

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER XIII.

FRAUDULENT FIRING.

[Continued from p. 176.]

In *Soye v. Merchants' Insurance Co.*¹ a house was insured, became unoccupied, was left vacant, and was burned. (The key of it had been left with a neighbor in order that the house might be looked at by applicants for it.) Some evidence was produced that a window was sometimes open, but as to condition on day of the fire it was not spoken to. The fire was by incendiaries doubtless, or people *rodeurs*. The company was condemned; it appealed and the appeal was dismissed. It was held that the insured was not bound to leave a keeper in the house when the policy did not stipulate for that. But the Court seems not to have determined the legal effect of such negligence as leaving an uninsured house open knowingly and grossly negligently. *Semble* gross negligence might free the insurance company.

In the *Catlin* case² the insurers agreed to pay in case of loss or damage from fire happening from any cause "except design in the insured," etc. It was held that the insurers were liable for all losses not by design, and mere negligence of the plaintiff therefore could not hurt him.

Story seems to say that cases may be where the jury ought to be charged to say, 1st, whether the plaintiff is in fraud; or, 2nd, whether he is guilty of gross negligence presumptive of fraud. Yet Story, J., said:—"I do not say that the defendants would be liable for every loss occasioned by the gross personal negligence of plaintiff; for it might, under circumstances, amount to a fraudulent loss."

A gas burner is left without a new globe or shade, the original one having been broken. A fire happens. The insurance company cannot escape if the fire be accidental.³

§ 283. *Effect of wilful firing as to mortgage creditor.*

Unless there be a condition when a mortgage creditor insures his debtor's house, that the debtor wilfully firing his house the insurer shall be free, the insurer must pay though the debtor be guilty of arson; that is, if the insurance contract is from the insurer directly to the mortgage creditor. So it has been held in France; Pouget, p. 1103. Generally, in France, the mortgage creditor insuring is not affected by the *déchéances* of the insured.

CHAPTER XIV.

OF WAIVER.

§ 284. *Condition against waiver.*

"The non-fulfilment of any one of these said conditions or stipulations shall entail the forfeiture to the insured, or his assigns, of all benefit under this policy. And none of the conditions of this policy, either in whole or in part, shall be deemed to have been waived by or on the part of this company, unless the *waiver* be clearly expressed in writing, signed by the company's resident secretary for Canada, and delivered to the insured or to the lawful agent or representative of the insured."

The above is a condition of the Queen (English) Company.

American policies contain sometimes this condition: "No condition, clause or covenant herein contained shall be altered, annulled or waived, except by writing endorsed upon the policy."

§ 285. *Waiver of preliminary proofs.*

Waiver of preliminary proofs may be made by the company-assurer paying a sum to the assured on account of a loss.¹

The insurance company may also be held to have waived right to object to defects in preliminary proofs by putting their refusal to pay on a particular ground.

The principle is admitted in other matters, as in Campbell's Rep., Trover. Time is often waived in sale cases by the purchaser's con-

¹ La. Annual Rep. of 1851.² 1 Sumner 446.³ How far is the following to be admitted?—*Nemo est in culpa faciendo id quod si factum non fuerit idem eventus futurus esset.* No. 87, 1st Disc. Casaregis. See Misrepresentation, ante.¹ 14 Barbour, Supreme Court (N. Y.) Rep. 206. See Angell. See also *Chapman* case, 1 Camp. 134, 274, contra.² 25 Wendell, 375; 16 Wend. 385; *Taylor v. Merchants' F. Ins. Co.*, 9 Howard, 111.