Ferguson, J., noted in this Journal *ante* Vol. 18, p. 345.

The facts of the case are concisely stated there, it being only necessary to add, for the understanding of the present judgment, that at the time of the insurance in the Union Fire Insurance Co., $1,000 had been paid on the plaintiffs' mortgage, leaving the balance $3,000.

Held, now (reversing FERGUSON, J.), that it should be declared that the mortgage has been paid, and that the proper discharge should be executed, and that the loan company should pay the balance of the insurance money to the plaintiffs, with interest from the time when it would be payable under the policy, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating as advised their respective liabilities as between themselves.

For (I.) it was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of the non-communication to the Insurance Co. at the time the policy issued, of Klein's previous retirement from the firm, because (1) as a matter of law (*a*) Klein, though he had so retired, retained an insurable interest both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; (*b*) even if Klein had no interest at all, the surviving partners could recover according to the extent of their interest, in the present action; and (2) as a matter of fact, the failure to disclose Klein's change of position, is not shown to have been to the prejudice of the company, or material to the risk.

Semble, even if notice of the change had been of moment, yet, since the evidence showed that the matter of the policy, as between the Loan Company and the Insurance Company, was left to the under-clerks to deal with, and that a clerk of the Loan Company informed a clerk of the Insurance Company of the change in question, a jury would on this evidence have little difficulty in finding that notice of the change was communicated to the Insurance Company.

(II.) It was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of non-communication of other mortgages, subsequent to that to the Loan Company, existing on the property, because (1) as a matter of law, (*a*) as held in *Samo* v. *Gore District Mutual Insurance Co.*, 1 App. 545, the existence of an incumbrance cannot be pronounced a material fact, the non-communication of which will, apart from stipulation, irrespective of its nature and amount, and without any imputation of fraudulent concealment, enable the underwriter to repudiate the liability; (*b*) as the Insurance Company dispensed with the usual application, and with any interrogatories as to the exact nature and extent of the interest to be insured, the assured were not bound to state it. There was, at least, contributory negligence on the part of the insurers, who may also be regarded as having waived information as to the incumbrances; (2) as a matter of fact, it did not appear from the evidence that the non disclosure as to the mortgages was a non-disclosure of a fact material to the risk, or that the rate of premium would have been affected by a knowledge of them on the part of the Company, but rather the contrary.

(III.) It was not correct to say that statutory condition No. 8 was broken, and the policy avoided, by reason of there being prior insurances unassented to by the Union Fire Insurance Co., because the evivence clearly showed that the policy of the Union Fire Insurance Co. was to take the place of the policy on the Royal Insurance Co., in pursuance of the usual mode of dealing between the Union Loan Co. and the Union Fire Insurance Co., and of the two prior insurances, one was marked on the face of the Royal policy as assented to, and the other had been taken in substitution for another which appeared in like manner as assented to in the Royal Policy; and *Parsons* v. *The Standard Insurance Co.* 5 S. C. R. 234, showed this substitution was immaterial so far as the Royal policy was concerned; and these two policies were current when the policy in the Union Fire Insurance Co. was taken out. It was the duty of the Union Fire Insurance Co. to have properly issued their policy, agreeing to take the position of the Royal, as also it was the duty of the Union Loan to see the policy properly issued. But as a reformation of the policy was not asked on the pleadings, the Union Fire might succeed on the technical defence as to the prior insurances not being assented to on their policy, so far as the $1,000, which had been paid on the mortgage was concerned.

(IV.) The representations made to the plaintiffs by the Union Loan Co., and especially their letter of March 14, 1881, stating that the policy was