pleaded, and if not, are they not waived? It ought to be so.[1]

Where a policy was issued against sea-risks only on the "good British Brig, called the John," it was held that this description did not constitute a warranty that the vessel was *British*, because the risk of capture being excluded from the policy, the national character of the vessel could have no relation to, or effect upon the risk.[2]

Also where in a policy against fire, the premises insured were described as occupied by a certain individual as a private residence, it was held that this did not amount to a warranty that that person would continue to be the occupant during the whole duration of the risk; and that if it was a warranty at all, it was merely one that he was the occupant at the date of the policy, and so *semble*, if the policy said, "intended to be occupied by assured as a private residence."[3]

The Court, however, held in *O'Neil* v. *Buffalo Fire Ins. Co.*, that if a fact is in express terms *warranted*, it will be considered a warranty, and must be literally fulfilled, notwithstanding its unimportance and entire disconnection from the risk, but where it is otherwise, and is sought to be made a warranty because it is stated upon the face of the policy, it must relate in some degree to the risk.

Arnould favors the rigid rule that every allegation in the policy amounts to a warranty and must be literally fulfilled. 1 *Arnould, Ins.* p. 584, *Perkins' Ed.* 1850; while Phillips recognizes the distinction taken in the cases above cited, but holds that it must be rigorously confined to cases where it plainly appears that the fact alleged could not possibly, in the opinion of any man, have any relation to the risk assumed. 1 *Phillips, Ins.* 418. But it will be presumed that every fact stated in the policy does relate to the risk, until the contrary is shown, *id.*

In the *Sexton* case,[1] the judge said the statement in descriptions or policy that *house insured* is distant —— feet from other buildings, make a warranty. Some judges, in other cases, say if only moveables are insured, and such statement as to buildings be incorrect, that the insured may yet recover.

In *Blood* v. *Howard Fire Ins. Co.*,[2] it was held that a statement that the building insured *is* fastened up and occupied only occasionally for a stated purpose, although a warranty by the express terms of the policy, is only a warranty of the *then* situation of the property, and is *not* a warranty that it shall so continue. A change in the use of the building, not increasing the risk, will not of itself avoid the policy.

In *Bay State Glass Co.*, v. *People's Fire Ins. Co.*,[3] to the question, What is used for fuel? the applicant answered coal, wood and resin in small quantity. The answers were made warranties, and one condition on the policy was that the insured should notify the company of any change or alteration of risk. Held, that this was a warranty of the *then* existing habit or custom, which might afterwards be changed if in good faith, and so that the risk was not increased.

A statement by the assured that a machine in the building insured "is for burning hard coal," is not a warranty not to burn other fuel.[4]

But the courts will look into the intention of a warranty, and will not construe it more strictly than it really imports.

In an application for insurance on a building, which was in terms referred to in the policy as forming a part thereof, occurred the question, "How bounded, and distance from other buildings if less than ten rods." The answer in the same application stated the *nearest* buildings on the several sides of the insured premises, but did not mention *all* the buildings within ten rods. Held that

[1] *Mayall* v. *Mitford*, 6 Ad. & E.

[2] *Mackie* v. *Pleasants*, 3 Binney, 363; and see also a dictum of Sutherland, J, to the same effect in *Francis* v. *Ocean Ins. Co.*, 6 Cowen, 430.

[3] *O'Neil* v. *Buffalo Fire Ins. Co.*, 3 Comstock, 122; See also *Catlin* v. *Springfield Fire Ins. Co.*, 1 Sumner, 434.

[1] 9 Barbour.

[2] Monthly Law Reporter, A.D. 1858, Supreme Court, Mass.

[3] Monthly Law Reporter, A.D. 1857, p. 565.

[4] *Tillon* v. *Kingston Mut. Ins. Co.*, 7 Barb. 570.