the contract, and invalidates the policy only on the ground of fraud upon the insurer. But he holds that the fraud required is not moral, but simply *legal* fraud; it is sufficient if the insurer is misled, even by an innocent mistake of the other party, this constituting a fraud in contemplation of law. 1 *Arnould* on *Ins.*, 495. Duer, on the other hand, insists with his accustomed force and clearness, that every positive representation, is a part of the contract of insurance, though not inserted in the policy: and that its substantial correctness is thereby made a condition precedent, on which the validity of the policy depends; that a representation is equivalent to a warranty, except in regard to the strictness of fulfilment required; "that where there is no actual intention to deceive, there is no other fraud than exists in every case where a party relies on a promise that is not fulfilled;" and that, therefore, the effect of an innocent misrepresentation in invalidating a policy, cannot be on the ground of fraud, but on account of the non-performance of a condition precedent. *Duer* on *Ins.*, *Vol.* 2, *Lect.* 14, p. 653.

Concealment must be of something that the party concealing was bound to disclose. A, wishing to insure, is asked by one office 50s. He goes to another that offers to insure him at 25s. A is not bound to say that the other asked 50s.[1]

Where the insured said so-and-so was the highest premium he had ever paid, and this was false, and induced undue confidence, the Supreme Court of Scotland reversed the original judgment, which held that representation not essential to the policy. 1 Bell, 619.

If one party conceals or misrepresents, but the other discovers everything and the truth, and then both sign the contract, concealment or misrepresentation will be in vain urged.[2] *E. G.*—A being asked if he has proposed elsewhere, and what was asked, says: "Yes, and they asked 30s." The company enquires and finds that they asked 50s.

But by the forms of pleading, it is seen that every action for the breach of a promise is founded upon *legal* fraud, and it is always so charged in the declaration. Therefore, inasmuch as insurance is a contract of a peculiar nature, entirely on speculation, and *uberrimae fidei*, it would seem that the slightest fraud is sufficient to defeat it, and that anything which the law terms fraudulent will produce that result.

Mr. Phillips' doctrine is that "it is an implied condition of the contract of insurance, that it is free from misrepresentation or concealment, whether fraudulent or through mistake." 1 *Phillips*, *Ins.*, 287.

Art. 2487, C.C. of L.C., says that concealment, either by error or design, of any fact of a nature to diminish the assurer's appreciation of the risk, is a cause of nullity.

No point in the law of insurance is better settled than that, in every case of misrepresentation of existing facts material to the risk, the insurer is not liable for an injury to the property insured, though it has no connection with the fact misrepresented, but is owing entirely to another cause. This is on the ground that the insurer has been misled by the misrepresentation, and would, if the fact had been truly stated, either have declined the risk entirely, or demanded a larger premium. But the case of *Stebbins* v. *Globe Ins. Co.*[1] denies the applicability of this doctrine to *promissory* representations, and holds that the material increase of the risk by a breach of a representation of that character constitutes in itself no defence for the insurer, but that he must also show that but for its non-fulfilment, the loss would not have occurred.

The case referred to was an action on a policy of insurance against fire, and the facts material to the point in question were these: The plaintiff's application for insurance, after giving a general description of the property, referred for particulars to a diagram annexed thereto. On this diagram the space in the rear of the buildings on which insurance was requested was marked *vacant*. After exhibiting the diagram, the defendants offered to prove that after the insurance was effected, and during the continuance of

[1] Argument from judgment of Lord Brougham in 1850, in *Irvine* v. *Kirkpatrick*, 3 E. L. and Eq. R.

[2] Per Lord Brougham, *Ib.*

[1] 2 Hall, 632.