FIRE INSURANCE.

(*By the late Mr. Justice Mackay.*)

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

(Continued from p. 350.

This learned judge insists that any agreement on the part of the insured, in regard to the future, must, in order to bind him, be expressed in the policy, and that unless it is so expressed, any allegation and proof of it as a defence, on the part of the insurer, will be a direct violation of the rule, that extrinsic evidence is inadmissible to vary or control a written contract, and consequently should not be permitted. Though he admits that the case is different with a representation of an existing fact, his argument necessarily bases the effect of such a representation in invalidating the policy, simply upon its untruth at the time it is made, and therefore holds that it is of no force, so far as regards any implied stipulation, that the fact represented shall continue to exist during the whole period of the risk. Thus where one represents his building as occupied for a certain specified purpose, the result of the Chancellor's argument is, that if these facts are not true at the time the representation is made, then the policy is void, but if, on the next day or week after the policy is issued, the house is permanently put to a more hazardous use, it will constitute no defence for the insurer to an action on the policy. But this conclusion is opposed to the invariable tenor of the decisions both in England and this country, such representations having been always construed to be representations, not only that the fact exists, but also that it will continue throughout the duration of the risk, so far as this depends upon the insured. But the opinion of the Chancellor, even in regard to representations, purely and solely promissory, is not supported by the decisions. See *Edwards* v. *Footner*. [1]

[1] 1 Camp. 530. This was a case of a man insuring a ship to sail with two others, and to carry 10 guns and 25 men. She sailed alone, and did not carry so many guns or men. She was captured; the insurer was freed. In *Dennistoun* v. *Lillie*, 3 Bligh, the insured, by letter, instructed correspondents to effect insurance. A letter from the insured was shown to the insurers, stating that the ship "will sail on 1st May." The ship sailed 23rd April and was captured on the 11th May coming from Nassau to the Clyde. The expression in the letter was held to be positive, and not a mere statement of expectation; and being a material representation and untrue, the insurer was freed.

Mr. Duer has ably reviewed the position taken in *Alston* v. *Mechanics' Mut. Ins. Co.*, and has showed its error, as well as that of *Bryant* v. *Ocean Ins. Co.*, 22 Pick. 200, which supports the opinion of Chancellor Walworth, and he has plainly demonstrated by an analysis of the various decisions on the subject, that promissory representations have been from the first recognized by the courts, and that a substantial compliance with them is necessary to the validity of the policy. See *Duer on Ins., Lect.* 14, *note* 6.

It must, however, be admitted that the settled law, in regard to the effect of misrepresentations without fraud upon the policy, as laid down in the cases above cited, and denied in *Alston* v. *Mechanics' Mut. Ins. Co.* is a departure from the rule in reference to the admissibility of parol, or extrinsic evidence, to vary or control written contracts. If the representation is admitted in evidence, it is plain that the insurer is permitted to show by proof of an agreement extrinsic to and independent of the policy, that the contract is not such as the terms of the policy taken by itself, would imply. Mr. Duer and Mr. Arnould agree that this salutary rule of evidence has been, in a measure, violated; and while they consider the law as too well settled, both in the U. S. and in England, to be shaken, [1] they still express a decided preference for the doctrine prevalent on the continent of Europe, which requires the insertion in the policy of all material facts, which, however, are not to be construed as warranties, unless an intention to that effect is expressly and unequivocally declared.

Representations promissory impose as a duty the performance of future acts, says Mr. Park. What is such a thing, I say, but a warranty; and is it to be tolerated that a warranty shall be fixed as addition to a written agreement and established by parol?

[1] When some strong judge comes along it will be shaken.