

but it also appeared that at the date of the policy the premises were of the second class, contrary to the warranty. In answer to this it was alleged that Hamilton, the agent, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured; and that before the policy was delivered, the premises had been altered so as to bring them within the first class. The Court below decreed against the insurers and they appealed.

Lord Eldon, C.—This is an appeal by the Newcastle Company from a judgment of the Court of Session, by which they were held liable in the payment of a sum of £1647 upon a policy of insurance, and the question is, whether this judgment was right or not?

The policy described the subjects insured, and then followed the words "warranted that the above mill is conformable to the first class of cotton and woollen rates delivered herewith."

The materiality of them consisted in this, that if the mill was not of the first class, a larger premium ought to have been given.

The appellants represent that in the second set of proposals for the insurance of cotton mills, &c., certain classes of buildings were specified, according to the particulars of which the premium is at a higher or a lower rate.

Thus, class 1 comprehends "buildings of brick or stone and covered with slate, tile, or metal, having stoves fixed in arches of brick or stone on the lower floors, with upright metal pipes carried to the whole height of the building, through brick flues or chimnies, or having common grates, or close or open metal stoves or coakles standing at a distance of not more than one foot from the wall, on brick or stone hearths, surrounded with fixed fenders." I request your lordships' particular attention to the words following, "and not having more than two feet of pipe leading therefrom into the chimney," &c.

Class 2 comprehends "buildings of brick or stone, and covered with slate, tile, or metal, which contain any singeing frame, or any stove or stoves having metal pipes or flues more than two feet in length," &c.

This mill was burnt and an action was brought to compel payment. As to the defence that the premises had been wilfully set on fire, there was no ground for it; and the Court of Session seems to have thought that there was no ground for the imputation of fraud and overvalue.

But there was another very material point of defence stated, that this mill which was warranted as being of the first class, with a pipe of two feet, was in reality of the second class; and that being of the second class whether there was fraud or not; whether the mis-statement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent, (unless they were misled by the agent of the Newcastle Company,) or from whatever other cause, the contract never had effect.

Evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class and was really of the second the judgment of the court below was clearly erroneous; for it is a first principle in the law of insurance on all occasions that where a representation is material it must be complied with; if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact.

My impression is, that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the question, unless it can be effectually answered that the insured were misled by the insurers or their agent.

They say that the misrepresentation was owing to the agent of the Newcastle Fire Company. I cannot say, however, that they have made out that point.

The insured say that there was no effectual policy till the premium is paid, and refer to the term of the fourth article of the printed proposals, which declares "that no insurance is considered by this office to take place till the premium is actually paid by the insured,