

Representations here were embodied in the contract. (*Per* the Lord Chancellor.)

But Lord St. Leonards said the "word 'false' being used in connection with the 'earlier word 'fraud' means not that that 'is merely false, but false to the man's knowledge, fraudulently false, 'the untruth 'must be wilful.' The latter branch of the 'clause I would advise the company to put 'wilful into—'wilful' before 'false statement.'" Phillips approves, vol. I.

§ 209. *What is a Warranty?*

A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent, and as applicable to fire policies is usually of an affirmative nature, as that the property insured is of the nature described in the policy.

A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but being once inserted in the policy it becomes a binding condition on the insured; and unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy.

But sometimes warranties need not be alleged as fulfilled, as if they be gathered by insurers from the description of the subject insured. In such case the insurer ought to allege the warranty, and breach of it.

The 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.

An express warranty being in the nature of a condition precedent, it must appear on the face of the policy.

The stipulations and conditions printed upon the same sheet as the policy, and delivered with it, form a part of the policy, and are considered as express warranties.<sup>1</sup>

Instructions in writing for effecting the policy, unless inserted in the instrument itself, do not amount to a warranty, but only to a representation.

§ 210. *When representations become warranties.*

<sup>1</sup> *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488.

A reference in the policy to the application, or to a plan on file in the office, for a further description of the subject insured will not constitute the statements therein made warranties.<sup>1</sup>

But if the application is in terms made a part of the policy, or referred to as forming a part of the policy, or if the plan be attached to the policy and referred to in it as part of it, the statements of the insured, which would otherwise be merely representations, are thereby converted into warranties, and are binding upon him as such.<sup>2</sup>

The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformation, mistake of an agent, (unless the agent of the insurers,) or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity.

§ 211. *Warranties affirmative or promissory.*

Warranties in policies are of two kinds: Affirmative, affirming something, and promissory, something to be done or not to be done. Both are in the nature of conditions precedent.<sup>3</sup>

But, query, have they all the incidents; for instance, must all warranties be set out with allegations of compliance with them? or must the insurer set them out and defend himself by plea of breach of warranty? It depends: warranty from mere description, *semble*, need not be set out.

The law of the continent of Europe allows substantial compliance with warranty to be

<sup>1</sup> *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114; *De Longuemare v. Tradesmen's Ins. Co.*, 2 Hall 589; *Stebbins v. Globe Ins. Co.*, *id.* 633; *Jefferson Ins. Co. v. Cothel*, 7 Wend. 72; *Farmers' Ins. Co. v. Snyder*, 13 *id.* 92; *S. C.*, 16 *id.* 481; *Burrill v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188.

<sup>2</sup> *Burrill v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Egan v. Mut. Ins. Co.*, of Albany, 5 Denio, 326; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barbour, 285; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comstock, 210.

<sup>3</sup> *Goicoechea v. Louis. S. I Co.*, 3 Cond. R. La.