the making of the original contract. A large number of authorities are cited in support of the conclusions reached. In Steen v. Insurance Co., 89 N. Y. 315, the court held that the consent to the assignment created a new contract between the company and the assignee, unaffected by the forfeiture, if, in any event, it could have been insisted upon. In Shearman v. Insurance Co., 46 N. Y. 526, the property was conveyed to plaintiff March 14th. The policy was renewed in the name of the grantor, March 21st, and was assigned to plaintiff, April 15th, and on the same day the company consented to the assignment. The company insisted that at the time of its consent it had no knowledge of any fact except that at that time it was notified that the property had been conveyed to plaintiff, but the time of the transfer had not been given, nor the fact that the policy was issued after the transfer. The court held that "the renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose, if it had not expired; that the consent to the assignment was equivalent to an agreement to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on renewal was a good consideration." In Hooper v. Insurance Co., 17 N. Y. 424, the insurance was upon a stock of goods which had been sold on execution, and the purchaser obtained the consent of the company to an assignment to him, and the court held that the policy became a new contract of insurance between the underwriters and the assignee. "An assignment, therefore, being of no avail, except in case of an interest in the assignee in the subject insured, the request made to the defendant to consent to an assignment to plaintiff was of itself notice to them that he had acquired or was about to acquire an interest in the insured property. If, therefore, it was important to the defendants to know what the nature of the interest was which the plaintiff had acquired, they should have asked for information in respect to it. If they were content to give their consent without such inquiry, it was their own fault." In Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. Rep. 782, it was held that, although "assured may have made statements in his application which by the terms of the policy would defeat a recovery thereon by him, yet, where the insured property is sold and the policy assigned to another, and the company assents to such assignment, a new contract arises, which is not affected by the fraud of the party originally insured." In Ellis v. Insurance Co., 68 Iowa, 578, 27 N. W. Rep. 762, a majority of the court held that the provision in the policy that, if the title of the property is incumbered, the policy should be void, was imported into the new contract, and that the existence of the mortgage invalidated that contract. The court divided upon the construction of this provision, a minority of the court holding that it was not against prior or existing incumbrances, but against those which should fall on the property subsequent to the execution and delivery of the new contract. Upon this question the dissenting opinion is in accord with the case of Hoose v. Insurance Co., supra.

In Ellis v. Insurance Co., 32 Fed. Rep. 646, there is a very able discussion of the question by BREWER, J., who says: "That where an assignment goes with an absolute sale of the property there is the creation of a new contract. If it is a new contract for one purpose, it is a new contract for all purposes. The assignment is expressed to be subject to the terms and conditions of the policy. It is equivalent to saying that the assignee takes the contract as of present writing, containing the same terms and stipulations, binding him to the same duties, and subjecting him to the same liabilities that were imposed by the contract in the first instance upon the assignor. In no other way can it fairly be said that a new contract was made. Tested by that rule, the assignee, as the assignor, had agreed, in the first instance, that he would place no incumbrance upon the property, and that, if he did, the policy should fail. There is no pretense that he has violated that stipulation thus construed. It may well be doubted whether the use of the technical terms 'assignment,' 'assignor,' and 'assignee' are apt to describe the actual transaction. When the insured sells the property, that moment the policy falls. He has no insurable interest. The policy ceases to have legal force as a policy. Can it be said he is assigning that which is nothing, and that the insurance company contemplates and assents to the transfer of that which has no legal existence? This is a practical question, and we must look at these matters in a practical light. When the purchaser buys the property, naturally the thought in his mind is insurance. It being his, and the old policy being dead, he looks for insurance. He finds a policy which had been in force, dead because of his purchase and cessation of the insurable interest in the assignor, yet which the insurance company is willing to have transferred to him. Would it not be an injustice to him if, after the insurance company had consented to that transfer, it could turn back to acts done by the person from whom he obtained the policy, and claim that those acts vitiated the whole thing, and rendered it not liable to the assignee? But it is said there is really no consideration for this contract on the part of the company; the assignment of this policy is an assertion, practically, by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that there would be the injury to the assignee as well as the benefit to the insurer to be considered. Again, it is said that there can be no waiver without knowledge; that the insurance company was ignorant of the fact of this incumbrance; and therefore it should not be held to have waived its rights. There may be estoppel without knowledge. This consent to the assignment, dealing with things in a practical way, must be construed as a statement by the insurance company that it recognized that policy as a valid instrument. Surely it would be unjust to think that the insurance company put itself into the position of assenting to the transfer of a policy, which had no validity, going through the form of consenting to that which had no legal existence, and was worthless. These considerations, although we concede that the question is one of not perfect transparency, leads us to the conclusion that this assignment must be taken, in the language of the text-books and the authorities, to create a new contract between the assignee and the insurance company,—a new contract embracing, as of present writing, the same terms and stipulations as were embraced in the contract originally written between the assignor and insured." 2 May, Ins. 378; Wood, Ins. 110, 366; Bland. Ins. 484; Cummings v. Insurance Co., 55 N. H. 457; Wilson v. Hill, 3 Metc. (Mass.) 66; Pratt v. Insurance Co., 64 Barb. 589.

An insurance policy is a personal contract of indemnity. It is nonassignable, except with the assent of the insurer; nevertheless the assignment of policies of insurance is an incident of nearly every transfer of personal property or improved real estate. Unexpired policies, before loss, have, as a rule, in the hands of the person to whom issued or his assignee, a certain face value, which is the unearned premium or indemnity to the assignee for the unexpired term. They are either transferred as a part of the consideration for the purchase money, or the value of the unearned premium is agreed to be paid in consideration of the assignment. The assignee acquires the right to the unearned premium, or the right to the indemnity for the unexpired term for value. The right to the unearned premium may be subject to the conditions of the contract, for he takes that right subject to the consent of the company. But suppose that the unearned premium is paid over to the assignee of the policy, or credited upon the premium for a new policy, could it be contended that the company would have the right to recover back the sum so paid or credited from the assignee? The company, in such case, recognizes the validity of the policy, and the assignee is simply reimbursed for what he has paid to the assignor. The ordinary railroad mileage ticket is not transferable, and attached is a condition that its use by any other person will operate as a forfeiture. Suppose that A. holds such a ticket, which he desires to transfer to B., and they go together to the office of the railroad company, and A. transfers the ticket to B., and the company indorses its consent, B. paying the value represented by the unused strip for the transfer. Could the railroad company be afterwards heard to say, as against B., that A. had, before the transfer, forfeited the contract, even though it had no knowledge of the breach, and therefore the contract was void as to B.? Certainly not. By consent, a new contract between the company and B. is created. The company has agreed with B. that the unused coupons are good in his hands. The company cannot be said to have waived that which they had no

knowledge of, but they have waived the right as against B. to insist upon A.'s infirmities, whatever they may have been. The contract which, prior to the transfer, was personal with A., has ceased, and has become personal with B. B. does not agree that A. has not violated its provision, but only that he will not. Insurance contracts are peculiar, and hence rules applicable to other contracts are applicable to them only so far as the provisions are analogous.

When a party to a nonassignable instrument, representing upon its face an unearned value, consents to its transfer without reservation, and the assignee in good faith pays value for such transfer, the party consenting cannot be heard to set up mental reservations or prior breaches which were unknown to either party. The rule applicable to the transfer of an assignable contract has no application to such contracts. The consent to the assignment imported validity. The right to withhold or grant it is for the benefit of the insurer. It has its burdens as well as its advantages. The application for consent is, in effect, one for a contract of indemnity to the assignee. It affords an opportunity to the company to examine the risk, or to inquire as to the title or interest to be insured, or as to whether there had been any other change in risk or title. Had it done so, and refused its consent, plaintiff would have been in a position to retain or recover the consideration paid, and to seek indemnity elsewhere. It is too late now, after the loss, to set up the changed conditions. It may be said, too, that at the time of the application for the consent of the company to the assignment, plaintiff informed the company that Hough had assigned his interest in the property to him. That was sufficient, of itself, to put the company upon inquiry.

Defendant insists, further, that, inasmuch as plaintiff had commenced proceedings against Stevens before a circuit court commissioner, to recover possession of the premises, the policy was invalidated thereby. The policy contained a provision that, "if the title or possession be now or hereafter involved in litigation," the policy should become void. Stevens was clearly in default, having occupied the premises for 12 months, and paid but $75, whereas he had agreed to pay $25 per month. Plaintiff had declared the contract under which Stevens occupied void, as he had the right to do under the contract. From that moment Stevens became and was a tenant holding over without permission. The proceeding to recover possession was predicated upon these provisions of the contract. It cannot be contended that the provision of the policy referred to contemplated that, in the event that proceedings were instituted to oust a tenant, the policy should become void. This provision, taken in connection with the other provisions of the policy, clearly relates to a litigation over the title or possession of the insured. The judgment must be reversed, and a new trial had, with costs of this court to the plaintiff. The other justices concurred.

RICKER et al. v. CHARTER OAK LIFE INS. CO. et al.

(6 N. W. 771, 27 Minn. 193.)

Supreme Court of Minnesota. Sept. 24, 1880.

Appeal from order of district court, Hennepin county.

Woods & Babcock, for plaintiffs. Wilson & Lawrence, for defendants. Lochren, McNair & Gilfillan, for intervenor and appellant.

CORNELL, J. The original policy was issued upon the application of Samuel Stanchfield, the person whose life was insured, and all the provisions stipulated for were paid by him before the death of Elizabeth A. Stanchfield, who was his wife. By its terms the amount of the insurance was made payable upon the death of the insured to Elizabeth A. Stanchfield, his said wife, and in case of her death before his decease the same was to be paid to his children, or to their guardian, if minors, for their use and benefit. The said Elizabeth died intestate in July, 1874, leaving surviving her said husband, the plaintiffs herein, and one Joel B. Stanchfield, who were the issue of their marriage. After this Samuel Stanchfield married the intervenor herein, by whom he had one child, Carl S. Stanchfield, both of whom are now living. On the thirteenth day of February, 1878, Samuel Stanchfield died. After the decease of his former wife and his marriage with the intervenor, Louisa Stanchfield, the insured surrendered the original policy, which was cancelled, and a new one was issued in its place and as a substitute therefor, bearing the same date, and containing the same terms and conditions, save that it was therein provided that it should enure "to the sole and separate use and benefit" of said intervenor, Louisa Stanchfield, his second wife. The legal effect of this surrender and change, and the competency of Samuel Stanchfield to make it without the consent of his children, are the important questions presented for adjudication in this case.

Upon the allegations and admissions in the pleadings it must be presumed that the original policy was made, and its stipulations were to be performed, in the state of Connecticut, where the defendant company was created, organized, and did its business, and hence its legal effect, and the rights and obligations of the parties under it, depend upon the laws of that state; but as no evidence appears to have been given as to what those laws were, they are to be taken as identical with the common law of this state, independent of any statute upon the subject. Upon this theory the case has been argued, and it will be considered and determined accordingly.

The general rule upon the subject, as stated by Mr. Bliss, is this: "That a policy of life insurance, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person or persons so named. The person designated in the policy is the proper person to receipt for and to sue for the money. The principle is that the rights under the policy become vested immediately upon its being issued, so that no person other than those designated in it can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." Bliss, Ins. (2d Ed.) §§ 317, 337. This is held to be the rule in Succession of Kegler, 23 Lon. 550.

Upon the facts in the case at bar, however, the court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance still remains unpaid, and where the policy is liable to forfeiture in case of non-payment. Here the entire amount of the premiums stipulated for in the policy had been paid before the death of the wife, Elizabeth A. Stanchfield, and the subsequent attempted surrender of the policy by her husband, whose life was insured. The case, therefore, stands in the same position it would if the whole consideration for the policy had been paid by the party procuring it at the time of its execution and delivery by the company, and the question is, having made such payment and taken out a policy for the benefit of his said wife and his children, payable in express terms to her, or, in the event of her prior decease, to his children, it was competent for him to surrender the same and take another policy in consideration of such surrender, and in lieu of the original, for the benefit of another party. This question, it seems to the court, must be answered in the negative.

The transaction on the part of Mr. Stanchfield was in the nature of an irrevocable and executed voluntary settlement upon his wife and children of the sum secured to be paid by the policy at his death, conditioned that the same should be to her for her benefit should she survive him; but, if not, then the same should be paid to his children, or, if minors, to their guardian, for their sole use and benefit. Nothing remained to be done on his part to make the intended gift of the policy to the beneficiaries therein named complete and effectual as against himself and all mere volunteers claiming under him. In paying for the insurance and procuring the policy to be issued, payable, in express terms, upon his death, to his said wife, Elizabeth, if then living, and if not, to his children, for their sole use and benefit, without any condition or stipulation reserving a right to change or alter any of the terms of the agreement, he did all that could well be done, under the circumstances, in the execution of an intention to vest in his said appointees the en-

tire interest in the policy, and all rights thereunder. Adams v. Brackett's Ex'r, 5 Metc. (Mass.) 280; Landrum v. Knowles, 22 N. J. Eq. 594.

What he did was a "clear and distinct act," wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depositary, without any interest, for those entitled thereto. Such conduct on the part of the husband and father was both natural and proper, and it raises no presumption against the theory of a completed transaction on his part, as evidenced by his other acts. As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained. We concur in the opinion of the district court, that "his children" included the issue of both marriages.

Order affirmed.

CENTRAL BANK OF WASHINGTON et al. v. HUME et al.

HUME v. CENTRAL NAT. BANK et al.

(9 Sup. Ct. 41, 128 U. S. 195.)

Supreme Court of the United States. Nov. 12, 1888.

Appeals from the Supreme Court of the District of Columbia.

On the 23d of April, 1872, in consideration of an annual premium of $230.89, the Life Insurance Company of Virginia issued at Petersburgh, in that commonwealth, a policy of insurance on the life of Thomas L. Hume, of Washington, D. C., for the term of his natural life, in the sum of $10,000, for the sole use and benefit of his wife, Annie Graham Hume, and his children, payment to be made to them, their heirs, executors, or assigns, at Petersburgh, Va. The charter of the company provided as follows: "Any policy of insurance issued by the Life Insurance Company of Virginia on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected originally by herself or her husband, or by any other person, or whether the premiums thereafter be paid by herself or her husband or any other person as aforesaid, shall inure for her sole and separate use and benefit, and that of her or husband's children, if any, as may be expressed in said policy, and shall be held by her free from the control or claim of her husband or his creditors, or of the person effecting the same and his creditors." Section 7. The application for this policy was made on behalf of the wife and children by Thomas L. Hume, who signed the same for them. The premium of $230.89 was reduced by annual dividends of $34.71 to $196.18, which sum was regularly paid on the 23d of April, 1872, and each year thereafter, up to and including the 23d of April, 1881. On the 28th of March, 1880, the Hartford Life & Annuity Company of Hartford, Conn., issued five certificates of insurance upon the life of Thomas L. Hume, of $1,000 each, payable at Hartford, to his wife, Annie G. Hume, if living, but otherwise to his legal representatives. Upon each of these certificates a premium of $10 was paid upon their issuance, amounting in all to $50; and thereafter certain other sums, amounting at the time of the death of Hume to $41.25. On the 17th of February, 1881, the Maryland Life Insurance Company of Baltimore issued, at Baltimore, a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable in the city of Baltimore to "the said insured, Annie G. Hume, for her sole use, her executors, administrators, or assigns;" the said policy being issued, as it recites on its face, in consideration of the sum of $337.20 to them duly paid by said Annie G. Hume, and of an annual premium of the same amount to be paid each year during the continuance of the policy. The application for this policy was signed "ANNIE G. HUME, by THOMAS L. HUME," as is a recognized usage in such applications, and in accordance with instructions to that effect printed upon the policy.

The charter of the Maryland Life Insurance Company provides as follows: "Sec. 17. That it shall be lawful for any married woman, by herself, or in her name or in the name of any third person, with his consent, as her trustee, to be caused to be insured in said company, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable, after the death of the husband, to her children, or, if under age, to their guardian, for their use. In the event of there being no children, she may have power to devise, and, if dying intestate, then to go [to] the next of kin." The directions printed on the margin of the policy called especial attention to the provisions of the charter upon this subject, an extract from which was printed on the fourth page of the application. The amount of premium paid on this policy was $242.26, a loan having been deducted from the full premium of $337.20.

On the 13th of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford, in consideration of an annual premium of $350.30, to be paid before the day of its date, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable at Hartford to Annie G. Hume and her children by him, or their legal representatives. The application for this policy was signed "ANNIE G. HUME, by THOMAS L. HUME." It was expressly provided, as part of the contract, that the policy was issued and delivered at Hartford, in the state of Connecticut, and was "to be in all respects construed and determined in accordance with the laws of that state." The "statute of Connecticut, respecting policies of insurance issued for the benefit of married women," was printed upon the policy under that heading, and is as follows: "Any policy of life insurance expressed to be for the benefit of a married woman, or assigned to her or in trust for her, shall inure to her separate use, or, in case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy: provided, that if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premiums; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy;" and this extract from the statute

was printed upon the policy, and attention directed thereto. From the $350.30 premium the sum of $105 was deducted, to be charged against the policy in accordance with its terms, with interest, and $245.30 was therefore the sum paid. The American Life Insurance & Trust Company of Philadelphia had also issued a policy in the sum of $5,000 on the life of Hume, payable to himself or his personal representatives, and this was collected by his administrators.

Thomas L. Hume died at Washington on the 23d of October, 1881, insolvent, his widow, Annie G. Hume, and six minor children, surviving him. November 2, 1881, the Central National Bank of Washington, as the holder of certain promissory notes of Thomas L. Hume, amounting to several thousand dollars, filed a bill in the supreme court of the District of Columbia against Mrs. Hume and the Maryland Life Insurance Company, the case being numbered 7,906, alleging that the policy issued by the latter was procured while Hume was insolvent; that Hume paid the premium of $242.26 without complainant's knowledge or consent, and for the purpose of hindering, delaying, and defrauding the complainant and his other creditors; and praying for a restraining order on the insurance company from paying to, and Mrs. Hume from receiving, either for herself or children, the amount due pending the suit, and "that the amount of the said insurance policy may be decreed to be assets of said Thomas L. Hume applicable to the payment of debts owing by him at his death," etc. The temporary injunction was granted. On the 12th of November the insurance company filed its answer to the effect that Mrs. Hume obtained the insurance in her own name, and was entitled under the policy to the amount thereof, and setting up and relying upon the seventeenth section of its charter, quoted above. Mrs. Hume answered, November 16th, declaring that she applied for and procured the policy in question, and that it was not procured with fraudulent intent; that the estate of her father, A. H. Pickrell, who died in 1879, was the largest creditor of Hume's estate; that she is her father's residuary legatee; that the amount of the policy was intended, not only to provide for her, but also to secure her against loss; that her mother had furnished Hume with about a thousand dollars annually, to be used for her best interest, and that of his wife and children; and that the premium paid on the policy in question, and those paid on other policies, was and were paid out of money belonging to her father's estate, or out of the money of her mother, applied as directed and requested by the latter. Benjamin U. Keyser, receiver, holding unpaid notes of Hume, was allowed, by order of court, November 16, 1881, to intervene as co-complainant in the cause. R. Ross Perry and Reginald Fendall were appointed, November 26, 1881, Hume's administrators. On January 23, 1882, the administrators filed three bills (and obtained injunctions) against Mrs. Hume and each of the other insurance companies, being cases numbered 8,011, 8,012, and 8,013, attacking each of the policies (except the American) as a fraudulent transfer by an insolvent of assets belonging to his creditors. The answers of Mrs. Hume were substantially the same, *mutatis mutandis*, as above given, and so were the answers of the Connecticut Mutual and the Virginia Life; the former pleading the statute of Connecticut as part of its policy, and the latter the seventh section of its charter. The Hartford Life & Annuity Company did not answer, and the bill to which it was a party defendant was taken *pro confesso*. The administrators were, by order of court, January 2, 1883, admitted parties defendant to said first case numbered 7,906, and cases numbered 8,011, 8,012, and 8,013 were consolidated with that case. January 4, 1883, the court entered a decretal order, dissolving the restraining order in original cause numbered 8,012, and directing the Virginia Insurance Company to pay the amount due upon its policy into court, and the clerk of the court to pay the same over to Mrs. Hume, for her own benefit and as guardian of her children, (which was done accordingly;) and continuing the injunctions in original causes 8,011, 8,013, and 7,906, but ordering the other insurance companies to pay the amounts due into the registry of the court. By order of court, January 30, 1883, the Farmers' & Mechanics' National Bank of Georgetown, which had proved up a large claim against Hume's estate, was allowed to intervene in original cause No. 7,906 as a co-complainant; and March 19, 1883, George W. Cochran, a creditor, was by like order allowed to intervene as co-complainant in the consolidated cases. Replications were filed and testimony taken on both sides.

The evidence tends to show that Hume's financial condition, as early as 1874, was such that, if called upon to respond on the instant, he could not have met his liabilities, and that this condition grew gradually worse, until it culminated in irretrievable ruin, in the fall of 1881; but it also indicates that for several years, and up to October 21, 1881, two days before his death, he was a partner in a going concern apparently of capital and credit; that he had a considerable amount of real estate, though most of it was heavily incumbered; that he was an active business man, not personally extravagant; and that he was, for two years prior to October, in receipt of moneys from his wife's mother, who had an income from her separate property. He seems to have received from Mrs. Pickrell, or the estate of Pickrell, his wife's father, of which Mrs. Hume was the residuary legatee, over $6,000 in 1879, over $3,000 in 1880, and over $1,700 in 1881. Mrs. Pickrell's fixed income was $1,000 a year from rents of her own property, which, after the death of her husband in May, 1879, was regularly paid over to Mr. Hume. She testifies that she told Hume that "he could use all that I [she] had for his own

and his family's benefit, and that he could use it for anything he thought best;" that she had out of it herself from $200 to $250 a year from the death of Pickrell, in May, 1879, to that of Hume, in October, 1881; and that before his death Mr. Hume informed his wife and herself that he had insured his life for Mrs. Hume's benefit, but did not state where the premium money came from. Blackford, agent for the Maryland company, testified, under objection, that Hume told him in February, 1881, that certain means had been placed in his hands, to be invested for his wife and children, and he had concluded to take $10,000 in Blackford's agency, and should, some months later, take $10,000 in the Connecticut Mutual. He accordingly took the $10,000 in the Maryland, and subsequently, during the summer, informed Blackford that he had obtained the insurance in the Connecticut Mutual. Evidence was also adduced that Mr. Hume was largely indebted to Pickrell's estate, by reason of indorsements of his paper by Pickrell, and the use by him in raising money of securities belonging to the latter, and that said estate is involved in litigation, and its ultimate value problematical. The causes were ordered to be heard in the first instance at a general term of the supreme court of the District of Columbia; which court, after argument, on the 5th day of January, 1885, decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all said policies, including those on the Virginia policy from 1874; and that, after deducting said premiums, the residue of the money paid into court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually, or as guardian for herself and children; and that the Hartford Life & Annuity Company pay over to her the amount due on the certificates issued by it. From this decree the said Central National Bank, Benjamin U. Keyser, the Farmers' & Mechanics' National Bank of Georgetown, George W. Cochran, and the administrators, as well as Mrs. Hume, appealed to this court, and the cause came on to be heard here upon these cross-appeals.

W. D. Davidge, *R. Ross Perry*, and *Reginald Fendall*, for Central National Bank. *J. S. Edwards* and *Job Barnard*, for George W. Cochran. *Enoch Totten* and *J. H. Gordon*, for Annie G. Hume.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

No appeal was prosecuted from the decree of January 4, 1883, directing the amount due upon the policy issued by the Life Insurance Company of Virginia to be paid over to Mrs. Hume for her own benefit and as guardian of her children, nor is any error now assigned to the action of the court in that regard. Indeed, it is conceded by counsel for the complainants that this contract was perfectly valid as against the world, but it is insisted that, assuming the proof to establish the insolvency of Hume in 1874 and thenceforward, the premiums paid in that and the subsequent years on this policy belonged in equity to the creditors, and that they were entitled to a decree therefor, as well as for the amount of the Maryland and Connecticut policies, and the premiums paid thereon. It is not denied that the contract of the Maryland Insurance Company was directly between that company and Mrs. Hume, and this is, in our judgment, true of that of the Connecticut Mutual, while the Hartford company's certificates were payable to her, if living.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz. c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute; and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman v. Pope, L. R. 9 Eq. 206, L. R. 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. Cornish v. Clark, L. R. 14 Eq. 189. But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power; because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. May, Fraud. Conv. 33. It is true that creditors can obtain relief in respect to a fraudulent

conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance.

A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an insurable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment, yet if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds would go to the estate of the debtor. Knox v. Turner, L. R. 9 Eq. 155. The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him, and he pays the premiums and survives them, it might be reasonably claimed, in the absence of a statutory provision to the contrary, that the policy would inure to his estate. In Insurance Co. v. Palmer, 42 Conn. 60, the wife insured the life of the husband, the amount insured to be payable to her if she survived him; if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The court held that, under the provisions of the statute of that state, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy that the grandson was entitled to his father's share, the wife having died before the husband; but that, in the absence of the statute, "it would have been a fund in the hands of his representatives for the benefit of the creditors, provided the premiums had been paid by him." So in the case of Anderson's Estate, 85 Pa. St. 202, A. insured his life in favor of his wife, who died intestate in his life-time, leaving an only child. A. died intestate and insolvent, the child surviving, and the court held that the proceeds of the policy belonged to the wife's estate, and, under the intestate laws, was to be distributed share and share alike between her child and her husband's estate, notwithstanding, under a prior statute, life insurance taken out for the wife vested in her free from the claims of the husband's creditors. But if the wife had survived she would have taken the entire proceeds.

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries, to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss, Ins. (2d Ed.) 517; Glanz v. Gloeckler, 10 Bradw. 486, per McALLISTER, J.; Id., 104 Ill. 573; Wilburn v. Wilburn, 83 Ind. 55; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. Rep. 771; Insurance Co. v. Brant, 47 Mo. 419; Gould v. Emerson, 99 Mass. 154; Insurance Co. v. Weitz, Id. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions. Mrs. Hume was confessedly a contracting party to the Maryland policy; and, as to the Connecticut contracts, the statute of the state where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children; but, if the annual premium exceed $300, the amount of such excess shall inure to the benefit of the creditors of the person paying the premiums. The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place. And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary; nor is there anything to the contrary in the statutes or general public policy of the District of Columbia. It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in that district, even though valid under the laws of Connecticut, if the laws of the district were opposed to the latter, because the positive laws of the domicile and the forum

must prevail; but there is no such conflict of laws in this case, in respect to the power of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts. Thus in Elliott's Appeal, 50 Pa. St. 75, where the policies were issued in the name of the husband, and payable to himself or his personal representatives, and while he was insolvent were by him transferred to trustees for his wife's benefit, the supreme court of Pennsylvania, while holding such transfers void as against creditors, say: "We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud, directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors, and are not touched by this decision." In the use of the words "without fraud," the court evidently means actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency; and, at all events, in McCutcheon's Appeal, 99 Pa. St. 137, the court say, referring to Elliott's Appeal: "The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13 Eliz. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount, also issued in the wife's name. * * * The question of good faith or fraud only arises in the latter case; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name or for the benefit of the beneficiary, the title is good, notwithstanding the claims of creditors. * * * There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in the case of the assignment of a policy that once belonged to the assured that the question of fraud can arise under this act." And see Bank v. Insurance Co., 24 Fed. Rep. 770; Pence v. Makepeace, 65 Ind. 347; Succession of Hearing, 26 La. Ann. 326; Stigler's Ex'r v. Stigler, 77 Va. 163; Thompson v. Cundiff, 11 Bush, 567.

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below, for the decree awarded to the complainants the premiums paid to the Virginia Company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies; amounting, with interest, to January 4, 1883, to the sum of $2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual Companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do, (Thompson v. Ins. Co., 46 N. Y. 675,) and as she does, (and the same remarks apply to the children,) then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors; and can the decree against her be sustained on that ground? If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the

money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881, (the payments prior to those years having been the annual sum of $196.18 on the Virginia policy,) we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell; and that, in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust; and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them. We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the states of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible. But the circumstances of each particular case should be considered, as in Partridge v. Gopp, 1 Eden, 163, Amb. 596, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that "the fraudulent intent might be collected from the magnitude and value of the gift." Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in Kipp v. Hanna, 2 Bland, 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and, in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses. Emerson v. Bemis, 69 Ill. 541. This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion. Ordered accordingly.

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