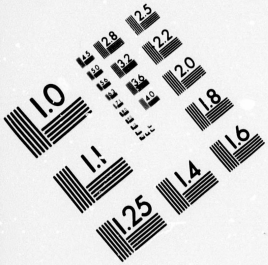


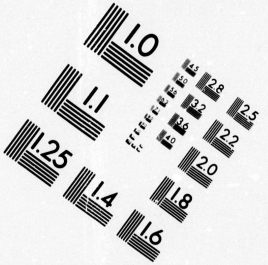
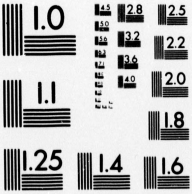
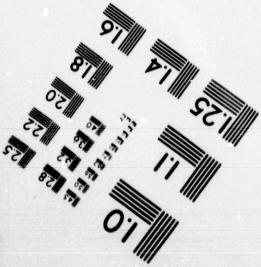
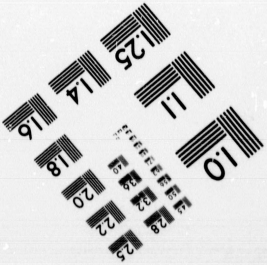


IMAGE EVALUATION
TEST TARGET (MT-3)







Canadia

CIHM/ICMH Microfiche Series.

CIHM/ICMH Collection de microfiches.

Canadian Institute for Historical Microreproductions

Institut canadien de microreproductions historiques

1980

Technical Notes / Notes techniques

The Institute has attempted to obtain the best original copy available for filming. Physical features of this copy which may alter any of the images in the reproduction are checked below.

- ☐ Coloured covers/ Couvertures de couleur
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Tight binding (may cause shadows or distortion along interior margin)/ Reliure serré (peut causer de l'ombre ou de la distortion le long de la marge intérieure)
- ☐ Additional comments/ Commentaires supplémentaires

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Certains défauts susceptibles de nuire à la qualité de la reproduction sont notés ci-dessous.

- ☐ Coloured pages/ Pages de couleur
- ☐ Coloured plates/ Planches en couleur
- ☑ Show through/ Transparence
- ☑ Pages damaged/ Pages endommagées

Bibliographic Notes / Notes bibliographiques

- ☐ Only edition available/ Seule édition disponible
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Plates missing/ Des planches manquent
- ☐ Additional comments/ Commentaires supplémentaires

- ☐ Pagination incorrect/ Erreurs de pagination
- ☐ Pages missing/ Des pages manquent
- ☐ Maps missing/ Des cartes géographiques manquent

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

The original copy was borrowed from, and filmed with, the kind consent of the following institution:

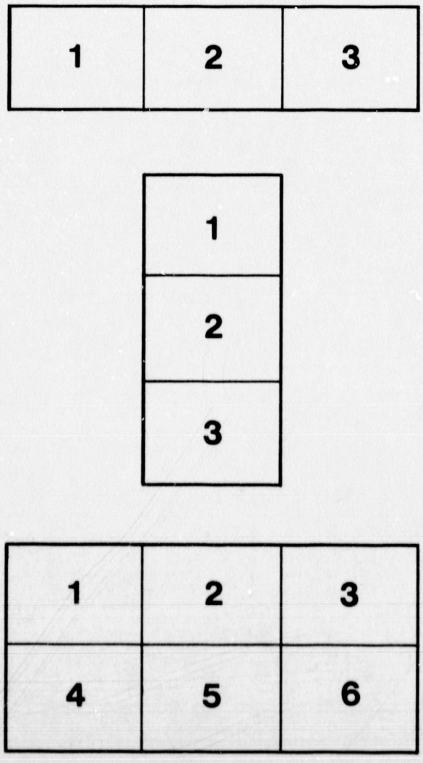
National Library of Canada

L'exemplaire filmé fut reproduit grâce à la générosité de l'établissement prêteur suivant :

Bibliothèque nationale du Canada

Maps or plates too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

Les cartes ou les planches trop grandes pour être reproduites en un seul cliché sont filmées à partir de l'angle supérieure gauche, de gauche à droite et de haut en bas, en prenant le nombre d'images nécessaire. Le diagramme suivant illustre la méthode :



LA

PRINTE

A

TREATISE

ON THE

LAW OF INSURANCE.

BY

S. R. CLARKE,

OF OSGOODE HALL, BARRISTER-AT-LAW.

TORONTO:

PRINTED AND PUBLISHED AT THE OFFICE OF THE "MONETARY TIMES."

1873.

Entered according to the Act of the Parliament of Canada, in the year 1873, by
JOHN MALCOLM TROUT, in the Office of the Minister of Agriculture.

PREFACE.

THE necessity for a work treating specially of the law of insurance, as applicable to Canada, was suggested to me by those immediately interested in the subject. On examination I found that a large number of cases relating to insurance had been decided in the Dominion; and considering the importance of insurance itself, arising from the advantages it confers on the community, I could not but arrive at the conclusion that such a work as I have attempted to produce would be useful, and would meet with the approval of those for whose benefit it has been prepared.

It will be found to embrace the whole Insurance law of Canada. On fire, marine, and life insurance, every reported Canadian case is given; but as to marine and life insurance, I do not pretend that my work is complete. To these two branches of insurance law I have contributed all that is to be found in the Canadian reports. On marine insurance I have given all Canadian cases in the form of a digest; and as to life insurance, most of the cases will be found interspersed throughout the work. On fire insurance alone I have sought to make the work complete. In addition to the Canadian cases, the work contains all English and a selection from the American cases. On this branch of insurance law I trust the work will be found more useful to the Canadian reader than any foreign production.

For the practical usefulness of the chapter on the ad-

justment of losses, I am indebted to Hugh Scott, Esq., of Toronto, whose valuable services and suggestions in the preparation of this portion of the work I here gladly acknowledge. I am also under great obligations to N. H. Meagher, Esq., Barrister, of Halifax, Nova Scotia, who has very kindly furnished me with the recent cases on marine insurance decided in that Province. I also beg to express my thanks to Mr. W. D. Hogg, student-at-law, who prepared the index of subjects and table of cases.

TORONTO, 12*th May*, 1873.

TABLE OF CONTENTS.

PAGE.

Table of Abbreviations vi

Table of Cases Cited vii

CHAPTER I.

The Contract of Insurance 1

CHAPTER II.

The Parties to the Contract 44

CHAPTER III.

The Subjects of Insurance or Insurable Interest 62

CHAPTER IV.

The Extent and Nature of the Risk 82

CHAPTER V.

Warranty, Misrepresentation and Concealment 110

CHAPTER VI.

The Conditions of the Policy 139

CHAPTER VII.

Alienation of Property and Assignment of Policy 192

CHAPTER VIII.

The Proofs of Loss, etc 211

CHAPTER IX.

Adjustment, Re-Building, etc 239

CHAPTER X.

The Proceedings at Law upon Policies 267

BOOK II.

Marine Insurance 303

BOOK III.

Life Insurance 345

APPENDIX 257

TABLE OF ABBREVIATIONS.

Allen—Allen's Reports, New Brunswick.
Cochran—Cochran's Reports, Nova Scotia.
E. & A. Reps.—Error and Appeal Reports, Ontario.
Grant—Grant's Chancery Reports, Ontario.
Hannay—Hannay's Reports, New Brunswick.
James—James' Reports, Nova Scotia.
Kerr—Kerr's Reports, New Brunswick.
L. C. J.—Lower Canada Jurist.
L. C. R.—Lower Canada Reports.
Oldright—Oldright's Reports, Nova Scotia.
Revue Critique—La Revue Critique de Legislation et de Jurisprudence du Canada, Montreal.
Rob. Dig.—Robertson's (Andrew) Digest of Reports, Quebec.
Thomson—Thomson's Reports, Nova Scotia.
U. C. C. P.—Common Pleas Reports, Ontario.
U. C. L. J.—Upper Canada Law Journal.
U. C. P. R.—Practice Reports, Ontario.
U. C. Q. B.—Queen's Bench Reports, Ontario.

The other abbreviations being of English and American Reports only, will be readily understood without the aid of a table.

TABLE OF CASES CITED.

A

	PAGE
Abbot v. Hampden Ins. Co	69
Abbott v. Shawmutt Fire Ins. Co	119
Acey v. Fernie	5
Adams v. Lindsell	37
Adams v. Rockingham Ins. Co.	193
Adamson v. Kentucky Ins. Co.	22
Ætna Ins. Co. v. Tyler	3
Ætna Ins. Co. Re	22
Ætna Ins. Co. v. Grube	120
Alchorne v. Saville	33
Alderman v. West of Scotland Ins. Co.	218
Allan v. Franklin Fire Ins. Co.	68
Allan v. Mutual Fire Ins. Co	22
Allen v. Vermont Mutual Ins. Co.	170
Alleyn v. Quebec Ins. Co.	181
Alsager v. St. Katharines Dock Co	16
Alston v. Mechanics' Ins. Co.	24
Ames v. New York Union Ins. Co.	155
Amicable Society v. Bolland	351
Anderson v. Fitzgerald	16
Anderson v. Thornton	27
Anderson v. Edie	349
Andree v. Fletcher	263
Andrews v. Ellison	33
Andrews v. Union Mutual Ins. Co.	96
Appleby v. Fireman's Fund Ins. Co	149
Aquilars v. Rogers	25
Armstrong v. Tarquand	56
Ashford v. Victoria Mutual Ins. Co	128
Ashley v. Ashley	350
Ashley v. Pratt	317
Atwell v. Western Ass. Co	153
Attwood v. Emery	216
Audubon v. Excelsior Ins. Co.	23
Austin v. Drew	103
Australian Steam Navigation Co. v. Morse	320
Avon Mutual Ins. Co. v. Barteaux	344
Ayres v. Hartford Fire Ins. Co	3
Ayres v. Home Ins. Co.	27

B.

Babcock v. Montgomery Co. M. Ins. Co.	96

PAGE
Baltimore Fire Ins. Co. v. Louey 248
Bambridge v. Wilson 329
Bank of Toronto v. European Ass. Co 103
Banting v. Niagara District M. F. Ins. Co 222
Baptist Church v. Brooklyn Fire Ins. Co.....7, 37
Barber v. Cox..... 33
Barclay v. Cousins..... 44
Barnes v. Union Mutual Fire Ins. Co 40
Barrett v. Jermy 151
Barrett v. Union Mutual Fire Ins. Co 168
Barsolou v. Royal Ins. Co..... 129
Barteau v. Cobequid Mutual Ins. Co..... 320
Bates v. Hamilton..... 337
Bates v. Hewett, L. R..... 135
Battles v. New York County Mutual Ins. Co..... 119
Baxendale v. Harvey 89
Baxter v. Massassit Ins. Co..... 24
Beacon Fire and Life Ins. Co. v. Gibb.....13, 15, 142
Beales v. Home Ins. Co 259
Beebe v. Hartford Mutual Ins. Co..... 54
Beemer v. Anchor Ins. Co 197
Bell v. Gardiner..... 29
Bell v. Hudson 318
Bell v. Janson 277
Bell v. Nixon..... 324
Benedict v. Ocean Ins. Co 17
Berry v. Columbian Ins. Co 293, 333
Bersche v. Globe Mutual Ins. Co 124
Biccard v. Sheppard 305
Biglar v. New York County Mutual Co..... 165
Bird v. Brown..... 58
Bishop v. Pentland 104
Blackett v. Royal Exchange Ass. Co..... 14
Blake v. Exchange Mutual Ins. Co 237
Blakeley v. Phœnix Ins. Co..... 219
Bleakley v. Niagara District Mutual Ass. Co 28
Bodle v. Chenango Co. M. Ins. Co 236
Boehen v. Williamsburgh County Ins. Co..... 7
Boehm v. Bell 80
Bonar v. MacDonald..... 353
Bonner v. Home Ins. Co 227
Borradaile v. Hunter..... 111
Bousfield v. Barnes 4
Box v. Provincial Ins. Co..... 65
Brady v. North Western Ins. Co 11
Brady v. Western Ins. Co 171
Brannsteni v. Accidental Death Ass. Co 227
Brewer v. Chelsea Mutual Fire Ins. Co..... 7
Brichta v. New York Life Ins. Co 45
Briggs v. Traders Ins. Co..... 79
Brimley v. National Ins. Co 107
British American Ins. Co. v. Joseph..... 95
British Life Ass. v. Ward..... 51

PAGE
Britton v. Royal Ins. Co 232
Brown v. Erie & Ontario Ins. Co 248
Brown v. Gore District Mutual Ins. Co 126
Brown v. Hartford Ins. Co 288
Brown v. King's County Fire Ins. Co 104
Brown v. Peoples Mutual Ins. Co 123
Brown v. Roger Williams Ins. Co 208
Brown v. Royal Ins. Co 261
Bruce v. Gore District Mutual Fire Ins. Co 34
Brush v. Ætna Ins. Co 15
Bryant v. Poughkeepsie Mutual Ins. Co 17
Buckley v. Garrett 195
Bufe v. Turner 65
Buffalo, S. E. W., v. Sun Mutual Ins. Co 206
Bullock v. Doods 275
Bumstead v. Dividend Mutual Ins. Co 224
Burbank v. Rockingham Ins. Co 196
Burgess v. Nackham 153
Burgoss v. Alliance Ins. Co 94
Burritt v. Saratoga County Mutual F. I. Co 116
Burt v. Peoples Mutual Ins. Co 168
Burton v. Gore District Mutual Fire Ins. Co 49, 50
Busk v. Royal Exchange Ins. Co 104
Busk v. Royal Ins. Co 305
Butler v. Waterloo Mutual Fire Ins. Co 153

C.

Caballero v. Home Mutual Ins. Co 101
Cabion v. Tennessee Ins. Co 20
Cain v. Lancashire Ins. Co 152
Calloway v. Ward 69
Calvin v. Provincial Ins. Co 57
Cameron v. Monarch Ins. Co 79
Cameron v. Times & B. F. Ins. Co 79, 222
Campbell v. Ætna Ins. Co 164
Campbell v. Liverpool & L. Fire Ins. Co 178
Campbell v. Merchants & F. M. Ins. Co 120
Canada L. C. Co. v. Canada Ins. Co 19, 143
Carroll v. Charter Oak Ins. Co 51
Carbis ex parte in re Croggan 203
Carover v. Mutual Ins. Co 193
Carpenter v. American Ins. Co 114
Carpenter v. Mutual Ins. Co 36
Carpenter v. Washington Ins. Co 49, 50
Carruthers v. Shedden 132
Carter v. Boehm 28
Carter v. Humboldt Fire Ins. Co 80
Carter v. Niagara District Mutual Ins. Co 221
Case v. Hartford Fire Ins. Co 97
Casey v. Goldsmith 92
Castelli v. Boddington 49
Catlin v. Springfield Fire Ins. Co 104
Chalmers v. Mutual Fire Ins. Co. 61

PAGE

Chandler v. Worcester Mutual Fire Ins. Co. 104
Chapman v. Fraser..... 28
Chapman v. Lancashire Ins. Co..... 51
Chase v. Hamilton Mutual Fire Ins. Co..... 55
Chisholm v. Provincial Ins. Co..... 209
Cinqmars v. Equitable Ins. Co 221
City Fire Ins. Co. v. Corlies..... 99
City of Davenport v. Peoria M. & F. Ins. Co. 24, 34
Clapham v. Langton 304
Clark v. Hamilton Mutual Ins. Co..... 132
Clark v. Manufacturers Ins. Co.....28, 134
Clark v. New England Mutual Fire Ins. Co..... 165
Clark v. Western Ass. Co..... 67
Collett v. Morrison.....25, 38
Columbia Ins. Co. v. Cooper..... 55
Columbian Ins. Co. v. Lawrence..... 71
Commonweath Ins. Co. v. Monningers..... 110
Commonwealth Ins. Co. v. Sennett..... 108
Constable v. Noble..... 319
Converse v. Citizens Fire Ins. Co..... 72
Cooke v. Field..... 349
Coons v. Ætna Ins. Co.....309, 320
Cooper v. Farmers Mutural Fire Ins. Co..... 25
Conway v. Britannia Life Ass. Co..... 271
Cornell v. Le Roy 212
Cornell v. Liverpool & L. Ins. Co..... 371
Cornell v. Millwaukee Mutual Fire Ins. Co..... 215
Courtney v. New York City Ins. Co..... 203
Cowie v. Barber..... 28
Crawford v. Hunter 80
Crawford v. St. Lawrence Ins. Co..... 50
Creighton v. Union Mutual Ins. Co..... 11
Crombie v. Portsmouth Mutual Ins. Co..... 109
Crowley v. Agricultural Mutual Ass. Co..... 233
Crowley v. Cohen..... 44
Crozier v. Phœnix Ins. Co..... 3
Cumberland Valley M. P. Co. v. Schell..... 120
Curry v. Commonwealth Ins. Co..... 109
Cusack v. Montreal Ass. Co..... 339
Cusack v. Mutual Ins. Co..... 75
Cushman v. North Western Ass. Co..... 4

D.

Da Costa v. Firth..... 247
Dafoe v. Johnstown D. M. Ins. Co..... 34, 58, 59
Dalby v. India & L. L. Ass. Co..... 1
Dalglish v. Jarvie..... 350
Daniel v. Robinson..... 40
Daniels v. Hudson R. F. Ins. Co..... 32
Dapin v. Mutual Ins. Co..... 105
Date v. Gore District Mutual Ins. Co.....40, 41
David v. Hartford Ins. Co..... 165
Davies v. Home Ins. Co.....3, 64

PAGE

Davis v. Scottish Provincial Ass. Co. ... 52
Davis v. St. Lawrence I. M. Ins. Co. ... 333
Dawes v. North River Ins. Co. ... 215
Dawson v. Home Ins. Co. ... 310
Day v. Charter Oak F. Ins. Co. ... 128
De Bolle v. Pennsylvania Ins. Co. ... 58
De Foresh v. Fulton Fire Ins. Co. ... 46
De Kahn v. Hartley ... 112
Delonquemare v. Tradesman's Ins. Co. ... 112
Demill v. Hartford Ins. Co ... 154
Dennison v. Thomaston Mutual Ins. Co. ... 133
Denny v. Conway S. & M. Ins. Co. ... 120
Devaux v. J. Clanson ... 79
Dickson v. Equitable Fire Ins. Co. ... 19, 20
Diggs v. Albany Ins. Co. ... 83
Dill v. Quebec Ass. Co. ... 217
Dimock v. New Brunswick Mutual Ass. Co. ... 32
Dix v. Mercantile Ins. Co. ... 195
Dixon v. Sadlier ... 111
Dobson v. Sotheby ... 90
Dodge County Mutual Ins. Co. v. Rogers ... 148
Doe d. Pitt v. Laming ... 11
Doe d. Pitt v. Shewin ... 7
Doemay v. Barrowdale ... 354
Dowker v. Canada Life Ass. Co ... 29, 38
Downes v. Craig ... 69
Dresser v. Norwood ... 54
Drew v. Whetten ... 25
Drinkwater v. London Ass. Co. ... 105
Duncan v. Sun Fire Ins. Co. ... 111
Dunlop v. Ætna Ins. Co. ... 269
Dupin v. Mutual Ins. Co. ... 105
Durar v. Hudson County Mutual Ins. Co. ... 61
Dutton v. New England Mutual Fire Ins. Co. ... 128
Dwyer v. Edie ... 349

E.

Eagle Ins. Co. v. Lafayette Ins. Co. ... 264
Edes v. Hamilton Mutual Ins. Co ... 208
Edwards v. Baltimore Ins. Co. ... 213
Elliott v. Royal Exchange Ass. Co. ... 216
Ellis v. Beaver & Toronto Mutual Ins. Co. ... 300
Ellis v. Kreutgruger ... 204
Elmaker v. Franklin Ins. Co. ... 106
Elton v. Larkins ... 337
Equitable Fire Ins. Co. v. Quinn ... 246
Evans v. Bignold ... 350
Everett v. London Ass. Co. ... 101
Every v. Provincial Ins. Co. ... 267
Ewer v. Washington Ins. Co. ... 25

F.

Fairbanks v. Union Mutual Ins Co. ... 284

PAGE
Farnworth v. Hyde 323
Falkner v. Central Fire Ins. Co 173
Fawcett v. Liverpool, London & Globe Ins. Co 328
Finley v. Lycoming Mutual Ins. Co 195
Fisher v. Western Ass. Co 316
Fitzgerald v. Gore District Mutual Ins. Co 220
Fitzherbert v. Mather 10, 53
Fitzsimmons v. City Fire Ins. Co 249
Fletcher v. Commonwealth Ins. Co 73
Flenst v. Waters 349
Flin v. Tobin 111
Flint v. Flennying 79
Flint v. LeMesurier 44
Flint v. Ohio Ins. Co 5
Fogg v. Middlesex Mutual Ins. Co 196
Foley v. Moline 337
Foley v. Tabor 135
Forbes v. Agawan, Ill., Ins Co 156
Forbush v. Western Mutual Ins. Co 249
Forgie v. Royal Ins. Co 202
Fort v. Lee 337
Fortescue v. Barnett 354
Fordrinier v. Hartford Fire Ins. Co 6, 9, 10, 34
Fowkes v. Manchester Ass. Co 16
Fowkes v. Manchester & L. Ass. Association 1, 7, 118
Fowler v. Ætna Ins. Co 290
Fowler v. Scottish Equitable Ins. Co 25, 27, 55
Foy v. Ætna Ins. Co 84
Francis v. Ocean Ins. Co 236
Franklin Fire Ins. Co. v. Coates 124
Franklin Fire Ins. Co. v. Culver 222
Franklin Fire Ins. Co. v. Drake 27
Franklin Fire Ins. Co. v. Findlay 74
Franklin Fire Ins. Co. v. Updegraff 13
Freeman v. Fulton 62
Friedlander v. London Ass. Co 90
Friesmith v. Agawan Mutual Ins. Co 28
Frost v. Knight 274

G.

Gahaghan v. Union Ins. Co 119
Gamwell v. Merchant's & Farmer's Mutual Fire Ins. Co 176
Gardiner v. Piscataquis Mutual Fire Ins. Co 147
Gardner v. Home Ins. Co 360
Garrett v. Provincial Ins. Co 111
Gaston v. Wald 258
Geach v. Ingall 132
Gifford v. Queens Ins. Co 58
Gilbert v. North American Ins. Co 215
Gilbert v. Stockton 319
Gilbert v. British American Fire & Life Ass. Co 113
Gladstone v. King 351
Glen v. Lewis 88

PAGE

Glendale W. M. Co. v. Protection Ins. Co 26
Goit v. National Provincial Ins. Co 6
Goodall v. New England Mutual Fire Ins. Co 34, 36
Goodfellow v. Times & B. Ass. Co 35
Goodwyn v. Cheveley 296
Goss v. Citizens' Ins. Co 17
Goss v. Lord Nugent 171
Gould v. British American Ass. Co 149
Gould v. York County Mutual Fire Ins. Co 40
Goulstone v. Royal Ins. Co 69
Graham v. Barras 304
Graham v. Van Diemans Land Co 296
Grant v. Ætna Ins. Co 121
Grant v. Equitable Fire Ins. Co 142
Grant v. Howard Fire Ins. Co 116
Grant v. Lexington Ins. Co 276
Great Western Ins. Co. v. Staaden 237
Greaves v. Niagara District Mutual Ins. Co 221
Grenier v. Monarch Fire and Life Ass. Co 291
Grevier v. Queen Ins. Co 232
Grim v. Phœnix Ins. Co 99
Grosvenor v. Atlantic Ins. Co 208
Groves v. Boston Mutual Fire Ins. Co 25

H.

Hageden v. Oliverson 58, 59
Haigh v. De La Cour 19
Hale v. Mechanics Mutual Fire Ins Co 155
Haldhead v. Young 16
Halford v. Kymer 348
Hallock v. Commercial Ins. Co 6
Hamilton v. Lycoming Ins. Co 37
Hamilton v. Mendes 329
Hamilton v. Montreal Ass. Co 340
Hare v. Barstow 26
Harkley v. Provincial Ins. Co 323
Harman v. Kingston 44
Harper v. Albany Mutual Ins. Co 17
Harris v. Eagle Ins. Co 4
Harris v. London and Liverpool Fire Ins. Co 99
Harris v. Mantle 286
Harris v. York Mutual Fire Ins. Co 69
Hart v. Western R. R 263
Hartford P. Ins. Co. v. Harmer 237
Hartigan v. International Life Ass. Co 121
Hatton v. Beacon Ins. Co 172
Hatton v. Provincial Ins. Co 274
Hayward v. Liverpool and London F. & L. Ins. Co 101
Hayward v. New England Mutual Ins. Co 123
Hayward v. North Western Ins. Co 17
Heath v. Franklin Ins. Co 13
Hebden v. West 72
Heckman v. Isaac 70

PAGE
Hendrickson v. Queen Ins. Co.....55, 56
Heneker v. British America Ins. Co..... 125
Henkle v. Royal Exchange Ins. Co..... 25
Hennessey v. New York Mutual M. Ins. Co..... 319
Henry v. Agricultural Mutual Fire Ins. Co.....52, 55
Herkimer v. Rice 79
Hersey v. Merrimack County Mutual Fire Ins. Co..... 291
Hervey v. Mutual Fire Ins. Co..... 146
Hickey v. Anchor Ins. Co..... 36
Hickman v. North British and Mercantile Ins. Co..... 78
Higgins v. Aquila 334
Hill v. Secretan..... 46
Hillier v. Alleghany County Mutual Ins. Co..... 97
Hobson v. W. D. M. F. Ins. Co 177
Hodgkins v. Montgomery Co. Mutual Ins. Co., New York 138
Hodson v. Observer Life Ass. Co 38
Hochster v. De La Tour 274
Hoen. v. Anglo Australian, &c., Life Ins. Co 352
Hoffman v. Ætna Fire Ins. Co 13
Hoffman v. Western M. & F. Ins. Co 108
Holdsworth v. Wise 305
Holhook v. American Ins. Co 168
Hollingworth v. Brodrick 104
Holmes v. Mutual Fire Ins. Co 116
Home v. Mutual Safety Ins. Co 264
Home District Mutual Ins. Co. v. Thompson 259
Honnick v. Phœnix Ins. Co..... 26
Hopkins v. Provincial Ins. Co.....18, 114
Houghton v. Manufacturers M. F. Ins. Co 118
Houghton v. Reynolds 280
Howard v. Kentucky and Louisville Mutual Ins. Co..... 149
Howard Ins. Co. v. Bruner 128
Huff v. Marine Ins. Co 215
Humphrey v. London & Lancashire Ass. Co 359
Hunt v. Royal Exchange Ins. Co 331
Hutchins v. Bowker..... 16
Hutchinson v. Western Ass. Co 156
Hyatt v. Waif 13
Hyde v. Bruce..... 111
Hygum v. Ætna Ins. Co 249
Hynds v. Schnectady Co. Mutual Ins. Co..... 174

I.

Illinois M. Ins. Co. v. O'Neill 26
Independent M. Ins. Co. v. Agnew 98
Indiana Ins. Co. v. Rutledge..... 274
Inman v. Western F. Ins. Co..... 213
Insurance Co. v. Chase 46
Irvine v. Nova Scotia M. Ins. Co 342
Irving v. Manning.....4, 323
Irving v. Richardson 3, 4, 49
Isaac v. Royal Ins. Co..... 9

J.

	PAGE
Jackson v. Massachusetts M. F. Ins. Co	193
Jacobs v. Equitable Ins. Co	51, 144
Jefferson Ins. Co v. Cotheal	111
Johnston v. Berkshire M. F. Ins. Co	104
Johnston v. Graham	193
Johnston v. Niagara District M. Ins. Co	132
Joice v. Swaim	73
Jones v. Dana	21
Jones v. Provincial Ins. Co	23
Joult v. Keene	354
Joyce v. Maine Ins. Co	122

K.

Keeler v. Niagara F. Ins. Co	195
Kelly v. Commonwealth Ins. Co	23
Kelly v. Troy F. Ins. Co	53
Kennedy v. St. Lawrence Co. M. Ins. Co	119
Kenniston v. Mer. Co. M. Ins. Co	96
Kenny v. Halifax Mar. Ins. Co	329
Kenyon v. Berthon	110
Kern v. South St. Louis M. Ins. Co	147
Kernschan v. New York B. F. Ins. Co	50
Kerr v. British America Ass. Co	79
Ketchum v. Protection Ins. Co	64
Kimball v. Ætna Ins. Co	177
Kimball v. Howard F. Ins. Co	40
King v. Prince Edward C. M. Ins. Co	243
King v. Walker	278
King v. Western Ass. Co	326
Knight v. Faith	322
Kreutz v. Niagara M. F. Ins. Co	166
Kunzze v. American Ex. F. Ins. Co	93
Kuntz v. Niagara District M. F. Ins. Co	40

L.

Lafarge v. Liverpool L. & G. Ins. Co	216
Laidlaw v. Liverpool & London Ins. Co	19
Lampkin v. Ontario M. & F. Ins. Co	235
Lampkin v. Western Ins. Co	51
Lane v. Maine M. F. Ins. Co	94
Langel v. Mutual Ins. Co., Prescott	140
Laurie v. Douglas	321
Lawrence v. Holyoke Ins. Co	208
Lawrent v. Chatham F. Ins. Co	246
Lazare v. Phœnix Ins. Co	292
Leadbetter v. Ætna Ins. Co	230
Leclaire v. Crasper	263
Lecras v. Hughes	80
Leduc v. Prov. Ins. Co	322
Lee v. Brown	355
Lee v. Jones	353

PAGE
Leggett v. Ætna Ins. Co 174
Leonarda v. Phœnix Ass. Co 106
Levy v. Baillee 19
Lewis v. Monmouth M. F. Ins. Co 237
Liberty Hall Ass. Co. v. Housatonic M. F. Ins. Co 121
Lightbody v. North Am. Ass. Co 36
Linford v. Prov. H. & C. Ins. Co 55
Lingley v. Queen Ins. Co 20
Livingstone v. Western Ass. Co 1, 16, 24
Lomas v. British Am. Ass. Co 125
London Ass. Co. v. Montefiore 199
London Dock Co. v. Sinnott 57
London & N. W. R. Co. v. Glyn 3, 45
Longdale v. Mason 105
Longhhurst v. Star Ins. Co 80
Lonnsbury v. Protection Ins. Co 226
Lothian v. Henderson 110
Loughhurst v. Conway F. Ins. Co 530
Loughhurst v. Star Ins. Co 80
Lovejoy v. Augusta M. F. Ins. Co 40
Lowry v. Bourdieu 28
Lucas v. Jefferson Ins. Co 249
Lucas v. Worswick 29
Lucena v. Crawford 58
Luckie v. Bushby 239
Lycoming Ins. Co. v. Mitchell 5
Locoming Co. M. Ins. Co. v. Schollenberger 213
Lynch v. Dalzell 192
Lyndsay v. Niagara D. M. F. Ins. Co 143
Lynn v. Burgoyne 32

M.

Macarthy v. Commercial Ins. Co 73
Macpherson v. St. Lawrence F. M. Ins. Co 276
Mahoney v. Prov. Ins. Co 338
Mann v. Western Ass. Co 71
Manning v. Bowman 205
Mansfield v. Maitland 79
Marchesson v. Merchants Ins. Co 108
Marion v. Great Republic Ins. Co 233
Markle v. Niagara D. M. F. Ins. Co 226
Marks v. Hamilton 78
Marsden v. City & C. Ass. Co 102
Marsden v. Reed 317
Marshall v. Emperor L. Ass. Co 141
Marshall v. Times F. Ins. Co 116
Martin v. Gilham 286
Martin v. Home Ins. Co 126
Mason v. Agricultural M. Ins. Co 124
Mason v. Hartford F. Ins. Co 75
Mason v. Harvey 216
Masters v. Madison M. Ins. Co 54

PAGE

Mathewson v. Western Ass. Co 1, 49
Matthews v. Howard Ins. Co..... 104
Mayall v. Mitford..... 115
Mayor of N. Y. v. Hamilton Ins. Co..... I74
Mead v. Davison..... 9
Meagher v. Ætna Ins. Co 16, 31
Meagher v. Home Ins. Co..... 180
Mellen v. Hamilton F. Ins. Co 162
Menzies v. North British Ins. Co 106
Mercantile Mar. Ass. Co. v. Fetherington 16
Merchants Ins. Co. v. Edmond 12
Merchants & M. M. Ins. Co. v. Washington M. Ins. Co..... 122
Merrick v. Germania F. Ins. Co 13
Merrick v. Provincial Ins. Co 77
Merritt v. Niagara District Mutual F. Ins. Co 158
Miall v. Western Ins. Co 43
Michael v. Mutual Ins. Co 6
Millandon v. Atlantic Ins. Co 95
Millandon v. New Orleans Ins. Co..... 100
Miller v. Western Ins. Co 11
Milligan v. Equitable Ins. Co 71
Mitchell v. Lycoming M. Ins. Co..... 299
Mittleberger v. British America F. & L. Ass. Co 308
Moadinger v. Merchants F. Ins. Co..... 94
Moens v. Hayworth 135
Molteaux v. London Ass. Co 24, 36
Montgomery v. Gore Dis. M. Ins. Co..... 302
Montreal Ass. Co. v. McGillivray 7, 22, 55 57
Montreal F. Ins. Co. v. Stanstead S. & C. Ry. Co..... 302
Moody v. Ætna Ins. Co 229
Moore v. Home Ins. Co..... 76
Moore v. Protection Ins. Co 173
Morrells v. Irving F. Ins. Co 260
Morrison v. Tennessee Marine and F. Ins. Co 134
Morton v. Patillo 344
Mose v. Hastings Gas Co..... 262
Motley v. Manufacturers Ins. Co 49
Moxam v. Atkins 334
Mulvey v. Gore D. M. F. Ins. Co 27
Mulvey v. Shawmut M. F. Ins. Co 7
Muma v. Niagara D. M. Ins. Co 131
Murdock v. Chenango Mutual Ins Co 149
Murphy v. Peoples Equitable M. F. Ins. Co 119
Mutual Ins. Co. v. Deale 118
Myers v. Sarl 15
Myles v. Montreal Ass. Co 309
Myles v. Thompson 288

Mc.

McBride v. Gore District M. F. Ins. Co 47
McCollum v. Ætna Ins. Co..... 266
McConnell v. Delaware Ins. Co 293

PAGE

McCuaig v. Unity F. Ins. Co 338
McCulloch v. Gore District M. & F. Ins. Co 244
McDonnell v. Beacon F. Ins. Co 135
McEvers v. Lawrence 213
McEwan v. Gutteridge 93
McFaul v. Montreal F. Ins. Co 28
McGibbon v. Queen Ins. Co 99
McGillivary v. Montreal Ass. Co 277
McGivern v. Prov. Ins. Co 14
McGivney v. Phœnix Ins. Co 71
McInnes v. Western Ass. Co 298
McKenzie v. Times & B. Ins. Co 286
McLachlan v. Ætna Ins. Co 166
McLean v. Phœnix Ins. Co 240
McMillan v. Gore Dis. M. F. Ins. Co 295
McQuaig v. Quaker City Ins. Co 109
McSiviney v. Royal Ass. Co 79

N.

National F. Ins. Co. v. Crane 25
Nave v. Home M. Ins. Co 95
Naylor v. Taylor 329
Newby v. Reed 107
Newcastle F. Ins. Co. v. McMorran 7
N. E. Fire & M. Ins. Co. v. Schettler 23
New England F. & M. Ins. Co. v. Wetmore 11
Newhall v. Union M. Ins. Co 124
New Mark v. London & L. F. Ins. Co 99
New York Ins. Co. v. Thomas 17
New York B. F. Ins. Co. v. New York F. Ins. Co 263
New York B. & P. Co. v. Washington F. Ins. Co 14
New York C. Ins. Co. v. National P. Ins. Co 6
New York Equitable Ins. Co. v. Langdon 173
Niagara F. Ins. Co. v. De Graff 67
Niagara District M. Ins. Co. v. Lewis 237
Niblo v. North American F. Ins. Co 69
Nichols v. Fayette M. F. Ins. Co 4
Nichol v. American Ins. Co 54
Noad v. Prov. Ins. Co 153
Noonan v. Hartford Fire Ins. Co 230
North B. & M. Ins. Co. v Moffatt 358
Norton v. Ransselaer and Saratoga Ins. Co 224

O.

Ocean Ins. Co. v. Francis 215
O'Connor v. Imperial Ins. Co 34
Ogden v. Montreal Ins. Co 49, 58, 63
Oldman v. Bewicke 230
O'Neill v. Buffalo Ins. Co 174
Orchard v. Ætna Ins. Co 79
Osser v. Prov. Ins. Co 155
Ott v. Liverpool, London and Globe Ins. Co 286
Ottawa F. Ins. Co. v. Liverpool, London and Globe Ins. Co 178

P.

	PAGE
Pacaud v. Monarch Ins. Co	169
Paddock v. Franklin Ins. Co	342
Palmer v. Pratt	84
Park v. Phœnix Ins. Co	19, 20
Parson v. Bignold	25, 55
Paterson v. Harris	320
Patrick v. Farmers' Ins. Co	215
Patterson v. Continental Ins. Co	30
Patterson v. Powell	63
Patterson v. Provincial Ins. Co	279
Patterson v. Ritchie	329
Patterson v. Royal Ins. Co	36, 54, 57
Pearson v. Commercial Union Ass. Co	103
Peddie v. Quebec F. Ins. Co	1, 244
Pemberton v. Oakes	353
Penley v. Beacon Ass. Co	36, 53
Pennsylvania Ins. Co. v. Bowman	202
People's Ins. Co. v. Spencer	53
Peoria Ins. Co. v. Lewis	213
Peoria M. & F. Ins. Co. v. Frost	270
Peoria M. & F. Ins. Co. v. Hall	272
Peoria M. & F. Ins. Co. v. Hervey	270
Peoria M. & F. Ins. Co. v. Whitehill	272
Perkins v. Equitable Ins. Co	130
Perkins v. Washington Ins. Co	36
Perry v. British America F. & L. Ins. Co	53
Perry v. Newcastle D. M. F. Ins. Co	29, 30, 33
Perry Ins. Co. v. Stewart	196
Phœnix Ins. Co. v. Lawrence	175
Phœnix Ins. Co. v. Taylor	174
Philhook v. New England M. Ins. Co	165
Philips v. Protection Ins. Co	227
Pim v. Reid	86
Pimm v. Lewis	134
Plahts v. Merchants Ins. Co	51
Platt v. Gore District M. F. Ins. Co	232
Pole v. Leask	288
Post v. Ætna Ins. Co	11
Potter v. Ontario & L. M. Ins. Co	154
Powles v. Innes	3
Prince of Wales Ins. Co. v. Harding	6
Prince of Wales Ins. Co. v. Palmer	28
Pritchard v. Merchants & T. L. Ins. Co	7
Protection Ins. Co. v. Hall	20
Protection Ins. Co. v. Harmer	123
Protection Ins. Co. v. Pherson	229
Provincial Ins. Co. v. Ætna Ins. Co	275
Pupke v. Resolute F. Ins. Co	206

Q.

Quebec F. Ins. Co. v. Molson	262
Quebec Marine Ins. Co. v. Commercial Bank of Canada	303

R.

	PAGE
Racine v. Equitable Ins. Co	230
Rafael v. Nashville M. & F. Ins. Co	45
Rafferty v. New Brunswick F. Ins. Co	175
Ramsay v. Gregory	214
Ramsay W. C. M. Co. v. Mutual Ins. Co	42
Ramsbottom v. Gordon	25
Rathbone v. City F. Ins. Co	92
Reach v. Niagara District M. Ins. Co	118
Redpath v. Sun Mutual Ins. Co	52
Reed v. McLaughlin	319
Reed v. Philps	308
Reed v. Royal Exchange Ass. Co	346
Reed v. Weldon	314
Regnier v. Louisana L. M. & F. Ins. Co	293
Reid v. Gore D. M. & F. Ins. Co	149
Rex v. Doran	292
Rex v. Insurance Co	50
Riach v. Niagara District M. Ins. Co	117
Rice v. Provincial Ins. Co	20
Rice v. Tower	194
Richards v. Liverpool & L. F. Ins. Co	49
Richardson v. Canada W. F. M. & S. Ins. Co	180
Richardson v. Home Ins. Co	49
Richmondville Un. Sem. v. Hamilton Ins. Co	250
Rickman v. Carstairs	15
Ries v. Equitable Ass. Co	286
Ripley v. Ætna Ins Co	27
Ripon v. Cape	104
Rising Sun Ins. Co. v. Slaughter	165
Roach v. New York & Erie Ins. Co	272
Roberts v. French	317
Robertson v. Clarke	334
Robertson v. French	11, 12, 16
Robertson v. New Brunswick M. Ass. Co	218
Robertson v. Provincial M. & G. Ins. Co	61
Rockingham M. F. Ins. Co. v. Bosher	270
Rodgson v. Richardson	111
Rogers v. Payne	204
Rolland v. North British & Mercantile Ins. Co	92
Roots v. Cincinnati Ins. Co	166
Roper v. Lendor	216
Ross v. Commercial Union Ass. Co	166
Ross v. Bradshawe	307
Roth v. City Ins. Co	113
Routh v. Thompson	58, 59
Routledge v. Burrill	230
Routledge v. Grant	37
Roumage v. Mechanics F. Ins. Co	216
Roux v. Salvador	324
Rowe v. London & L. F. Ins. Co	60
Royal Canadian Bank v. European Ass. Co.	141

PAGE
Rudsen v. Pope 205
Russ v. Mutual F. Ins. Co 194

S.

Sadlers Co. v. Badcock 63
Salvin v. Longston 8
Sandford v. Mechanics M. F. Ins. Co 212
Sayles v. North Western Ins. Co 110
Sayres v. Hartford F. Ins. Co 75
Scatcherd v. Equitable F. Ins. Co 48
Schenck v. Mercer Cy. M. Ins Co 156
Schmidt v. New York Union F. Ins. Co 294
Scott v. Avery 297
Scott v. Niagara D. Ins. Co 171
Scott v. Phœnix Ins. Co 215
Scott v. Quebec F. Ins. Co 12
Scriptur v. Lowell M. Ins. Co 99
Seghetti v. Queen Ins. Co 232
Sexton v. Montgomery County Ins. Co 156
Shaw v. Phœnix Ins. Co 64
Shaw v. Robberds 85
Shaw v. St. Lawrence County M. Ins. Co 18
Sheldon v. Hartford Ins. Co 26
Sherboneau v. Beaver M. Ins. Co 235
Sheridan v. Phœnix Ass. Co 6
Sibbald v. Hill 116
Sillem v. Thornton 87
Sim v. Edwards 281
Simeral v. Dubuque M. F. Ins. Co 200
Simpson v. Accidental Death Ins. Co 7
Simson v. Cooke 353
Simson v. Scottish M. F. & L. Ins. Co 258
Sinclair v. Maritime B. A. Co 352
Sloat v. Royal Ins. Co 166
Smith v. Commercial Union Ins. Co 357
Smith v. Mechanics & Traders F. Ins. Co 122
Smith v. Monmouth M. F. Ins. Co 193
Smith v. Packard 49
Smith v. Provincial Ins. Co 70
Smith v. Queen Ins. Co 217
Smith v. Roe 288
Smith v. Royal Ins. Co 67
Snyder v. Farmers Ins. Co 120
Somers v. Athenæum Ins. Co 89
South, ex parte 354
South A. Ins. Co. v. Randell L. R 47
South I. Cal. Co. v. Waddle 57
Sparkes v. Marshall 3, 64
Spitta v. Woodman 317
Stainbank v. Fenning 72
Stainbank v. Shepard 80
Stanley v. Western Ins. Co 12
Stark County M. Ins. Co. v. Hurd 157

PAGE
State M. Ins. Co. v. Roberts 206
Steele v. Franklin F. Ins. Co 46
Sterling v. Vaughan 80
Stevenson v. London & L. F. Ins. Co 81
Stevenson v. Snow 27
Stewart v. Greenock Marine Ins. Co 324
Stinson v. Pennock 258
St. Louis v. Kyle 213
Stockdale v. Dunlop 72
Stokes v. Cox 16
Stone v. Elliott F. Ins. Co 26
Storms v. Canada F. M. Ins. Co 209
Stout v. City F. Ins. Co 80
Strickland v. Turner 27
Strong v. Harvey 227
Strong v. Manufacturers Ins. Co 67
Suffolk F. Ins. Co. v. Boyden 262
Sun M. Ins. Co. v. Masson 247
Supple v. Cann 11, 56
Sussex County Ins. Co. v. Woodruff 134
Sutherland v. Pratt 44
Sweet v. Farlie 351

T.

Talaman v. Home & C. M. Ins Co 98
Tallman v. Atlantic F. & M. Ins. Co 63
Tallman v. Mutual F. Ins. Co 275
Tarleton v. Stamforth 6–8
Tarr v. Desjardins 313
Tasker v. Scott 69
Tate v. Citizens M. F. Ins. Co 269
Taunton v. Royal Ins. Co 101
Tayloe v. Merchants Ins. Co 36, 37
Taylor v. Smith 328
Tesson v. Atlantic M. Ins. Co 25
Thames v. Times & B. F. Ins. Co 225
Thames I. Co. v. Royal M. S. P. Co 172
Theobald v. Railway P. A. Co 353
Thompson v. Hopper 146
Thompson v. Montreal Ins. Co 98
Thompson v. Royal Exchange Ass. Co 331
Thurtell v. Beaumont 294
Tidswell v. Ankerstein 46
Tilt v. Silverthorne 67
Tilton v. Hamilton F. Ins. Co 98
Tittemore v. Vermont M. F. Ins. Co 193
Todd v. Liverpool & L. Ins. Co 26
Toms v. Wilson 228
Toronto S. B. v. Canada L. Ass. Co 247
Tourville v. Ruchle 342
Townsend v. North Western Ins. Co 147
Townsend v. Shangoon 25

PAGE

Trail v. Baring 121
Trew v. Railway P. A. Co 352
Trull v. Roxbury M. Ins. Co 109
Trumbull v. Portage County M. Ins. Co 195
Trustees, &c. v. Brooklyn F. Ins. Co 203
Trustees, &c. v. Western Ass. Co 254
Tucker v. Provincial Ins. Co 23, 61
Tunno v. Edwards 323
Turley v. North American Ins. Co 229
Turner v. Harvey 354
Turquand v. Armstrong 143
Tyler v. Ætna Ins. Co 71
Tyler v. Horne 28
Tyrie v. Fletcher 27

U.

Ulhde v. Walters 25
Union Ins. Co. v. Hoge 7

V.

Vance v. Foster 4
Van Denser v. Charter Oak M. & F. Ins. Co 236

W.

Wainwright v. Bland 349
Walden v. Louisana Ins. Co 133
Walker v. Maitland 104
Walker v. Provincial Ins. Co 5
Walker v. Western Ass. Co 235
Wall v. Howard Ins. Co 119
Wallace v. Insurance Co 4
Walroth v. St. Lawrence C. M. Ins. Co 127
Walters v. Washington Ins. Co 203
Washington County M. Ins. Co. v. Merchants & Mar. I. Co 106
Washington Union Ins. Co. v. Wilson 294
Watchorn v. Langford 83
Waters v. Louisville Ins. Co 99
Waters v. Monarch F. & L. Ins. Co 45
Watson v. Summers 291
Waydell v. Provincial Ins. Co 287
Wedderburn v. Bell 133
Weinaugh v. Provincial Ins. Co 34
Weir v. Anderson 303
West v. Lockyer 230
West v. Old Colony Ins. Co 92
West Branch Ins. Co. v. Heffenstein 195
Western v. Genesee M. Ins. Co 31
Western Ass. Co. v. Atwell 51
Westlake v. St. Lawrence County M. Ins. Co 236
Wheelton v. Hardisty 351
White v. Agricultural M. Assce. Co 131

PAGE
White v. British & M. L. Ass. Co. 352
White v. Madison 51
Whitehead v. Brice 115
Whitehurst v. Fayetteville M. Ins. Co 98
Whyte v. Home Ins. Co 72
Wiggins v. Queen Ins. Co 238
Wightman v. Western Marine & Fire Ins. Co 237
Wilbur v. Bowditch M. Ins. Co 19, 123
Williams v. G. W. R. Co 295
Williams v. New England F. Ins. Co 112
Williamson v. Gore District M. Fire Ins. Co 244
Williamson v. Niagara District M. F. Ins. Co 130
Wilson v. Ætna Ins. Co 273
Wilson v. Duckett 28
Wilson v. Hill 200
Wilson v. Martin 80
Wilson v. Merchants M. Ins. Co 316
Wilson v. R. E. A. Co 28
Wilson v. State F. Ins. Co 212
Wilson v. Tummun 58
Wing v. Harvey 56
Wise v. Metcalf 69
Witherell v. Maine Ins. Co 98
Wood v. Poughkeepsie M. Ins. Co 7
Woodbury, S. B. v. Charter Oak Ins. Co 52
Woodhouse v. Provincial Ins. Co 321
Wolf v. Howard Ins. Co 107
Wolff v. Horncastle 59
Worcester Bank v. Hartford F. Ins. Co 156
Workman v. Royal Ins. Co 280
Worsley v. Wood 231
Wright v. Poole 79, 245
Wyman v. Prosser 271
Wyman v. Wyman 271

X.

Xenos v. Wickham 34, 42, 55

Y.

Young v. Austin 281
Young v. Eagle F. Ins. Co 193

THE

LAW OF INSURANCE.

CHAPTER I.

THE CONTRACT OF INSURANCE.

INSURANCE is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils (*a*).

The principle of indemnity is a general principle which runs through the whole contract of insurance, and it is applicable to insurances against fire as well as to marine insurance. The contract in a life policy is, however, not one of indemnity (*b*).

In determining, therefore, the loss or damage for which indemnity is to be made, the state of things at the time of action brought is to be considered and whether at that time any actual damage exists. Thus, where before action brought, the premises destroyed by fire had been rebuilt, and restored to the insured in as good condition as before, it was held that he could not recover (*c*).

In this case, the insured was only interested in the property as mortgagee to the extent of his security, and the court considered the security was as perfect after the

(*a*) *Livingstone v. Western Assce. Co.*, 14 Grant, 463. See also *Peddie v. Quebec F. Assce. Co.*, Stuart's L. C. Appeals 177.

(*b*) *Dalby v. India & L. L. Assce. Co.*, 15 C. B., 365.

(*c*) *Mathewson v. Western Assce. Co.*, 4 L. C. J., 57.

rebuilding as it was before; and that, therefore, no loss had been sustained; and on this ground the action was dismissed.

In all forms of policy which the writer has seen, the express language of the contract to pay renders it merely a contract of indemnity. The contract is only to pay all *such immediate loss or damage by fire* as may happen to the subject insured during a specified period of time. The word "immediate" is inserted to protect the insurers from losses of a consequential or constructive character, for although the rule is that the proximate and not the remote cause of the loss is to be looked to in determining the liability of the insurers, yet in its application the words "proximate cause" are not to be understood in their strict and limited sense as meaning only that cause that immediately precedes and directly occasions a loss. It is settled now that insurers, both upon marine and fire policies, are not only responsible for losses produced by the direct action of a peril insured against, but losses in their nature consequential. On the principle already explained, that the contract is one of indemnity only, if the insured transfers all his interest in the property insured, he has no claim upon the policy as he can show no damage, and all claim for subsequent loss will be at an end unless the policy has been regularly assigned with the assent of the company, and then only in favour of the assignee of the policy on whose behalf as a nominal plaintiff the party originally interested must sue. In order to recover the insured must have an interest in the property protected by the insurance, and if he has not, he is met either by a plea denying his interest, or by a plea alleging that he has not been damnified by the loss. But the assignment of the property insured does not invalidate the policy, provided

the parties keep the contract of insurance alive for the benefit of the assignee (*a*).

If on a sale the insured still retains a partial interest in the property, the policy will protect such interest if there is no provision therein to the contrary (*b*).

In general when the interest ceases as to part of the property, the policy is good at law for the remainder (*c*). But it would be safer in every instance of the discontinuance of interest, for the insured to give notice to the office and thereby create a privity of contract on the altered basis. In the case of mutual companies, any alienation by sale or otherwise is in general prohibited, without written notice or consent, and a similar condition is sometimes inserted in the policies of proprietary companies.

It seems that if, during the currency of the policy, the insured parts with his interest, but afterwards regains it, the policy will re-attach if the insurers are not prejudiced: the subject and the risk remaining the same as described in the policy. Thus where the insured, after making the policy, assigned the property insured to A., and also purported to assign the policy to him by a form of assignment, which however the court held invalid, but afterwards, before the loss, the goods were retransferred to the insured, and he was in possession of them at the time of the fire, it was held that he could recover the amount insured, the assignment of the policy not being effectual to transfer the contract to A (*d*).

The policy is either *open* or *valued*. In fire insurance

(*a*) *Davies v. Home Ins. Co.*, 24 U. C. Q. B., 364. *London & N. W. R. Co. v. Glyn*, 1 E. & E., 652. *Sparkes v. Marshall*, 2 Bing. N. C., 761. *Powles v. Innes*, 11 M. & W. 10.

(*b*) *Ætna Ins. Co. v. Tyler*, 16 Wend, N. Y., 385. *Ayres v. Hartford F. Ins. Co.*, 17 Iowa, 176.

(*c*) *Irving v Richardson*, 1 M. & Rob. 153.

(*d*) *Crozier v. Phœnix Ins. Co.*, 2 Hannay 200.

however, the valuation in the policy is (unless the policy is a valued one) merely the fixing of a maximum beyond which the underwriters are not to be liable. The mention of the sum insured is not a conclusive ascertainment of the sum to be recovered, for the actual damage only is recoverable irrespective of the sum insured (*a*).

In most policies the contract to pay is so worded as to render the application if any other rule impossible; the operative words of the contract being to make good unto the insured all such loss or damage by fire not exceeding the amount insured on the property, etc. An *open* policy is where the value of the thing insured is not inserted in the policy, and therefore must be proved at the trial if a loss happen. A *valued* policy is where the value of the thing insured is settled by agreement between the parties and inserted in the policy *(b)*.

The words "valued at" are invariably used where the intention of the parties is to make the estimate conclusive (*c*).

In fire insurance the policy is usually an open one; and the insured must prove the amount of damage sustained, and he cannot as already explained, recover beyond the amount of loss. There is no doubt, however, that, by express stipulation, the policy may be made a valued one, and in such case, in the absence of fraud, the insured will be entitled to recover the full value stated, irrespective of the amount of loss *(d)*.

A valued policy of insurance is not one which estimates

(a) Vance v. Forster, 2 Craw & Dix, C. Rep. Irish, 118.
(*b*) Smith's Mer. Law, 344.
(c) Wallace v. Ins. Co., 2 La., 559.
(d) See *Harris v. Eagle Ins. Co.*, 5 Johns (N. Y.), 368. *Cushman v. North Western Ins. Co.*, 34 Me., 487. *Nichols v. Fayette M. F. Ins. Co.*, 1 Allen, (Mass.), 63. *Irving v. Manning* 6 C. B., 39. *Irving v. Richardson*, 1 M. & R., 153. *Bousfield v. Barnes*, 4 Camp. 228.

merely the value of the property insured, but which values the loss, and is equivalent to an assessment of damages in the event of a loss *(a)*.

As all the positive stipulations of the policy that may be enforced by law, are on the part of the insurer, it is not necessary that it should be signed by both parties, the obligations implied on the part of the person obtaining the insurance are merely conditions on the performance of which his right to indemnity depends *(b)*.

As to mutual companies, the Con. Stats. L. C. C. 68, S. 26, provides that it shall not be necessary to the validity of any policy of insurance issued by any company, under the Act, that such policy should be executed in duplicate or be signed by the party insured. Thus the policy is in the nature of a deed-poll, which is only of one part and the sole deed of the grantor.

The consideration for the obligation of the insurer is called the premium. Nearly all the policies in common use contain a condition that no insurance shall be binding until actual payment of the premium.

The payment of the premium as required and stipulated for by the company, is a condition precedent to their liability, though the application has been received, and the risk accepted and approved of before the loss occurs *(c)*.

It will not be sufficient that the premium is charged to the agent of the insurers in the books of the latter, unless the insured pays it to the agent, or the agent expressly agrees to advance the money for the insured and enters the premium in his books as paid *(d)*.

(a) Lycoming Ins. Co. v. Mitchell, 48 Penn. St., 367.
(b) Angell on Ins., 4.
(c) Walker v. Prov. Ins. Co., 7 Grant 137; affirmed in appeal 8, Grant 217; 5 U. C. L. J., 162. See also *Flint v. Ohio Ins. Co.*, 8 Ohio, 501.
(d) Acey v. Fernie, 7 M. & W., 151.

But if the insurers agree with the insured to give him credit for the premium, and deliver a receipt therefor, this will dispense with actual payment. *(a)*

And if a policy reciting the payment of the premium is issued and delivered to the insured, the insurers will be liable though the premium is not paid till after the fire *(b)*.

In such case the insurers are estopped from denying payment of the premium, unless they can show that the acknowledgment was made in error, by fraud or duress (*c*).

When the condition of a policy provides that it shall not be binding on the company until actual payment of the premium, no insurance can be effected until the condition is complied with, and any violation of this condition by the agent of the company, and participation in it by the insured, would be a fraud on the company and invalidate the whole engagement *(d)*.

It has however been held in the United States that the agent has in certain cases authority to waive the actual payment of the premium, and when the insured proposed to draw a cheque upon the delivery of the policy, but the agent requested him to let it lie, and that he (the agent) would call for it when he wanted it, and the premium was not paid until after the fire, it was held that the payment was waived by the conduct of the agent *(e)*.

And such a condition may be waived by a general

(*a*) *Prince of Wales Assce. Co. v. Harding*, 1 E. B. & E. 183. *Sheridan v. Phœnix Assce. Co.*, 5 Jur. N. S., 192.

(*b*) *New York C. Ins. Co. v. National P. Ins. Co.* 20 Barb. (N. Y.), 468.

(*c*) *Michael v. Mutual Ins. Co.*, 10 La. An., 737.

(*d*) *Fourdrinier v. Hartford F. Ins. Co.*, 15 U. C. C. P. 415. *Tarleton v. Staniforth*, 5 T. R., 695.

(*e*) *New York C. Ins. Co. v. National P. Ins. Co.* 20 Barb. (N.Y.), 468. See also *Goit v. National P. Ins. Co.*, 25 Barb. (N.Y.), 189. *Hallock v. Com'l Ins. Co.* 2 Dutch, N.J., 263.

agent of the company issuing and delivering the policy before payment, *(a)* and an agreement to give credit for the premium renders the policy binding without actual payment *(b)*.

The delivery in such case raises a presumption that a short credit is intended to be given, and the policy will be binding (*c*).

In the case of a mutual company where the charter and by-laws prescribe the mode of payment of the premium, no valid contract can be effected unless their provisions are complied with; and, if there is an express stipulation that the insurance shall not take effect until the premium is actually paid, none of the officers or agents of the company have power to dispense with the condition (*d*).

Where the printed conditions referred to in the policy allow the space of fifteen days beyond the quarter day for payment of the premium, during which time the company are to be liable, if the premium is not paid during these fifteen days the policy will be void, at least until it is paid (*e*).

Where the insured agreed to pay the premium half-yearly as long as the insurers should agree to accept the same within fifteen days after the expiration of the former half-year, and it was also stipulated that no in-

(*a*) *Wood v. Poughkeepsie M. Ins. Co.*, 32 N. Y., 619. *Newcastle F. Ins. Co. v. McMorran*, 3 Dow., 255.

(*b*) *Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y., 153.

(*c*) *Boehen v. Williamsburgh C. Ins. Co.*, 35 N.Y., 131.

(*d*) See *Mulrey v. Shawmut M. F. Ins. Co.*, 4 Allen (Mass), 116. *Brewer v. Chelsea M. F. Ins. Co.*, 13 Gray (Mass.), 203. See also *Union Ins. Co., v. Hoge*, 21 How., U.S., 35. See also *Montreal Assce. Co. v. McGillivray*, 13 Moore's P. C. Cases, 87.

(*e*) *Doe D. Pitt v. Shewin*, 3 Camp., 134. See also *Simpson v. Accidental Death Ins. Co.*, 2 C.B., N.S., 257. *Pritchard v. Merchants & T. L. Ins. Co.*, 4 Jur., N.S., 307.

surance should take place till actual payment of the premium: it was held that this insurance did not extend to half-a-year and fifteen days, and a loss happening within the fifteen days after the end of one half year, but before the premium for the next was paid, the insurers were not liable though the premium was tendered before the end of the fifteen days after the loss, the insurers having refused to accept the same (*a*).

In general, the day on which the policy is effected is excluded from the period during which it has to run and the last day of the term is included; and this is particularly the case where by the course of dealing between the parties the insured has a right to renew on the last day.

The plaintiffs insured their goods against fire with the defendants by a policy whereby it was provided that from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the sum of 225 dollars, and the defendants at the time above mentioned accept the same, the defendants funds should be liable to make good losses by fire to the plaintiffs' goods. The plaintiffs intended to keep up this policy, and the defendants knew their intention, but the renewal premium was not demanded or paid on the 14th of August, 1868. On that day, a fire took place, which destroyed the plaintiffs' goods. The course of business beween the plaintiffs and defendants was that the defendants should come to the plaintiffs and demand the renewal premium. *Held*, that under the terms of the policy the whole of the 14th of August was protected,

(*a*) *Tarleton v. Staniforth*, 5 T. R., 695. This case is not now relied on in practice—Beaum on Insurance, 16. See further on this point, *Salvin v. Langston*, 6 Ea., 571. *McDowell v. Carr*, H. & J., 256.

and that the defendants were therefore liable for a loss caused by a fire happening on that day (*a*).

A policy of insurance may, by express stipulation, where there is no fraud either practised or contemplated, have a retroactive operation. Thus, in the case of a marine policy on a ship or goods, if the words "lost or not lost" are introduced, it operates as an indemnity against all past as well as all future losses, and it would be no defence that the goods were damaged or destroyed before the plaintiff acquired any interest in them, and this will be equally the case, although the policy has not been actually executed until after the loss, if the subject of insurance has been accepted and the premium paid before the loss, and all parties are aware of the loss at the time of executing and delivering the policy (*b*). So, if the premium is paid before the fire, though no policy is issued until afterwards, it may, when issued, have a retroactive operation in relation to the time of the payment of the premium (*c*). In this case, a condition provided that the policy should not take effect until payment of the premium.

The plaintiff, in March, 1861, made a written application to defendants for insurance on certain premises. The risk was accepted conditionally on certain alterations being made, and until the making of which it was not to be considered as taken. After these alterations were made, no steps were taken towards completing the contract of insurance until January, 1862, when a policy dated in May, 1861, was issued and delivered to plaintiff. Among other conditions of the policy were these: 1st, That the policy should not be binding upon the company

(*a*) *Isaacs v. Royal Ins. Co.*, L.R., 5 Ex., 296.

(*b*) *Fourdrinier v. Hartford F. Ins. Co.*, 15 U.C.C.P., 414. *Mead v. Davison*, 3 A. & F., 303.

(*c*) *Ib.*

until actual payment of the premium. 2nd, That application for insurance should specify the construction of the building to be insured, and that, after the effecting of the insurance any increase to the risk by any means whatever within the control of the assured, should avoid the policy. The premium was not paid until January, 1862, on the day of the issue and delivery of the policy to the plaintiff. Between March, 1861, and January, 1862, a funnel for conducting shavings from an upper to a lower story in front of a furnace, was placed in the insured building. This addition or alteration, it was proved, increased the risk. *Held*, that the insurance was not effected until January, 1862, and that the policy not having then a retroactive relation to its date for any other purpose than for the computation of the period at which it should expire, the risk by the erection of the funnel was not increased after, but before the making of the policy (*a*).

But in all such cases, perfect good faith is required on the part of the insured; and where the application for insurance was made by letter, but before it was posted the property was burnt to the knowledge of the writer, an insurance effected in ignorance of the fact was held void (*b*).

Where on the back of a fire policy there was a printed memorandum, stating that in case of the death of the assured the policy might be continued to his legal representative, provided an indorsement was made on the policy to that effect within three months after his death, and the policy was for a definite time, extending beyond the three months. It was held that the policy was not void against the executor for want of an indorsement within three months, but at most it was voidable by the

(*a*) *Fourdrinier v. Hartford F. Ins. Co.*, 15 U. C. C. P., 403.
(*b*) *Fitzherbert v. Mather*, 1 T. R., 12.

company; and here the policy, having been confirmed by the insurers after the three months, was binding upon them (*a*).

The renewal of the policy before its expiry does not constitute a new agreement of insurance, but merely revives an expiring contract, and continues it in force another term; and if a loss occurs within the new term a recovery can only be had upon the original contract (*b*).

Where an agreement is made by the agent of the company for the renewal, and nothing is said respecting the amount to be charged, the insured has a right to suppose the renewal is to be at the rate formerly paid (*c*).

In the construction of a policy of insurance, the same rule applies as in the case of other instruments, and it is to be construed according to the sense and meaning, as collected in the first place from the terms used, which terms are to be construed in their plain ordinary and popular sense, unless they have generally in respect to the subject matter, as by the known usages of trade acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense (*d*).

Policies of insurance are to be considered and construed as a whole, and particular clauses or passages are not to be wrested from their context, so as to destroy the

(*a*) Doe d. *Pitt v. Laming*, 4 Camp., 73.

(*b*) *New England F. and M. Ins. Co. v. Wetmore*, 32 Ill., 221. See, however, *Brady v. North Western Ins. Co.*, 11 Mich., 425. See also *Supple v. Cann*, 9 Ir., C.L.R., 1. *Acey v. Fernie*, 7 M. & W., 151.

(*c*) *Post v. Ætna Ins. Co.*, 43 Barb., N.Y., 351.

(*d*) *Creighton v. Union M. Ins. Co.*, 1 James, 214. *Robertson v. French*, 4 Ea., 134. See also *Miller v. Western F. M. Ins. Co.*, 1 Hand, Ohio, 208.

unity of the contract, and create conflict where there should be agreement, but one part is to be elucidated by the other, so as to reconcile them if practicable, to one common intent or design, present to the minds of the contracting parties *(a)*.

The words of a policy are to be construed, not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense, as commonly understood by mankind *(b)*.

On the principle before stated, that policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, certain words have acquired a peculiar sense, distinct from their ordinary and popular sense *(c)*, it was held that an express contract in the policy could not be altered or varied, nor could any new terms be engrafted thereon by implication. Thus where the contract required the assured to have iron doors and shutters on the house insured, and this condition was complied with the court held that they could not imply an undertaking on the part of the insured to *keep the doors shut*, and that the insurers therefore were not relieved from liability by reason of the fire entering at an open door, at half-past eight o'clock in the evening, there being no proof of negligence *(d)*.

In order to construe a term in a written instrument, where it is used in a peculiar sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain.

(a) *Merchants Ins. Co. v. Edmond*, 17 Gratt (va.), 138.
(b) *Stanley v. Western Ins. Co.*, L. R., 3 Ex., 71.
(c) *Robertson v. French*, 4 Ea., 130, Ante. p. 11.
(d) *Scott v. Quebec F. Assce. Co.*, Stuarts L.[C., Appeals, 147.

Where a policy of insurance effected on a steamer prohibited the keeping of more than 20 pounds of gunpowder on the "premises," it was held that the meaning of the word "premises" must be gathered from the contract itself, and not from any external evidence, and that parol evidence was not admissible to show that the word "premises" was not intended to include the steamer (*a*).

In the construction of a policy, a particular description which is clearly false, may be rejected as surplusage, in order to give effect to other descriptive words, when such words are sufficient to define the building intended to be described (*b*).

The conditions of the policy are to be construed strictly against the insurers, as they tend to narrow the range and limit the force of the principal obligation (*c*). So where the insurers have left their design doubtful, by using obscure language, the construction will be most unfavourable to them (*d*).

The policy being a deed-poll, can only be construed as containing the language of the party executing, and not the language of both parties, as in the case of an indenture.

In the case of a mutual company, in order to arrive at a proper understanding as to the rights and obligations of the parties to the contract, the charter of the company, the policy issued by it, and the conditions annexed thereto, must be read together (*e*).

(*a*) *Beacon F. & L. Ins. Co. v. Gibb*, 7 L. C. J., 57; 1 Moore's P. C. Cases, 73, 7 L. T. N. S., 574.

(*b*) *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.), 257.

(*c*) *Hoffman v. Ætna F. Ins. Co.*, 32 N. Y., 405. *Franklin F. Ins. Co. v. Updegraff*, 43 Penn. St., 350.

(*d*) *Merrick v. Germania F. Ins. Co.*, 54 Penn. St., 277.

(*e*) *Hyatt v. Wait*, 37 Barb. (N. Y.), 29.

Ambiguous words in a policy of insurance may be construed by extrinsic evidence of accompanying circumstances, and the usages of the business in which the property insured was employed (*a*).

But usage, though admissible to explain what is doubtful, is never admissible to contradict what is plain. For instance, it would not be admissible in support of a construction at direct variance with the words of a policy, and in plain opposition to the language used (*b*).

The only usage admissible would be one shewing that the particular expression, when used in policies of insurance, was by the understanding of the assurers and assured, construed in the sense contended for; in other words, the usage must be one among underwriters, and not merely the ordinary usage among the owners and charterers of ships (*c*).

Parol evidence of custom or usage cannot be received to vary the terms of a policy, and to engraft thereon conditions and agreements inconsistent with and directly opposed to it. Thus, where, by a policy of insurance on a "general stock of iron and hardware," it was provided that if gunpowder was kept on the premises without written consent, the policy should be void. It was held that the plaintiff could not be permitted to show that, by the usage of the hardware trade, the words "general stock of iron and hardware" meant and included gunpowder in tins and canisters to the amount of 25 lbs.; and that, therefore, the policy covered gunpowder to that amount, for the condition wholly excluded gun-

(*a*) *New York B. & P. Co. v. Washington F. Ins. Co.*, 10 Bosw. (N. Y.), 428.
(*b*) *McGivern v. Prov. Ins. Co.*, 4 Allen, 64; *Blackett v. Royal Ex Assce. Co.* 2 C. & J., 249.
(*c*) *McGivern v. Prov. Ins. Co.*

powder without written consent, and it could not be thus qualified by parol evidence (*a*).

Where, in case of an insurance on a steamer, a form of policy was used applicable only to houses and buildings, and the policy prohibited the keeping of more than twenty pounds of gunpowder on the "premises:" *Held*, that the latter word, although in popular language applicable to buildings only, in legal language meant the subject or thing previously expressed, and was applicable to the insurance on the steamer (*b*).

The law will presume that a man intends to do what his duty requires, unless his conduct unequivocally declares an opposite purpose. Thus, if a mortgagor bind himself by a covenant in his mortgage to insure for the benefit of the mortgagee, and on a policy being effected it is ambiguous, and does not clearly show that it is in conformity with the covenant, it will be considered as effected in conformity with the covenant if such a construction can be adopted without doing violence to the language of the instrument or the rules of exposition (*c*).

But, when there is no ground for reforming the contract, the construction depends not upon the presumed intention of the parties, but upon what is the meaning of the words they have used (*d*).

In order to arrive at the meaning of any particular clause or expression, due weight must be given to the context; and if there has been any proposal in writing to the company for the insurance referred to in it, to the terms of that proposal which may control or enlarge the

(*a*) *Mason v. Hartford F. Ins. Co.*, 29 U. C. Q. P., 585. *Myers v. Sarl*, 3 E. & E., 319.

(*b*) *Beacon F. and L. Ins. Co. v. Gibb*, 7 L. C. J. 57, 1 Moore's P. C. Cases, N. S., 73, 7 L. T. N. S., 574, 13 L. C. R. 81.

(*c*) *Brush v. Ætna Ins. Co.*, 1 Oldright, 459.

(*d*) *Rickman v. Carstairs*, 5 B. & Ad., 663.

words of the policy itself (*a*); and, of course, the conditions will affect and modify the terms used in the body of the policy (*b*).

It is the province of the court to decide questions of construction, and thence as to the effect of the contract between the parties, although, when a question arises as to the meaning of any particular term of a technical kind or requiring the explanation of mercantile usage on such points, the jury must decide, and the court will construe the policy accordingly (*c*).

The policy is usually printed with a few terms added in writing according to the intentions and requirements of the parties. The words in writing, if there be a doubt upon the meaning of the whole, have greater effect attributed to them than those in print, because they are the immediate terms selected by the parties, and may be assumed to have received their special attention, whereas the others are a general formula (*d*).

Thus, where a *written* condition on the face of the policy provided "that the vessel was insured against total loss only, and that no claim for general average loss or particular average loss shall attach under the policy," it was held that this condition must prevail, although there were *printed* conditions endorsed on the policy inconsistent with it (*e*).

In general, when the policy contains written and printed stipulations which are inconsistent with each

(*a*) *Anderson v. Fitzgerald*, 4 H. L. C., 484. *Fowkes v. Manchester Assce. Co.*, 32 L.J., (Q.B.), 153.

(*b*) *Stokes v. Cox*, 1 H. & N., 533. Bunyon on F. Ins., 54.

(*c*) *Hutchins v. Bowker*, 5 M. & W., 542. Arnould on M. Ins. 1051.

(*d*) *Livingstone v. Western Assce. Co.*, 14 Grant, 471. *Alsager v. St. Katharine's Dock Co.*, 14 M. & W., 798, per Pollock, C.B. *Halhead v. Young*, 6 E. & B., 320, per Erle J. *Robertson v. French*, 4 Ea., 136.

(*e*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B., 607; S. C., 11 U. C. C. P., 328. And, see also *Mercantile Mar. Assce. Co., v. Titherington*, 5 B. & S., 765.

other, the written clauses must prevail (*a*); and, in several cases in the United States where, by the written words of description in the policy, the insurance was on articles which, by the printed conditions, were prohibited as hazardous, the insured was, nevertheless, held entitled to recover (*b*). But the construction is the same whether the contract is wholly written or wholly printed, for, in both cases, it is of equal validity (*c*).

In construing an ambiguous instrument prepared by the company, and submitted by them to the party effecting insurance for his signature, it must, according to the principle already explained, be construed most strongly against the company, and the language used by the latter ought to be construed in the sense in which it would be reasonably understood by the insured (*d*).

Thus, if, in the application for insurance, questions are put in such a way that the applicant may be misled as to the information required of him, he will not lose his insurance if he has acted in good faith, and has honestly given what he believed was sought of him, and has really been led into the difficulty by the carelessness of the company itself in framing the questions which they desired him to answer.

The application for insurance, though purporting to be put forth by the assured as the basis on which the insurance is to be effected, must be considered as the notice by the company to intending insurers of the information they wish communicated to them, and in all fairness

(*a*) *Goss v. Citizens Ins. Co.*, 18 La. An., 97. *Benedict v. Ocean Ins. Co.*, 31 N. Y., 389.

(*b*) See *Hayward v. North Western Ins. Co.*, 19 Abb. Pr., N. Y., 116. *Bryant v. Poughkeepsie M. Ins. Co.*, 17 N. Y., 200; 21 Barb., N. Y., 154. *Harper v. Albany M. Ins. Co.*, 17 N. Y., 194.

(*c*) *New York Ins. Co. v. Thomas*, 1 John's 1.

(*d*) *Fowkes v. Man. & L. Assce. Association*, 3 B. & S. 925.

should contain such clear intimations of information as would enable the signer of the application to give it without any hesitation or doubt as to what was intended. Thus, where the application required the insured to say whether he was owner of the premises or not, and by the terms of the policy the applicant was bound to represent fairly every material fact and circumstance in regard to the risk, and the condition, situation and value of the property, and a proviso was inserted that if any material fact or circumstance should not be fairly represented, the policy should be void, an answer in good faith by the insured that he was owner, he being such in one sense, was held not to avoid the policy (*a*).

Held also that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land, and that to establish the *bona fides* of the plaintiff's answers he might shew that defendant's agent, who drew up the statement, had been informed by plaintiff, or some one else, to plaintiff's knowledge, of the state of the title to the premises (*b*).

Any fraud or misrepresentation in procuring the insurance will render the policy void.

Where the plaintiff applied for an insurance with the defendants, as if the property were his own stating that it was occupied by himself, and unencumbered, and obtained a policy for two-thirds of the value which he represented it to be; and it appeared that he was only in possession of the land as lessee for years, and that he had grossly overstated its value, and especially his interest in it, it was held that the policy was void (*c*).

(*a*) *Hopkins v. Prov. Ins. Co.* 18 U. C. C. P., 74.
(*b*) *Ib.*
(*c*) *Shaw v. St. Lawrence Cy. M. Ins. Co.*, 11 U. C. Q. B., 73.

In general, an overvaluation of the property insured is a fraud upon the insurers which will make the contract void (*a*).

But as to the valuation of property insured, there is a manifest difference between marine risks and risks upon buildings. Ships when insured are generally not in a situation to be inspected and examined by the insurer, who is, therefore, obliged to depend on the account of the ship given by the owner; but it is not so with buildings on shore. The company or their agent has generally convenient means of inspecting them, seeing their real condition, and judging of their value; and thus the same strictness is not required in giving the value of buildings as in the case of ships (*b*).

The overvaluation of the amount of loss or damage, in order to avoid the policy within the meaning of the ordinary condition, must not arise from mistake or inadvertence, but must be done either for the fraudulent purpose of obtaining a sum greater than the value of the property destroyed, or with the fraudulent design of leading the insurers more readily to acquiesce in the claim made upon them, and to forbear examining so scrupulously into the actual amount of the loss, as they otherwise might have done (*c*).

The plaintiff effected an insurance with defendants on certain buildings for $1100, stating their value to be $3000. In an action on this policy, it appeared that ten days before he had insured the same buildings, together with a driving shed worth $400, in another office, for

(*a*) *Haigh v. De la Cour*, 3 Camp., 319. *Levy v. Baillee*, 7 Bing., 349. *Wilbar v. Bowditch M. Ins. Co.* 10 Cush. (Mass.), 446.

(*b*) *Dickson v. Equitable F. Ins. Co.*, 18 U. C. Q. B., 249, per *Robinson*, C. J.

(*c*) *Park v. Phœnix Ins. Co.*, 19 U. C. Q. B., 110. And see *Dickson v. Equitable F. Ins. Co.*, 18 U. C. Q. B., 248. *Laidlaw v. Liverpool & L. Ins. Co.*, 13 Grant, 379. *Canada L. C. Co. v. Canada Ins. Co.* 17 Grant, 418.

$900, and had then valued the whole at from $1200, to $1400. The policy contained no warranty or condition as to fraudulent valuation. The plaintiff only estimated his loss at $2089. The evidence as to the actual value was contradictory, and the great difference in the plaintiff's two valuations was not explained. The court inclined to the opinion that the manifest overvaluation without any fraudulent intention on the part of the plaintiff would avoid the policy; but, as a jury alone can draw inferences of fraud, they held that the case must be submitted to them, and granted a new trial. On the second trial, the jury found for plaintiff, and the court refused to disturb the verdict (*a*).

The question of overvaluation or fraud in a policy of insurance is properly left to the jury; and, although the court may be dissatisfied with the value put upon his property by the assured, still, unless it appears that the valuation was made *mala fide* for a fraudulent purpose, and not by error of judgment, they will not disturb the verdict. (*b*).

Where a house was insured for £250, and proved to be worth at least £400; but there being no exact evidence as to value, it did not appear that the house was not worth £500, it was held that there was no overvaluation, though the plaintiff, as widow, was only entitled, under the statute of distributions, to recover one half the value of the house (*c*).

A slight over-estimate such as might reasonably be accounted for from difference of opinion will not avoid the policy (*d*).

(*a*) *Dickson v. Equitable Fire Ins. Co.*, 18 U. C. Q. B. 246.

(*b*) *Rice v. Prov. Ins. Co.*, 7 U. C. C. P., 548. *Park v. Phœnix Ins. Co.*, 19 U. C. Q. B., 110.

(*c*) *Lingley v. Queen Ins. Co.*, 1 Hannay, 280.

(*d*) *Catron v. Tennessee Ins. Co.*, 6 Humph. (Tenn.), 176. See also *Protection Ins. Co. v. Hall*, 15 B. Monroe, Ky., 411.

On the other hand, if the insured has been induced to enter into a contract of insurance upon a fraudulent representation, by the agents and officers of a company, in regard to its capital or pecuniary resources and ability, or any other matter which rightfully influenced him in the negotiation, he may be relieved against the contract (*a*).

The business of fire insurance is now perhaps universally carried on by companies incorporated by statute, and the statute or charter prescribes the mode in which they may carry on business, and, in the case of mutual companies, enables them to pass by-laws more fully to carry out their objects (*b*).

By the provisions of the Statute of Canada, 31 Vic., c. 48, no company (unless transacting ocean marine insurance exclusively) can issue any policy or take any risk, or receive any premium, or transact any business of insurance in Canada, or prosecute or maintain any suit, action, or proceeding, either at law or in equity, or file any claim in insolvency without first obtaining a licence from the Minister of Finance to carry on business in Canada. By the same Act the licence is not to be granted until the company has deposited, in the hands of the Receiver-General of Canada, the sum of fifty thousand dollars as security to the policy-holders. Provision is also made that until the deposit shall equal one hundred thousand dollars, the company shall, each year, deposit in the hands of the Receiver-General a certain portion of its premiums.

The deposit required to be made by foreign fire insurance companies under the 28 Vic., c. 33, is intended for

(*a*) *Jones v. Dana*, 24 Barb., N. Y., 395.

(*b*) See Con, Stats. L. C., c. 68, s. 3, s-s. 2. Con. Stats. U. C., c. 52, s. 62. 24 Vic., c. 32, s. 5.

the security of Canadian policy-holders, who have sustained loss by fire, and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy-holders, notwithstanding the provisions of s. 7, that on judgment recovered against such company, execution may be levied on such deposit as aforesaid.

In case of a deficiency of assets, the costs of creditors in proving claims, are to be added to the debts and paid proportionally, and are not entitled to be paid in priority to the debts (*a*).

It is in all cases important that the company should conform to the provisions of their charter in making their contracts and in doing other acts, for it would seem that the company has no authority to issue policies except in conformity with the limitations and restrictions contained in their charter and by-laws, and it is at least doubtful whether an insurance by parol would be good when the charter provides that policies may be made by writing under the corporate seal (*b*).

An incorporated insurance company cannot, it seems, bind themselves by a parol contract of insurance, and where there is an application for insurance and payment of the premium, but no issue of the policy to the plaintfff, he cannot sustain an action on the agreement as for an actual insurance, but if he can prove an agreement to insure, in which the terms have been so fully settled by the parties, that nothing remains to be done but to deliver the policies, then the insured has a remedy at

(*a*) *Re Ætna Ins. Co.*, 17 Grant, 160.

(*b*) *Allen v. Mutual F. Ins. Co.*, 2 Md., 111, citing *Adamson v. Kentucky Ins. Co.*, 2 B. Monroe, Ky., 470. *Montreal Assce. Co. v. McGillivray*, 13 Moore's P. C. Cases, 87; 9 L. C. R., 488; 8 L. C. R., 401.

law for not delivering the policy, or he may be relieved in equity (*a*).

Though the corporate seal is required as a general rule in equity as well as at law to bind the company, yet this rule will not be permitted by the Court of Chancery to be an engine of fraud; and, therefore, if upon the faith of a contract, not under the corporate seal, anything be done or suffered by the other party with the acquiescence of the company, they will be bound to complete the agreement. But where the corporate seal is necessary to bind the company, a mere knowledge of facts entitling them to repudiate the contract will not fix their liability by acquiescence, unless such acquiescence is fraudulent or there is some consideration received (*b*).

But, although the charter of an insurance company requires their contracts of insurance to be executed in a particular mode, yet, if they adopt a different mode, and receive the benefit of the contract, they will be bound by it (*c*).

Several cases have been decided in the United States, shewing that an oral contract of insurance founded on a sufficient consideration may be valid and binding on the company when, by express stipulation, the contract is to take effect immediately, and the subsequent execution and delivery of a policy in the usual form is contemplated and agreed upon (*d*).

And where the charter required that all policies of insurance should be signed by the president and countersigned by the secretary of the company, it was held that

(*a*) *Jones v. Prov. Ins. Co.*, 16 U. C. Q. B., 478.
(*b*) *Tucker v. Prov. Ins. Co.*, 7 Grant, 122.
(*c*) *N. E. Fire and M. Ins. Co. v. Schettler*, 38 Ill., 166.
(*d*) *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N.Y.), 82. *Audubon v. Excelsior Ins. Co.*, 27 (N.Y.), 216.

a contract or agreement *to execute a policy* was not within the terms of the charter, and might be valid though made by an agent verbally (*a*).

There is no general provision of law in Canada relating to insurance, and specifically requiring such contracts to be in writing. But the practice of executing a written contract of insurance is so universal as almost to have acquired the force of positive law; and it is certainly the safest rule in effecting contracts of insurance, to adhere strictly to the requirements of the charter. It is competent, however, to prove a usage that where there has been a verbal agreement for insurance and the terms agreed upon and entered in the books of the company, the contract of insurance is considered as valid for the insured, although the premium is not paid (*b*).

Parol evidence is not admissable to vary or alter the terms or legal meaning of a written contract, except in cases of mistake, fraud, misrepresentation and deceit (*c*).

But a mistake in a policy may be corrected, when it clearly appears from the label or other satisfactory evidence that it was reduced to writing in terms not conformable to the real intention of the parties (*d*), and a court of equity will reform a mistake in a policy as to the name of the party insured (*e*); so if from mistake the policy has been so framed that it does not correspond with the original agreement of the parties, the error may be corrected in a court of equity. The court may, if the policy is not filled up according to the intention of the

(*a*) *City of Davenport v. Peoria M. and F. Ins. Co.*, 17 Iowa, 276.
(*b*) *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320.
(*c*) *Alston v. Mechanics' Ins. Co.*, 4 Hill (N.Y.), 329. *Flinn v. Tobin*, 1 *M. & M.* 369.
(*d*) *Motteux v. London Assce. Co.* 1 Atk., 545.
(*e*) *Livingstone v. Western Assce. Co.*, 14 Grant, 461.

parties through inadvertence or mistake, upon clear and positive evidence of such inadvertence or mistake, correct the policy (*a*).

But a court of equity ought to be extremely cautious in the exercise of such an authority, and ought therefore in all cases to withhold its aid where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory (*b*).

And where the court is asked to reform a policy on the ground of accident or mistake, and to make it conform to the original intention and agreement of the parties, it is only justified in proceeding on evidence almost if not quite incontrovertible establishing the mistake in the clearest manner, so that it is free from all reasonable doubt (*c*).

To afford grounds for reforming a policy for mistake, the mistake must appear to have been mutual (*d*).

Parol evidence, though not admissible to *control* the meaning of a policy or of any other written instrument, is admissible as in cases of other mercantile instruments to explain the language of the policy with reference to the usual practice of trade, *e.g.*, to show that the Gulf of Finland is considered by mercantile men as part of the Baltic (*e*).

(*a*) *Drew v. Whetten*, 8 Wend (N. Y.),166. *Ewer v. Washington Ins. Co.*, 16 Pick. (Mass.), 503. *Groves v. Boston M. Ins. Co.*, 2 Cranch., 418. *Townsend v. Strangoon*, 6 Vern., 328. *Ramsbotton v. Gordon*, 1 Ves. & Beames, 165. *Collett v. Morrison*, 9 Hare, 162. *Henkle v. Royal Ex. Ins. Co.*, 1 Ves. Sr., 317.

(*b*) *Angell on Ins.* 58, and see *Parsons v. Bignold* 15 L. J. (Ch.), 379. *Fowler v. Scottish Eq. Assce. Co.*, 4 Jur., N.S., 1169.

(*c*) *Tesson v. Atlantic M. Ins. Co.* 40 Mo., 33; *National F. Ins. Co. v. Crane*, 16 Md., 260.

(*d*) *Cooper v. Farmers' M. F. Ins. Co.*, 50 *Penn. st.*, 299.

(*e*) Smith's Mer. Law, 343. *Aquilars v. Rogers*, 7 *T. R.*, 421; and *Uhde v. Walters*, 3 Camp. 16.

But no usage of the company, nor even the express agreement of the parties, whether made previous to or at the time of the execution of the policy, can be admitted to explain, modify, or control the written contract (*a*).

So, verbal conversations had between parties at the time of effecting a policy, cannot be relied on to vary its terms (*b*).

Parol testimony is admissible to explain a latent ambiguity in regard to the merchandize intended by the parties to be embraced in the policies (*c*).

Where the policy was for "£1000 on oil mill; on steam engine therein, £300; on logwood warehouse, in which chopping dyewood is performed, communicating with the mill, £200; on warehouse on the other side of the mill, to the east side, merely for storing goods, £300"; it was held that there was no ambiguity in the policy, and that evidence to shew that it was intended to insure the machinery and gear in the logwood house, was inadmissible (*d*).

Parol evidence is not admissible to vary the terms of the policy or to shew what risks were intended to be covered and protected by the policy (*e*), nor to vary the terms of the policy and survey, when the latter has been made a part of the contract, and there is no ambiguity in either (*f*).

But it seems such evidence would be admissible to

(*a*) *Illinois M. Ins. Co. v. O'Neill*, 13 Ill., 89.
(*b*) *Todd v. Liverpool and L. Ins. Co.* 18 U. C. C. P., 192.
(*c*) *Stone v. Elliott F. Ins. Co.*, 45 Me. 175.
(*d*) *Hare v. Barstow*, 8 Jur., 928.
(*e*) *Honnick v. Phœnix Ins. Co.*, 22 Mo. 82.
(*f*) *Glendale W. M. Co. v. Protection Ins. Co.*, 21 Conn. 19. *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235.

shew the extent of the interest intended to be protected, if it does not contradict the terms of the policy itself (*a*).

Such evidence cannot be received to control, explain or modify a warranty in a policy of insurance (*b*); nor can a statement in the policy which is in terms a warranty, be shown by parol evidence to have been inserted by mistake (*c*).

But parol evidence is admissible to shew that an assignment of the interest insured made after the issue of the policy, and before the loss was in fact made, as collateral security only, though the assignment was absolute on its face (*d*).

By the general principles of insurance, whenever the risk to be run is *entire*, there is no return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time which cannot be severed; and, therefore, if the policy is avoided, and the insurers are discharged the very day after its taking effect, there can be no apportionment or return of premium (*e*).

But where the policy never attaches, the insured may recover back the premium (*f*). And no doubt he might do so in any case of cesser of interest, if there was an express condition to that effect in the policy.

When the policy is void the insured is entitled to a return of the premiums; but the return of the premiums

(*a*) *Franklin Ins. Co. v. Drake*, 2 B. Monroe, Ky., 47.
(*b*) *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136.
(*c*) *Cooper v. Farmers' M. F. Ins. Co.*, 50 Penn. St., 299.
(*d*) *Ayers v. Home Ins. Co.*, 21 Iowa, 185.
(*e*) *Tyrie v. Fletcher*, Cowp. 666. *Stevenson v. Snow*, 3 Burr. 237. *Fowler v. Scottish Eq.*, 4 Jur. N. S., 1169. *Anderson v. Thornton*, 8 Ex., 425.
(*f*) *Mulvey v. Gore D. M. F. Ins. Co.*, 25 U. C. Q. B. 424. See also *Strickland v. Turner*, 7 Ex., 208.

cannot be ordered in a suit in which the insured fails to shew any right to recover on the policy, for this would be granting some relief to a party who has failed in establishing an equity (*a*).

Where the risk never attaches, the premium must be returned, as already explained, provided there is no fraud (*b*).

But, if the policy is obtained by fraudulent misrepresentations, and never attached for that reason, no premium is returnable (*c*); and, in general, when there is fraud on the part of the insured or his agent, the premium cannot be recovered back (*d*).

If, however, there is fraud on the part of the insurers, who, at the time of underwriting, privately know circumstances rendering the contract void, the premium may be recovered from them (*e*).

Where the contract is illegal the premium cannot be recovered back, for in such case the maxim, *in pari delictu potior est conditio possidentis* applies (*f*).

Where the 14 Geo. III., c. 48, s. 2, was not complied with, the party effecting the insurance having omitted to insert the name of the person interested as that of the person interested, and the policy not shewing that the insurance was effected by one person in trust for another, the names of both being inserted in the policy, it was held that this omission of compliance with the statute

(*a*) *Bleakley v. Niagara D. M. Ins. Co.*, 16 Grant, 198.

(*b*) *Clark v. Manufacturers' Ins. Co.*, 2 Wood & Minnot, C. C. U. S., 472.

(*c*) *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.), 587.

(*d*) *Prince of Wales Ins. Co. v. Palmer*, 25 Beav., 605. *Wilson v. Duckett*, 3 Burr., 1361. *Tyler v. Horne*, Park on Ins, 329. *Chapman v. Fraser*, ib. *McFaul v. Montreal F. Ins. Co.*, 2 U. C. Q. B., 61-2.

(*e*) Beaum. on Ins. 20. *Carter v. Boehm*, 3 Burr., 1909.

(*f*) *Lowry v. Bourdieu*, Doug. 468. *Wilson v. R. E. A. Co.*, 2 Camp., 623. *Cowie v. Barber* 4 M. & Sel., 16,

did not constitute a *delictum* so as to render the maxim *in pari delictu potior est conditio possidentis* applicable, and that, therefore, the insured was entitled to recover back his premium (*a*).

Money paid on a consideration which has failed may be recovered back; but, where a person has paid money to another with full knowledge of facts, he cannot sue for its recovery on the ground that he has paid it in ignorance of the law resulting from these facts. Thus, if the insured pays the premium, knowing at the time that the policy is void, he cannot recover back the money paid, without, at least, giving the company an opportunity of remedying the defect; and it would seem that he could not in any case recover back the premium already earned under a policy informally executed, where the acceptance of the risk and payment of the premium would constitute a valid insurance, though the *policy* was not binding. But it seems the insured might resist an action for the payment of a further premium until a valid policy were executed, or he might resist an action on the premium note if the insurance was not in fact binding, for there would be an entire failure of consideration (*b*).

The insured, however, might recover back the premium if he had paid it in forgetfulness of certain facts which entitled him to resist payment (*c*).

Where a policy is in fact binding on the company, though not formally executed, the insured who has paid his premium with full knowledge of the informality, cannot recover it back on the ground of a consideration

(*a*) *Dowker v. Canada L. Ass. Co.*, 24 U. C. Q. B., 591.

(*b*) *Perry v. Newcastle D. M. F. Ins. Co.*, 8 U. C. Q. B., 363. See also *Bell v. Gardiner*, 4 M. & Gr., 11.

(*c*) *Lucas v. Worswick*, 1 M. & Rob., 293. *Kelly v. Solari*, 9 M. & M., 54.

which has failed. Where the policy for want of the signature of the president was void under the statute, but under a by-law of the company the insurance took effect on deposit of the application and premium note which was done, the insured paying his premium with knowlege of the defect in the policy was held not entitled to recover back the amount (*a*),

If a policy of insurance is made in Canada, our law governs its interpretation, and it is no defence for the insurers that the loss is occasioned in a foreign jurisdiction under circumstances affording a good defence to an action brought in that jurisdiction. In order that the law of the place where the loss occurs may be taken advantage of by the insurers, it must be shown that the contract was made there. Thus, in the case of the loss of a propellor by collision with a sailing vessel in American waters, it was held no defence for the insurers to show that by the law of the States it was incumbent on all vessels propelled by steam to keep out of the way of sailing vessels; and that in the case of loss or damage arising from collision between a steamer and sailing vessel, it is presumed that the fault or negligence lay with the former, and that therefore they were not entitled to any compensation from the insurers (*b*).

Where an insurance is effected in Canada with the agent of a foreign company doing business therein, and the agent gives a receipt for the premium, and the policy is then prepared and executed at the company's place of business in the foreign jurisdiction, and transmitted to the agent in Canada, and by the latter delivered to the insured, the law of this country, and not that of the

(*a*) See *Perry v. Newcastle D. M. F. Ins. Co.*, 8 U. C. Q. B., 363.
(*b*) *Patterson v. Continental Ins. Co.*, 18 U. C. Q. B., 9.

foreign state, is to govern the interpretation of the policy, for when the premium is paid and receipt given, the insurance is substantially complete, and therefore the contract is made here (*b*)

It has, however, been held in the United States that where by the terms of the policy the applicant must deposit his application and premium note with the secretary of the company, and then if approved, the policy to be dated as of the day of approval, and it appeared that the agent of the company in Canada received the application and premium note and forwarded them to the place of business of the company in the United States, and on their receipt the company executed a policy and returned it to the agent in Canada for delivery to the applicant: that the contract was consummated by the final assent on the part of the company, and upon that event and not upon its delivery to the insured became operative, and that the validity of the contract must therefore be determined by the law of the United States, as it was made there (*c*).

Another case seems to show that if it is necessary to the validity of the contract that it should be countersigned by an agent, the place where it is so countersigned will be the place of the contract. Thus, when the policy was issued in New York, and purported to be dated there, and signed by the president and secretary, but the negotitaion was had by an agent of the company in Massachusetts, and it was countersigned there in pursuance of a provision to that effect in the policy, and delivered to the insured, it was held that the contract

(*b*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B., 607.
(*c*) *Western v. Genesee M. Ins. Co.*, 2 Kern. N. Y., 258.

took effect in Massachusetts, and was to be governed by the law of that state (*a*).

Where the Act of Parliament incorporating the company contains no provision as to their having a common seal, but requires that the policy should be subscribed by the president, and countersigned by the secretary, a policy so signed is valid without the seal of the company, and evidence of these persons having acted as president and secretary is *prima facie* evidence of their appointments (*b*).

Where there is a stipulation in the policy "that it shall not be valid until countersigned by the agent," a policy signed by "B. for the agent," is void, and a premium note given by the insured is also void (*c*).

The policy must be subscribed by the officers of the company in conformity with the requirements of the charter, but no seal is necessary unless made so by the terms of the contract.

The Consolidated Statutes of Upper Canada (now Ontario), c. 52. s. 27, as to mutual companies, provides that where the insured has a title in fee simple unincumbered to the property insured, any policy of insurance thereon issued by the company, which is signed by the president and countersigned by the secretary, shall be deemed valid and binding on the company, but not otherwise; but if the insured has a less estate therein, or if the premises be incumbered, the policy shall be voidable, at the option or in the discretion of the directors, unless the true title of the insured be expressed therein, and in the application therefor (*d*).

(*a*) *Daniels v. Hudson R. F. Ins. Co.*, 12 Cush. (Mass.), 416.
(*b*) *Dimock v. New Brunswick M. Assce. Co.*, 1 Allen, 398.
(*c*) *Lynn v. Burgoyne*, 13 B. Monroe, Ky., 400.
(*d*) See 27-28 Vic., c. 38: Con. Stat. L. C., c. 68, s. 25.

Under this statute, the policy of a mutual company will be invalid, unless signed by the president, though it is signed by the secretary and has the corporate seal attached. The company, however, could be compelled, where they have accepted the risk, and received the premium, to execute a valid policy; and, in effect, therefore, there is a subsisting insurance, though the policy is not properly executed *(a)*.

It is necessary that the insurers should, by proper operative words, contract to pay the sum insured. Thus, no action at law can be maintained on a policy as follows: "We, the trustees and directors of the said society, whose names are hereunto subscribed, *do order, direct and appoint the directors for the time being* of the society to raise and pay, by and out of the monies, securities and effects of the said contributionship pursuant and according to said deeds;" for the underwriters do not in this case promise to pay, but merely direct their successors to do so. The contract was, therefore, held ineffectual, on the principle that the obligation must be imposed upon, and commence with the party subscribing the contract, in order to bind his heirs or successors *(b)*.

But where the directors subscribing the policy "declared" that the sum should be paid out of the funds of the society, this was held sufficient to support an action of assumpsit *(c)*.

The delivery of the policy is necessary to perfect the contract for the mere execution of the policy by the insurers, although under seal, is not conclusive, so long as it remains in their custody. Until the policy has been delivered or accepted at any rate by the insured, there

(a) *Perry v. Newcastle D. M. F. Ins. Co.*, 8 U. C. Q. B., 363.
(b) *Alchorne v. Saville*, 6 Moore, 202 n. See also *Barber v. Cox*, 2 Saund., 37.
(c) *Andrews v. Ellison*, 6 Moore, 199.

is no binding contract between the insurer and the insured: for so long as the insured has the power to reject the policy, there cannot be said to be a bargain, and one party cannot be bound and the other not bound (*a*).

The existence and delivery of the policy is not necessary, however, to the validity of the contract. Any written assent of one party to the written terms proposed by the other will form a valid contract, and a complete insurance may be effected by payment of the premium and the granting of the usual interim or provisional receipt by the agent of the company. And such receipt forms a second or double insurance within the meaning of a condition prohibiting double insurances (*b*).

Such an insurance is completely obligatory upon the company, though no actual policy issues until after the fire (*c*).

Where the agreement for insurance was made before the fire, and the parties afterwards, in ignorance of the fire, executed and delivered a policy in accordance with the agreement, it was held valid and binding (*d*).

When an insurance is effected by payment of the premium to the company's agent, and the granting of a receipt therefor in the usual form signed by such agent, the interest in the insurance money may be legally assigned by any simple form of transfer, such as "I hereby assign the within policy to" &c., endorsed on the policy, and such transfer does not require the consent or acceptance of the insurance company to make it binding (*e*).

(*a*) *Fourdrinier v. Hartford F. Ins. Co.*, 15 U. C. C. P., 414. *Xenos v. Wickham*, 10 Jur., N. S., 339; 14 C. B., N. S., 452.

(*b*) *Bruce v. Gore Dis. M. Ins. Co.*, 20 U. C. C. P., 207. *Weinaugh v. Prov. Ins. Co.*, 20 U. C. C. P., 405.

(*c*) *Dafoe v. Johnstone D. M. Ins. Co.*, 7 U. C. C. P., 55. See also *Goodall v. New England M. F. Ins. Co.*, 5 Fost., N. H., 169.

(*d*) *City of Devenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276.

(*e*) *O'Connor v. Imperial Ins. Co.*, 14 L. C. J., 219.

When an interim receipt is given by the agent of an insurance company, the latter have in general the right to accept or reject the risk within a reasonable time, and until a rejection is notified to the insured, the company will continue bound. Where a receipt was given in the following form: "The Times and Beacon Assce. Company Agent's Office, Brantford, 3rd February, 1858.—Received from Messrs T. Goodfellow & Co., the sum of $14, being the premium for an insurance to the extent of $2000, on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured. For three months,"—it was held that the act of the agent in giving the receipt purporting to insure for the twenty-one days was subject to the approval of the board, as well as the insurance for three months; that it was therefore not an absolute insurance for twenty-one days, but that the company might within that period reject the risk and give notice, after which their liability would cease (*a*).

A provisional receipt in the form furnished in blank to the agent of the company acknowledging the receipt of $40, "being the premium of insurance on property for twelve months, and for which a policy will be issued by the R. I. Co. within sixty days, if approved by the manager, otherwise the receipt will be cancelled, and the amount of unearned premium refunded," and containing at the bottom, "N.B.—This receipt will be void should

(*a*) *Goodfellow v. Times & B. Assce. Co.*, 17 U. C. Q. B., 411.

camphine oil be used on the premises," was held to create a contract of insurance binding on the company until rejection, and taking effect immediately on its being given and the premium paid (*a*).

Where a person has effected an insurance by paying the premium and obtaining an interim receipt, and the insurance is accepted by the company within the time limited, but after such time and before the issue of a policy the property is destroyed by fire, the Court of Chancery will compel the company to pay the amount of the insurance money; but it seems doubtful whether under such circumstances they could compel the issue of a policy (*b*).

And if the insurer in such case refuses to execute a policy, the insured may at law recover damages for such refusal (*c*).

An agreement to insure may be specifically enforced, and if a loss happen, payment may be compelled in a court of equity (*d*); so it has been held in the United States that a court of equity may compel the delivery of the policy contracted for either before or after the happening of the loss (*e*).

Where an agreement for insurance is entered into and the premium paid, but the policy is not executed until some days afterwards, it may be dated as of the day on which the agreement was made and the premium paid, and have retroactive operation in relation to that day (*f*).

(*a*) *Patterson v. Royal Ins.* Co., 14 Grant, 169. See also *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.), 645.

(*b*) *Penley v. Beacon Assce. Co.*, 7 Grant, 130. See also *Motteux v. London Assce. Co.*, 1 Atk., 545. *Goodall v. New England M. F. Ins. Co.*, 5 Fost. (N.H.), 169.

(*c*) *Hickey v. Anchor Assce. Co.*, 18 U. C. Q. B., 438.

(*d*) *Carpenter v. Mutual S. Ins. Co.*, 4 Sandf. Ch. (N. Y.), 408.

(*e*) *Tayloe v. Merchants Ins. Co.*, 9 How,. U. S., 390.

(*f*) *Lightbody v. North Am. Ins. Co.*, 23 Wend. (N. Y.), 18.

The rule that the assent of both parties is necessary to complete a contract is as applicable to policies of insurance as to any other description of contract, and in order that the contract may be binding, the minds of the parties must meet as to the premises, the risk and its duration, the premium and the amount insured (*a*).

As a proposal for insurance may be made by letter, it is sometimes material to consider when the necessary assent is given to bind the contract. The general doctrine on this point is, that the acceptance of a written proposal for insurance, consummates the contract, provided the offer is standing at the time of acceptance (*b*).

Where the company offered to insure on certain terms by letter, and the insured replied accepting the terms and inclosing the premium, the contract was held to be consummated from the date of mailing the acceptance, though the property was destroyed before receipt of the same by the company (*c*).

The statute, 28 Geo. III., c. 56, directs that there must be inserted in the policy the name or names of one or more of the persons interested, or of consignor or consignee of the property, or of the persons resident in Great Britain who shall receive the order and effect the policy, or of the person who shall give the order to the agent immediately employed to effect it.

The 14 Geo. III., c. 48, provides that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use,

(*a*) *Baptist Ch. v. Brooklyn F. Ins. Co.*, 28 N. Y., 153.

(*b*) *Adams v. Lindsell*, 1 B. & Ald., 681. *Routledge v. Grant*, 6 Bing., 653. *Hamilton v. Lycoming Ins. Co.*, 5 Penn., 339.

(*c*) *Tayloe v. Merchants F. Ins. Co.*, 9 How., U. S., 390.

benefit, or on whose account such policy is so made or underwrote.

Under the 14 Geo. III, c. 48, it is not sufficient that the name of the person interested is inserted in the policy, but the name must be inserted *as that of the person interested* (*a*).

A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife, they would hold the insurance money for the survivor and for their children. *Held*, that such policy was illegal under 14 George III., c. 48, s. 2, for the name of the person interested therein, or on whose account it was made was not inserted in it *as such* person, and the declaration of trust which shewed that the plaintiff had no interest could not be incorporated as part of the policy. (*b*).

Where the trustee has no legal interest in the property, as in the case of a husband, devisee or executor, in regard to the property of the minor, or wife or legatee, no insurance can be effected in the name of the trustee without also inserting in the policy the name of the person beneficially interested (*c*).

When several properties are covered by the policy, it is sometimes very material to consider whether a separate insurance is effected upon each, for if the insurances are separate and distinct, if one is avoided the other will not be effected; but if they are connected and

(*a*) *Hodson v. Observer L. Assce. Co.*, 8 E. & B., 40.
(*b*) *Dowker v. Canada Life Assce.*, 24 U. C. Q. B., 591.
(*c*) *Collett v. Morrison*, 9 Hare, 162. *Hodson v. Observer L. Co.*, 8 E. & B., 40.

entire, the whole policy fails, by reason of any defect avoiding the policy as to any part of the property. Thus, in the case of second insurances, it has often been a question whether they both cover the same property, and if the contract in the first policy is divisible as to the different subjects of insurance and creates a separate insurance upon each, a second insurance upon one of these subjects, will only avoid the policy as to that particular subject, and it will remain valid as to the others on which the insurance is distinct.

It seems clear that by express contract a policy of insurance may be made divisible as to the different subjects of insurance, and when there are separate sums secured upon each, and a distinct remedy in case of loss by fire to any one of them without regard to the other buildings, the insurance for the full amount upon any one of the properties might be recovered by the assured, even although he pulled down or removed the other buildings or subjects of insurance altogether. Some defences more particularly applicable to a part of the subjects insured may perhaps be held to defeat the insurance upon the whole, and it would seem that in any case the divisibility of the policy as to the different subjects of insurance depends upon its terms; and if the parties desire that the policy should be divisible as to any particular subject, they should be careful to use language to that effect in the policy. Thus, where the condition of a policy provided that the "alteration of *any building* within the limits described in the application will vitiate the policy," and the evidence shewed that there were three different subjects of insurance within the limits described by the application, namely, a frame dwelling house, barn No. 1, and barn No. 2, insured in different

sums, it was held that an alteration as to the dwelling house and barn No. 2 avoided the policy as to barn No. 1, although no alteration as to the latter was pleaded, the evidence showing the alteration of a building within the limits described by the application (*a*).

But where an insurance was effected at different rates of premium on two different subjects of property in no way connected with each other, it was held that the contract was divisible, and that a fact which avoided the policy as to one property, did not affect it as to the other (*b*); and where the insurance was for different sums on several houses, with a clause that if any building should contain any furnace or stove used, etc., the policy should be void *in respect to such building*, a plea in answer to the whole count, setting out that certain of the buildings did contain furnaces and stoves, was held bad, for the policy might be void as to those buildings, and still the plaintiff be entitled to recover on account of the loss of other buildings insured in the policy (*c*).

In the Con. Stat. U. C., c. 52, s. 27, (see ante p. 32), the expression "the policy shall be void," etc., should be read in the same manner as in the first branch of the section, namely, the "policy of insurance thereon," and the latter expression should be read as meaning the policy of insurance effected thereon, rather than as meaning the *policy* as an entire instrument, so that the objectionable part of the policy, if there be any such part in it, may alone be avoided. Where, for instance, a policy covers distinct properties, effecting a separate insurance upon

(*a*) *Kuntz v. Niagara Dis. M. F. Ins. Co.*, 16 U. C. C. P., 573.

(*b*) *Date v. Gore D. M. Ins. Co.*, 14 U. C. C. P., 548.

(*c*) *Daniel v. Robinson*, Batty, 650. As to cases where the policy is not divisable, see *Barnes v. Union M. F. Ins. Co.*, 51 Me., 110. *Gould v. York Co. M. F. Ins. Co.*, 47 Me., 403. *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me., 472. *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33.

each at different rates of premium, and the insurance is void as to one property by reason of its being incumbered within the meaning of the section, the expression "the policy" should be read as above mentioned, so as only to render void that part of the insurance effected on the incumbered property, unless indeed the contract is so expressed, and is so inseparable, that if one part of it is avoided, the rest of it must of necessity be avoided also.

There is no doubt that circumstances may render the contract divisible. But if an insurance were effected for a single sum upon a house, and the goods in it or upon a house and goods contained in a different house so that it would be impossible to say how much of the amount insured was upon the house and how much upon the goods exclusively, it might be that if the insurance on the house were invalid, the whole policy would be avoided.

But such a contract is not necessarily indivisible, and if it appear that it may well be dealt with in separate clauses, and the parties have insured for distinct and independent sums on different and distinct kinds of property, and different considerations or rates of insurance have been paid by the assured on these distinct properties according to their nature, quality and situation, it seems that such a contract ought to be severally construed.

Fraud as to part would in all probability vitiate the whole, but in the absence of fraud or some such general cause extending to the whole, the part which is specially affected by any ground of defence should alone be held to be invalidated when it can be impeached (*a*).

(*a*) *Date v. Gore Dis. M. F. Ins. Co.*, 14 U. C. C. P., 548.

But the two subjects of insurance must have no connection with each other; if they have and are both in the same building and insured by the same policy, the whole insurance will be avoided by the effect and provisions of the statute (*a*).

The policy usually contains a condition that if for any cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the insured or his representative of their intention to do so; in which case the company shall refund a ratable proportion of the premium. If there is no such clause, the policy may, like any other contract, be cancelled by consent of both parties. If the option is sought to be exercised by the company, they must, of course, comply with the condition granting it. It would seem that a notice and tender, or actual return of a ratable proportion of the unearned premiums would be necessary.

A policy of insurance, although under seal, is not like a deed conveying an interest in lands. It may be cancelled in divers ways, *in pais*; as, for example, tearing off the seal *animo cancellandi*, or, it would seem, endorsing a memorandum in writing, with the consent of parties, and the intention of cancelling will operate as a cancellation *(b)*.

So, if, after assignment of the first policy to a third party, a new policy for a larger sum is executed, with the intention of cancelling the former, the consideration or premium paid in the former being applied and taken as a premium upon the second, which is substituted for

(*a*) *Ramsay W. C. M. Co. v. Mutual Ins. Co., Johnston*, 11 U. C. Q. B., 516.
(*b*) *Xenos v. Wilkham*, L. R., 2 E. & I. App., 309.

the former, this, it seems, would be a good cancellation in law of the former policy *(a)*.

Although a policy of insurance is duly executed and assigned to a third party, with the consent of the company, if an action is afterwards brought, as well on behalf of the assignee as of the original insured, the fact that the assignee was never interested in the insured property, and that before the loss the policy was cancelled by an arrangement between the insurers and insured, by which a policy on other goods is substituted, and the unearned part of the premium credited by the insurers to the insured, will be a good answer to the action in equity, and it seems also at law *(b)*.

When an alteration is required in a policy, it may be made by an endorsement, if it is such as is provided for by the conditions of the policy; but, if not, and the contract becomes a new one, a new policy should be issued *(c)*.

(*a*) *Miall v. Western Ins. Co.*, 19 U. C. C. P., 276.
(*b*) *Miall v. Western Ins. Co.*, 19 U. C. C. P., 270.
(*c*) Gillson's case, 2 Leach, 1007; 1 Taun., 95.

CHAPTER II.

THE PARTIES TO THE CONTRACT.

THE general rule is that any person capable of entering into a contract on his own behalf may insure against fire. No company can, however, become insurers without obtaining a licence from the Minister of Finance, as already explained *(a)*.

A pledgee, or person holding goods for advances, may insure in his own name *(b)*. As may also an agent or consignee to the extent of his lien on goods in his possession, where he is paid by a commission on the proceeds or out of the profits of the sale (*c*).

An alien enemy cannot insure in this country, but where the policy is originally valid, and the insured becomes an alien enemy after the loss and before the action, the right to sue is not lost, but suspended during the war. *(d)*

It seems that a carrier by sea cannot effect an insurance against the perils of the navigation, as he has the bill of lading for his indemnity; but an inland carrier may in general insure *(e)*.

Where carriers effect an insurance "on goods their own and in trust" as carriers, they may recover the full value of the goods, although, by reason of non-compliance with the Carriers' Act, 11 Geo. IV. and 1 Wm. IV., c. 68, they would not be responsible to the owners for

(*a*) See Ante p. 21, 31 Vic., c. 48.
(*b*) *Sutherland v. Pratt*, 11 M. & W., 296.
(*c*) *Flint v. Le Mesurier*, cited in Parke on Ins., 563. *Barclay v. Cousins*, 2 Ea., 544. *Ætna Ins. Co. v. Jackson*, 16 B., Monroe, Ky., 242.
(*d*) *Harman v. Kingston*, 3 Camp., 150. Bunyon on F. Ins., 23–4.
(*e*) *Crowley v. Cohen*, 3 B. & Ad., 478.

their loss. In order to protect their own interest as carriers, it is not necessary that the goods should be insured as "in trust or on commission;" but where a condition of the policy provides that "goods in trust or on commission must be insured as such, otherwise the policy will not extend to cover such property," the condition must be complied with to entitle the carrier to recover the entire value of the goods *(a)*.

If the condition is not complied with, and the policy is merely in the name of the insured, he cannot recover in respect of goods held in trust *(b)*.

Warehousemen and wharfingers may insure the property of their customers deposited with them in the way of their business for safe custody, under the description of "goods in trust or on commission," although they have no express authority to do so from the owners of the goods, and would not be liable to the latter for their loss. And where wharfingers insured their own property and that of their customers in one policy, by which the insurers contracted to pay "all such loss and damage as may happen by fire to the property insured," it was held that they might recover the full sum insured in trust, and that their claim was not limited merely to their charges for landing, wharfage and cartage, but being satisfied the amount of their lien for these, they would be trustees of the residue for the benefit of the owners *(c)*.

So, if factors insure "goods as well the property of the insured as those held by them on commission," they may

(*a*) *London & N. W. Ry. Co. v. Glyn*, 1 E. & E., 652. *Richardson v. Home Ins. Co.*, 21 U. C. C. P., 297.

(*b*) *Rafael v. Nashville M. & F. Ins. Co.*, 7 La. An. 244. *Brichta v. New York L. Ins. Co.*, 2 Hall (N. Y.), 372.

(*c*) *Waters v. Monarch F. and L. Assce. Co.*, 5 E. & B., 870.

recover the whole value of the property, and not merely their lien or advances thereon (*a*).

An insurance by a warehouseman upon "merchandize generally in a certain warehouse for whom it may concern," protects only such interests as were intended to be insured at the time of the execution of the policy (*b*).

In these cases, however, the carrier or wharfinger could recover for himself only to the extent of his personal interest, and would be a trustee of the surplus for the benefit of the owner. Evidence would be admissible to shew the interest of the owner, and that the policy was effected for his benefit, and it would be for the jury to find this as a question of fact (*c*).

A trustee may insure for the benefit of his *cestui que trust*, and on recovering the insurance moneys, he will hold them for the benefit of the party beneficially interested; nor will his right to recover be affected by the fact that the name of the party beneficially interested is not inserted in the policy (*d*).

If, however, a trustee desires to effect an insurance, he should be careful to remember that nearly all the offices require by their conditions that the goods held in trust must be insured as such, otherwise the policy will not cover such property; and, in case of loss, the names of the respective owners must be set forth in the preliminary proofs of loss, together with their respective interests therein.

The expression "goods in trust or on commission," means goods with which the insured are entrusted, in the ordinary sense of the term, and not those in which he

(*a*) *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.), 84.
(*b*) *Steele v. Franklin F. Ins. Co.*, 17 Penn. St., 290.
(*c*) *Richardson v. Home Ins. Co.*, 21 U. C. C. P., 297.
(*d*) *Tidswell v. Ankerstein*, Peake, 151. *Hill v. Secretan*, 1 B. & P. 315. *Insurance Co. v. Chase*, 5 Wall, S. Ct., U. S., 509.

has a legal interest, with an equitable and beneficial interest in some other person. Thus wharfingers may, by the use of these words, insure the goods of their customers entrusted to them in the way of their business for safe custody (*a*).

The provision as to goods "in trust or on commission" being specified in the policy, should not receive a strict technical construction; but the substantial question in such cases is whether the insured is the beneficial owner or has merely the possession as bailee (*b*).

A condition in the policy that if the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the insurers, and expressed in the policy in writing, does not apply so as to affect an assignee of the policy (*c*).

It seems that the endorsement of warehouse receipts to a third person will make such person an *owner* within the meaning of a condition that property must be insured in the names of all the owners (*d*).

Notwithstanding the provision in the Act as to the registration of inland vessels (Con. Stats. Can. c. 41), that the mortgagee shall not, by reason of the transfer, merely be deemed to be owner, nor shall the mortgagor be deemed not to be owner, a mortgagee of a vessel who is alone named in a policy as the assured, without any general words or other indication of interest in any other person, but who has in fact insured the mortgagor's interest also, with the knowledge of the insurers, can re

(*a*) *Waters v. Monarch F. and L. Assce. Co.*, 5 E. & B., 870.
(*b*) *South A. Ins. Co. v. Randell L. R.*, 3 P. C. App., 101.
(*c*) *Davis v. Home Ins. Co.*, 3 E & A. Reps., 269.
(*d*) *McBride v. Gore Dis. M. F. Ins. Co.*, 30 U. C. Q. B., 451.

cover the whole amount so insured on parol evidence of that fact (*a*).

But without some general words, or such words, "as agent," only the interest of the person named is insured. (*b*).

This statute only applies when the vessel is registered, and the mortgagor of a non-registered vessel has not such an interest as is saleable under a *fi. fa.*; for, by the mortgage, the legal interest passes to the mortgagee. Where the plaintiff at the trial claimed, as owner, by purchase, of the mortgagor's interest, at a sale, under a *fi. fa.*, and, on the judge ruling against him, applied, and was allowed to prove his interest as mortgagee, which, in fact, he was. Upon a motion for a nonsuit on this ground, it was held to be within the discretion of the judge at *nisi prius* to permit such amendment and variance in the line of proof; and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused (*c*).

In such case the plaintiff can only recover the amount due on the mortgage with interest.

A mortgagee may insure to the full value of the property, but can only recover to the extent of his mortgage debt, unless it appears that in effecting the policy he intended to cover, not his own interest only, as mortgagee, but that of the mortgagor also. In the latter case, he can recover the full sum insured, and, after deducting his debt, he will be a trustee of the surplus for the mortgagor. If, however, he intended to cover only his own interest as mortgagee, and the amount of the insurance

(*a*) *Richardson v. Home Ins. Co.*, 21 U. C. C. P., 291.
(*b*) *Ib.*
(*c*) *Scatcherd v. Equitable F. Ins. Co.*, 8 U. C. C. P., 415.

is greater than that of the mortgage debt, he can recover to the extent only of his lien (*a*).

Persons having different interests in the same subject may insure their several interests, and therefore, a mortgagor and mortgagee may both insure the same building, and in such case the particular interest of each need not, as a general rule, be described in the policy, but it may be described as the property of the insured. The mortgagee can insure for himself only to the extent of his debt, whereas, the mortgagor can insure to the full value of the property, notwithstanding the incumbrance upon it; and, in this respect the insurable interests of mortgagor and mortgagee differ essentially (*b*).

Where a mortgagee effects an insurance for his own indemnity only on the mortgage property, he cannot be held to insure the specific property mortgaged, but only so much of it as is sufficient to satisfy the mortgage debt. In effect, the security only is insured, and the insurance is limited to the interest specified in the policy, not exceeding the amount of the mortgage debt. Thus, if the policy covered several properties, and only one was destroyed by fire, it might be doubted whether the mortgagee could recover in respect of this property, if the remaining value of the premises insured was more than sufficient to secure his debt (*c*).

It has, however, been held in the United States, that a suit by the mortgagee is not to be defeated by reason of the fact, that notwithstanding the loss by fire, the mortgaged premises are still ample security for the debt. The insurers

(*a*) *Richardson v. Home Ins. Co.*, 21 U. C. C. P. 301-2; *Burton v. Gore D. M. F. Ins. Co.* 12 Grant, 167; *Irving v. Richardson* 2 B. & Ad., 193.. See also *Castelli v. Boddington* 1 E. & B. 65; ib. 79; *Smith v. Packard* 19 N. H., 575.

(*b*) *Angell on Ins.*, 101-2; *Carpenter v. Washington Ins. Co.* 16 Peters (U. S), 475; *Motley v. Manufacturers Ins. Co.* 16 Shep. (Me.), 337. See also *Richards v. Liverpool & L. F. Ins. Co.* 25 U. C. Q. B., 400; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P., 497.

(*c*) *Mathewson v. Western Assce. Co.* 4 L. C. J., 57; 10 L. C. R., 8.

in such case, on paying the mortgagee, would be entitled to be subrogated as to his right against the property (*a*).

If a policy taken out by the mortgagor has been assigned as collateral security to the mortgagee, the entire loss may be recovered (*b*).

The appointment of an agent may be by writing or orally, or impliedly, by the course of business and correspondence between the principal and agent. When the whole authority is conferred by a written instrument, its nature and extent must be ascertained from the instrument itself, construed by reference to the usages of the trade to which it relates. When an agent has no written appointment, the jury must decide as to the extent of his authority from what he testifies and did, coupled with the acts of the company recognising him.

The authority of agents may be general or special—general when it extends to all acts connected with the particular business or employment, special when confined to a single specific act.

When the insurance is effected by an agent, the applicant should be careful to ascertain what powers are conferred on the agent by the condition of the policy to be issued by the company, for an insurance agent is only empowered to insure according to the conditions of the policy, and although he has power also to adjust claims, he clearly has no power to alter the conditions which are essential ingredients of the contract. Thus, he would not be empowered to waive a condition requiring notice of previous insurance to be given to the company, and endorsed on the policy, where

(*a*) *Kernochan v. New York B. F. Ins. Co.* 5 Duer. N. Y., 1; affirmed 17 N. Y. 428; *Rex. v. Insurance Co.* 2 Philadelphia Rep. Pa. 357; *Crawford v. St. Lawrence Ins. Co.* 8 U. C. Q. B., 135; *Burton v. Gore D. M. Ins. Co.* 12 Grant, 170.

(*b*) *Carpenter v. Washington Ins. Co.* 16 Pet. U. S., 495.

non-compliance with the condition had completely avoided the policy (*a*).

So the agent would have no implied authority to waive a forfeiture of the policy, for want of compliance with the conditions (*b*).

It has, however, been held in the United States, that a general agent has full power to insure to renew, and to receive notice of other insurances, and his giving a renewal receipt and subsequent acceptance of the premium, with a notice of a breach in respect to other insurances, is as effectual a waiver of the breach as if the premium had been paid and he had accepted it with notice at the time when the renewal receipt was issued (*c*).

An agent having a general authority to insure the property of his principal, is not authorised to insure in a mutual company, and thereby constitute his principal a member and insurer of others (*d*).

An agent may effect an insurance in his own name for the benefit of the owner, without giving the name of the owner of the goods, but the words of the policy must sufficiently indicate such intention (*e*).

As it is the duty of a person effecting an insurance with the agent of a company, to ascertain the extent of the latter's powers, if a contract is entered into which is not authorised by the charter and by-laws of the company, they will not be bound. Nor does it make any difference that the company is incorporated by act of a foreign Legislature. Therefore, a contract of insurance alleged to have been made in Montreal by an agent of an insurance company, incorporated

(*a*) *Chapman v. Lancashire Ins. Co.* 13 L. C. J., 49. See also *Western Assce. Co. v. Atwell* 2 L. C. J., 181; *Lampkin v. Western Ins. Co.* 13 U. C. Q. B. 361.

(*b*) *British L. Assce. v. Ward* 2 U. C. L. J. 20; *Jacobs v. Equitable Ins. Co.* 17 U. C. Q. B., 35.

(*c*) *Carroll v. Charter Oak Ins. Co.* 40 Barb. N. Y., 292.

(*d*) *White v. Madison* 26 N. Y., 117.

(*e*) *Plahto v. Merchants' Ins. Co.* 38 Mo., 248.

by the laws of the State of New York, is null and void if its charter and by-laws provide that it can only contract in New York, and by its President or Vice-President (*a*).

A person dealing with an agent must take notice of the extent of the agent's powers and authority, and the question is not always what the actual powers of the agent are, but, what powers has the principal permitted the agent to exercise, or led others to believe the agent possessed (*b*).

Where, however, the agent, contrary to his instructions, effected an insurance upon the interest of a mortgagee, it was held, that the insured could not be prejudiced by the excess of authority, he having no knowledge of the limitation of the powers of the agent (*c*).

The applicant for insurance has, however, a right to assume that the agent has the ordinary authority of insurance agents receiving applications, unless informed otherwise by the agent or by papers to which he is a party. Where, therefore a form of application and notes for the information of insurers was supplied to the applicant, and this form shewed that the agent could only insure certain classes of property, but, nevertheless the applicant effected an insurance with the agent on another class. It was held, that the applicant was fixed with notice of the extent of the agent's authority, and that he could not recover against the company after repudiation of the insurance by them, though it was admitted the agent had authority to receive proposals and give receipts, and it was proved, that after receipt from the insured of the usual premium, an interim receipt was given "subject to approval by the Board of Directors" (*d*).

The statement of an agent of the company as to the acceptance or rejection of the policy by the head office, will be binding on the company, for he must be treated as an officer of the company to communicate with persons effecting

(*a*) *Redpath v. Sun Mutual Ins. Co.* 14 L. C. J., 90.
(*b*) *Davis v. Scottish P. Ins. Co.* 16 U. C. C. P., 185,
(*c*) *Woodbury, S. B. v. Charter Oak Ins. Co.* 31 Conn., 518.
(*d*) *Henry v. Agricultural M. Assce. Co.* 11 Grant, 125.

insurances, and what he says or does in that capacity within the proper bounds of his authority, will be binding on the company (*a*).

Notice to the agent of the company of facts material to the risk, is notice to the company (*b*). But mere knowledge by an agent of acts which would avoid a policy issued by his principals, without objection thereto, does not bind the company (*c*).

A party who employs an agent to effect an insurance for him, is bound to communicate to the agent all he knows that is material to the risk; consequently the agent will be assumed to know all that his principal knows in regard to the risk, and a non-communication of material facts by the agent will be as fatal to the policy as if the principal himself were acting (*d*). If, therefore, the assured or his agent knows any fact which it is plainly their duty to communicate, and they fail to do so, the concealment or omission will equally invalidate the policy, whether it arise from accident or design (*e*). If the agent is asked as to a fact material to the risk, and he answer not merely by way of expressing an opinion, but as stating something which he knows, the insured cannot recover, though the agent may have ignorantly misled the underwriters, and though it is not shown that this had any influence in incurring the risk (*f*). The fact of an agent having innocently made a misrepresentation of facts, while effecting a contract for his principal, will not amount to fraud on the part of the latter, if the principal, though aware of the real state of the facts, was not cognizant of the misrepresentation being made, nor directed the agent to make it (*g*).

(*a*) *Penley v. Beacon Assce. Co.* 7 Grant, 130.
(*b*) *People's Ins. Co. v. Spencer* 53 Penn. St., 353.
(*c*) *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 176.
(*d*) *Perry v. British Am. F. & L. Ins. Co.* 4 U. C. Q. B., 330.
(*e*) *Ib.* 333; *Fitzherbert v. Mather* 1 T. R. 12; *Bridges v. Hunter* 1 M. & S. 15.
(*f*) *Perry v. British Am. F. & L. Ins. Co., Supra.*
(*g*) *Kelly v. Troy F. Ins. Co.* 3 Wis., 254.

The knowledge of the agent is in general the knowledge of the principal (*a*).

So any misrepresentation or concealment by an agent will have the same effect in avoiding the policy as if it were committed by the insured himself, even though it be done without the privity or knowledge of the latter, or ignorantly; for it is a maxim of law that where one of two innocent persons must suffer by the fraud or negligence of a third, the loss shall fall on him who trusted the third person (*b*).

On the same principle the company who employ an agent, and not the party effecting the insurance, must suffer for the agent's neglect or fraud on the company. Thus, where an insurance agent issued a provisional receipt binding on the company for sixty days, but neglected to notify the company thereof, and after the expiry of the sixty days a fire occurred. *Held*, that the company were liable to the insured, though they would have had a right to repudiate the contract had the agent notified them within the sixty days, according to his duty (*c*). It was also held that, although after the expiry of the sixty days the insured might have enforced the delivery of a policy, he did not by neglecting to do so, forfeit his claim on the company for the insurance money (*d*).

A by-law, declaring that the agent, in taking the application, shall be deemed the agent of the applicant, does not divest the agent of his attributes as agent of the company when in their employ soliciting risks of insurance and making applications (*e*).

When the agent of the insurers receives the particulars from the applicant, and forwards them to his principals, if

(*a*) *Dresser v. Norwood* 10. Jur. N. S., 851.

(*b*) *Marshall on Ins.* 208–9.

(*c*) *Patterson v. Royal Ins. Co.* 14 Grant, 169. See also *Beebe v. Hartford M. Ins. Co.* 25 Conn., 51; *Nicol v. American Ins. Co.* 3 W. & M. C. C. U. S. 529.

(*d*) *Ib.*

(*e*) *Masters v. Madison M. Ins. Co.* 11 Barb., N. Y., 624.

he does not deviate from his instructions in so doing, but simply communicates the information given, he will be considered as the agent of the applicant (*a*).

A stipulation in a policy, that if any agent of the company, in the transaction of their business, shall violate the conditions, the violation shall be construed to be the act of the insured, and shall avoid the policy, will not render the insured responsible for the mistakes of the agent (*b*).

The authority of the agent must always be exercised subordinately to the conditions of the particular policy, and to the special duty with which he is entrusted (*c*). An agent has no authority to go beyond the ordinary conditions of insurance, or to do anything outside of those conditions not sanctioned by the practice of the company (*d*). Where the conditions provide that no order for insurance shall be of any effect unless the premium is first paid at the office, the agent has no authority to take a promissory note for the premium, instead of cash (*e*); nor has he the power to grant a policy, or to bind the company to do so, for they are the authority to judge of such a matter themselves. Nor can he grant a receipt to bind the company as if a policy had been granted, unless specially authorized so to act (*f*); nor has he power to cancel or alter a policy, as representing the insured, without express authority (*g*). But a company whose local agent had notice from the assignee of the insured that the insured was residing beyond the specified limits without the license of the directors of the company, and nevertheless received the premiums from the assignee for several years, transmitting them to the company, saying to

(*a*) *Parsons v. Bignold* 15 L. J. (Ch.) 379.
(*b*) *Columbia Ins. Co. v. Cooper* 50 Penn. St., 331.
(*c*) *Hendrickson v. Queen Ins. Co.* 30 U. C. Q. B., 117.
(*d*) *Henry v. Agricultural M. Ins. Co.* 11 Grant, 125.
(*e*) *Montreal Assce. Co. v. McGillivray* 13 Moore's P. C. Cases, 87.
(*f*) *Linford v. Prov. H. & C. Ins. Co.* 10 Jur. N. S., 1066; *Fowler v. Scottish Eq. L. Ins. Soc'y* 4 Jur. N. S., 1169; *Acey v. Fernie* 7 M. & W., 151; *Chase v. Hamilton M. Ins. Co.* 22 Barb. N.Y., 527.
(*g*) *Xenos v. Wickham*, L. R. 2 H. L., 296.

the assignee that the policy would not be invalidated, was held to have had constructive notice of the breach of the condition, and to be precluded by their agent's conduct from insisting on the forfeiture (*a*).

The true question is not, in all cases, what was the real extent of the authority expressly or in fact given to the agent by the insurers, but what they have held him out to the world to persons with whom they had dealings, and who had no notice of any limitation of his powers, as authorized to do for them. An agent may bind his principals by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal, the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the persons with whom he is dealing. An agent's authority will ordinarily be limited by any restrictions on the powers of his principal, unless the principal has assumed to exceed those powers, and has held out the agent to the world as also authorized to exceed them. Where, therefore, the charter and by-laws of an insurance company only authorized them to enter into insurance contracts by policy signed by three directors and countersigned by the manager and secretary, and under the seal of the corporation, it was held, in the absence of evidence, that the company had expressly delegated to the agent, or had assumed the power to make contracts of fire insurance by parol, and had held out their agent as having authority to make such contracts without restriction; that they were not bound by a parol insurance effected by their agent not in conformity with their charter and by-laws; that the limitations and restrictions in the manner of effecting insurance being contained in a public statute, must be taken to be well known, and

(*a*) *Wing v. Harvey* 18 Jur., 394. See also *Armstrong v. Turquand* 9 Ir. C. L. R., 32; *Supple v. Cann*, 9 Ir. C. L. R., 1; *Hendrickson v. Queen Ins. Co.* 30 U. C. Q. B., 117-8.

were therefore binding on the party contracting with the agent (*a*).

An insurance company can only carry on business by agents, managers, and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and which are not required by their act of incorporation to be under seal, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. The seal is only required in matters of unusual and extraordinary character, which are not likely to arise in the ordinary course of business (*b*). But the agent of a marine company, empowered by their contracts to recover and repair vessels sunk or damaged, has no power to submit to arbitration, by parol agreement, the question whether the insured or the insurers ought to pay the expense of raising and repairing a vessel sunk in the lakes, for the contract does not relate to the purposes for which such company is formed; and, moreover, as the appointment of an arbitrator would have to be made by a submission deed under the seal of the company, and as a parol contract to enter into another contract under seal cannot be enforced against a corporation, the agreement is not binding on the company (*c*).

The agent of an insurance company has, in general, authority to bind the company by an interim or provisional receipt in such form as is furnished by the company; and this provisional receipt entitles the insured to have one of the usual forms of policy of the company executed and delivered to him, unless the insurance is rejected or altered, and a special form of policy stipulated for (*d*).

No person can by any subsequent act entitle himself to

(*a*) *Montreal Assce. Co. v. McGillivray* 13 Moore's P. C. Cases, 87.
(*b*) *South. I. Col. Co. v. Waddle*, L. R. 4 C. P., 463.
(*c*) *Calvin v. Prov. Ins. Co.* 20 U. C. C. P., 267. See also *London Dock Co. v. Sinnott* 8 E. & B., 347.
(*d*) *Patterson v. Royal Ins. Co.* 14 Grant, 169.

claim the benefit of an insurance made by another, if it appears that his interest was not intended to be embraced by it when it was made, for a policy effected by a person who has himself no interest to be insured, and who at the time does not intend it for the benefit of any one who has, is a gambling policy (*a*).

But where a policy of insurance is made for the benefit of a party having an interest in the property, it is competent to him to adopt it even after the fire, although previously ignorant of its existence and such ignorance will be no defence to an action by him (*b*).

A party may insure in his own name the property of another for the benefit of the owner, without the previous authority or sanction of the latter, and it will enure to the interest of the party intended to be protected on his subsequent adoption of it even after a loss has occurred and *a fortiori*; this rule will apply if he insures in the owner's own name (*c*).

And where a party has insured with one company and this company re-insure the property in the name of the original insured, with another company, without the knowledge or authority of the insured, the latter being ignorant of the transaction is not obliged to communicate any circumstances relating to the risk, and he may recover on afterwards adopting the policy (*d*)

The ratification by the insured of a policy effected by another person for his benefit, though without his previous authority, has the same effect as if the insured himself procured the making of the policy, provided the ratification takes place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies (*e*). But as already explained a party can-

(*a*) *Angell on Ins.* 126, *DeBolle v. Pennsylvania Ins. Co.* 4, Whart, Penn, 68.

(*b*) *Ogden v. Montreal Ins. Co.* 3 U. C. C.P. 511, *Lucena v. Crawford*, 3 B. & P. 75. See also *Dafoe v. Johnstown, D. M. Ins. Co.* 7 U. C., C. P. 55.

(*c*) *Giffard v. Queen Ins. Co.* 1 Hannay 439, *Routh v. Thompson*, 13 Ea. 284, *Hagedern v. Oliverson*, 2 M. & S. 405.

(*d*) *Giffard v. Queen Ins. Co., supra.*

(*e*) See *Wilson v. Tumman*, 6 M. & G. 239; *Bird v. Brown*, 4 Ex. 798.

not be affected by the wholly unauthorized act of a stranger in effecting a policy without his previous authority or subsequent ratification. If for instance a third person without authority effected a second insurance on the property in the name of the insured, this would not avoid the policy within a condition against second insurances, provided the insured immediately on discovering the second insurance repudiated the act and declined to take any benefit under it. If he, however, adopted and ratified the second insurance, he would be bound and the policy would be avoided (*a*).

Where the father of the plaintiff without any express authority effected a second insurance on part of the premises with another company, and paid the premium and received an interim receipt but no policy was issued till after the fire. It was held (the plaintiff having ratified the act of his father and received the insurance money under the second policy) that this constituted a second insurance within meaning of the ordinary condition (*b*).

The subsequent adoption of the policy by the party for whom it was intended to be made, constitutes the party making it "a person receiving the order to effect the insurance" within the meaning of the Act 28, Geo. 3, c. 56, which provides for inserting in the policy the name "of the person who shall give the order to the agent immediately employed to effect it (*c*).

Where, in the form of application used by an insurance company, and signed by an applicant for insurance, the following notice was printed—"Applications for insurance on manufacturing establishments where steam is used for propelling machinery, must be approved of by the head office at Montreal"—it was held that this notice did not refer to a vacant distillery which had not been in operation for some years, and which, at the time of the application,

(*a*) *Dafoe v. Johnstown D. M. Ins. Co.* 7 U. C., C. P. 55.
(*b*) *Dafoe v. Johnstown Dis. M. Ins. Co.* 7 U. C., C. P. 55.
(*c*) *Wolff v. Horncastle*, 1 B. & P. 316; *Routh v. Thompson*, 13 Ea. 274; *Hagedern v. Oliverson*, 2 M. & S. 485.

it was not contemplated to put in operation, and that, therefore, the agent had authority to bind the company by an interim receipt for insurance on such distillery, for the words above mentioned did not limit his ordinary authority in effecting insurances (*a*).

So the following note in the form of application was held not to restrict the authority of the agent to bind the company by an interim receipt, where two of the questions on the application were not answered, no fraud being shown: "The applicant is *requested* to answer the above questions fully, as it is expressly agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract." It was held that the answering of all the questions was not a condition precedent to the validity of the contract, and that the agent might, in some cases, dispense with answers to the questions, when they were not referred to in the policy or conditions endorsed (*b*).

An agent of an insurance company effected an insurance upon wheat belonging to himself and his partner for the sum of £3,000, there being at the time an insurance on the mill in which the wheat was stored of £750. The rule of the company was that not more than £3,000 should be taken on any one building and its contents, and this rule was contained in printed instructions sent to the agent. The usual proposal was transmitted by the agent to the head office on the 23rd, and on the 27th of the same month the premises and wheat were destroyed by fire, no action having in the meantime been taken by the company upon the application sent in by their agent, who, on making the proposal, had refrained from drawing the attention of the company to the fact of the previous insurance on the building, and the then secretary of the company swore that, had he been aware, or had his attention been drawn to the fact of such prior risk, the second application would have been immediately rejected. After the loss occurred, the company

(*a*) *Rowe v. London and L. F. Ins. Co.* 12 Grant, 311.
(*b*) *Ib.*

paid the sums of £750 (insured on the building) and £2,250 (on the wheat), together making the sum of $3,000 allowed by the rules to be on one building and its contents. Under these circumstances, a bill filed by the agent and his partner to compel the payment of the additional £750 was dismissed with costs (*a*).

In order to prove that a person acting as the agent of a foreign insurance company, by issuing policies in their name and receiving premiums thereon, is their accredited agent, it is not necessary to show his appointment under the corporate seal. A policy of insurance of a foreign company declared that it should not be valid until countersigned by W., agent at Saint John. In an action on the policy, proof that it was signed by W., and that he acted as the agent of the company at Saint John, and had paid a loss on a similar policy, is sufficient under the Act of that Province (13 Vic. c. 37), if not contradicted, to show that he was the accredited agent of the company, and to dispense with the proof of their corporate seal the policy being countersigned by the agent, and having the corporate seal affixed, and it being proved that the agent was recognized as such (*b*).

An endorsement on a policy of insurance issued under the provisions of the 4 Wm. 4, c. 33, authorizing the removal of the goods insured from the building described in the policy to another building, and signed by the secretary alone, is binding on the company, without the president's signature (*c*). So, where the charter gave the directors the power of assenting to assignments, and the secretary alone consented to an assignment of the policy, it was held that after entering it upon the books, subject to the inspection of the directors, without any disapproval being manifested on their part, the act was binding on the company (*d*).

(*a*) *Tucker v. Prov. Ins. Co.* 7 Grant, 122.
(*b*) *Robertson v. Prov. M. & G. Ins. Co.* 3 Allen, 379.
(*c*) *Chalmers v. Mutual F. Ins. Co.* 3 L. C. J., 2.
(*d*) *Durar v. Hudson Co. M. Ins. Co.* 4 Zabr. N. J., 171.

CHAPTER III.

THE SUBJECTS OF INSURANCE OR INSURABLE INTEREST.

As a result of the principle already explained, that insurance is a contract of indemnity, it is necessary that the insured, or the party on whose behalf the action is brought, should have an interest in the property at the time of the loss, for no indemnity can be made to a person who has sustained no damage. There is also strong reason for requiring that the insured should be interested in the property during the currency of the policy, as otherwise he would be under the temptation of wilfully setting fire to the premises in order to recover the insurance money.

There are some subjects of property in which the party may have the most perfect interest, and yet they are not deemed objects of insurance. Thus, the conditions of most policies provide that books of accounts, written securities, or evidences of debt, title deeds, bonds, bills, notes, writings, money, or bullion, are not deemed objects of insurance. So in the case of mutual companies, no allowance is to be made in any case for gilding, historical or landscape painting, stucco or carved work (*a*).

At common law a policy of fire insurance is void unless the party insured has at the time an insurable interest in the property insured (*b*), and wager policies of fire insurance are void at common law irrespective of any statute (*c*).

But the necessity for an insurable interest in the property has not been allowed to rest on the authority of the common law. It has also been created by various statutes passed with a view to check wagering and blank policies. The first statute was the 19 Geo. 2, c. 37, for the regulation of insurance on

(*a*) Con. Stat. U. C., c. 52 s. 79 : Con. Stat. L. C., c. 68 s. 27.
(*b*) *Freeman v. Fulton F. Ins. Co.* 38 Barb. N.Y., 247.
(*c*) S. C. 14 Abb Pr., 398.

ships or effects laden thereon. The next statute was the 14 Geo. 3, c. 48, which provided that no insurance should be made by any person, etc. on the life of any person, etc., or *on any other event or events whatsoever*, wherein the person etc. for whose use, benefit, or on whose account such policy should be made, should have no interest or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning thereof should be null and void to all intents and purposes whatosever. The 28 Geo. 3, c, 56 and the former statutes also provide that the name of the person interested must be inserted in the policy, the 14 Geo. 3, c. 48, requiring the names of all interested to be so inserted, though under the 28 Geo. 3, c. 56, it is sufficient to insert the name or names of one or more though less than all (*a*).

A contract, in consideration of forty guineas, to pay one hundred pounds in case Brazilian shares should be down at a certain sum on a certain day, subscribed by several persons, each for himself, is void as a gambling policy of insurance under 14 Geo. 3, c. 48 (*b*).

To sustain an action on the policy, the insured must have an interest in the property at the time of effecting the insurance and at the time of the loss (*c*). Where the party insured has no interest in the property at the time of the loss, the policy is void, although the loss is by the terms of the policy made payable to a third person, and such third person, at the time of the loss, has an interest in the property (*d*). If, however, the policy is regularly assigned or the insured sues for the benefit of the assignee or vendee of the property, a recovery may be had as hereafter explained, and therefore the general doctrine above enunciated, that the *insured* must have an interest in the property at the time of the loss, requires some qualification.

(*a*) See *Ogden v. Montreal Ins. Co.* 3 U. C., C. P. 513.
(*b*) *Patterson v. Powell*, 9 Bing. 320.
(*c*) *Sadlers Co. v. Badcock*, 1 Wilson 10, 2 Atk. 534.
(*d*) *Tallman v. Atlantic F. & M. Ins. Co.* 29 How, N. Y., 71.

If the interest ceases by operation of law before the loss occurs, the insured cannot recover. Thus if a man holds as a tenant for the life of another, land on which he has a house insured and the person for whose life the land is held dies, so that the estate determines, if the house is burned the day after the death, it would seem that in the absence of any conditions as to paying for improvements or allowing their removal, he could not recover on the policy, for the contract is one of indemnity and he would have no interest at the time of the loss (*a*).

The construction to be placed upon a policy, should have relation to the condition of things as they were at the time of the making of the policy, unless there be something in it requiring a different construction to be put upon it, and if the plaintiff has an insurable interest at the time the policy is effected, no change which may afterwards take place in the property, can have any effect in relieving the underwriters from their liability, as the plaintiff may sue upon the policy for the benefit of the party to whom the property has passed (*b*).

This doctrine, however, presupposes the fact that the conditions of the policy are complied with on a transfer of interest. Where the conditions provide that the interest of the insured is not assignable without the written consent of the directors, and that in case of any transfer or termination of interest without such consent the policy shall be void; if such consent were not obtained, the policy would be avoided by force of the condition. If the plaintiff is interested in any part of the goods insured, he is entitled to recover to the amount of loss he sustains by virtue of such interest and therefore a traverse in a plea that the plaintiff is not interested in the goods insured to the whole amount of their value is too large (*c*).

(*a*) *Shaw v. Phœnix Ins. Co.* 20 U. C., C. P. 179.

(*b*) *Davies v. Home Ins. Co.* 3 E. & A., Reps. 278-9; *Sparkes v. Marshall*, 2 Bing., N. C. 771.

(*c*) *Ketchum v. Protection Ins. Co*, 1 Allen 136.

At the time of insurance the property must be in existence and not on fire and not at that moment exposed to a dangerous fire in the immediate neighbourhood. (*a*).

If, however, a proposal is made for insurance upon property at a distance, and at the time of the application the property is actually destroyed by fire, this will not invalidate the contract, if both parties are ignorant of the loss at the time of the consummation of the contract. (*b*)

But if the property is actually destroyed before the time at which the policy commences the contract will be void and the insured entitled to a return of the premium, if paid.

It may be laid down in general terms that any subsisting right or interest in the property to be insured which will be recognized as such in any court, either of law or equity, is an insurable interest (*c*).

It seems that it is not in all cases necessary that the insured should have a property in the subject of insurance. If he has a right in the property, or a right derivable out of some contract about the property, it will be sufficient, for it is the impossibility of valuing the loss and not the want of property that renders a particular interest an uninsurable. Thus, where a warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order endorsed on the receipt, it was held that the 3,500 bushels not having been ascertained and specified or separted from the other wheat of the seller, no property passed therein, but that, nevertheless, the purchaser had a right derivable out of some contract in respect of the wheat, and therefore an insurable interest (*d*).

(*a*) *Bufe. v. Turner* 6 Taun., 328.
(*b*) *City of Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276.
(*c*) *Bunyon on F. Ins.* 6.
(*d*) *Box v. Pvov. Ins. Co.* 18 Grant, 280 (in E. and A.) reversing the judgments of the court below, S. C. 15, Grant 337 ; *ib.* 552.

In an action on a policy of insurance by A, brought for the benefit of B, an incorporated bank, to whom the policy had been assigned on a traverse of any insurable interest in B; *held* that a warehouse receipt for wheat, the property of A, given by a clerk of the warehouseman, in his own name, was sufficient under the 24 Vic., c. 23, s. 1, to pass the property in the wheat so as to confer an insurable interest in B (*a*). This case was reversed on appeal on the ground that the clerk was not a warehouseman within the Con. Stat. U. C., c. 54, s. 8, and that the receipt was not in compliance with 24 Vic. c. 23, s. 1, not being signed by the warehouseman (*b*).

The court will recognize the usual course of dealing among warehousemen in Canada, that by which the identical grain received from one person is not severed or distinguished from that received from another, but the whole is blended together, so that the receipt is not an undertaking by the warehouseman to deliver the identical grain received, but an equal quantity of the same kind as that specified in the receipt. Where, therefore, a policy is issued upon grain for which the owner holds a warehouse receipt, and the insurance is effected in general terms, without any special language, fixing the identity of the grain, it will be assumed that the insurer has contracted in reference to the well understood course of business in the receiving, storing, and delivering wheat into and from warehouses, and it will not be necessary for the insured, in case of loss, to prove that the identical grain insured was destroyed; it will be sufficient for him to show that the quantity claimed for was in the warehouse during the *whole* period between the insurance and the fire. But if at any time after the date of the policy the quantity of grain for which the policy was effected was not in the warehouse, the liability of the insurer will be proportionally diminished, and will not be restored

(*a*) *Todd v. Liverpool & L. & G. Ins. Co.* 18 U. C. C. P. 192.
(*b*) S. C. 20 U. C. C. P. 523.

although other grain is subsequently brought in sufficient to satisfy the existing claim of the plaintiff. But if, during the whole period covered by the policy, the necessary quantity of grain continues in the warehouse, the plaintiff's claim will not be affected by the fraudulent conduct of the warehouse-man in transferring a portion of the grain to a third party (*a*).

The ordinary risks covered by the policy are such as arise from accidents, and not such as are the consequences of illegal acts. Therefore, spirituous liquors illegally kept for sale may, notwithstanding he lawfully insured against destruction by fire (*b*).

Both the mortgagor and the mortgagee of property have an insurable interest (*c*). Where a policy is effected on the plaintiff's interest in certain property, and after the making of the policy, but before the loss, the plaintiff conveys the property to another by way of mortgage, but continues in possession with a right to redeem at the time of the loss, he has an insurable interest cognizable in a court of law (*d*). Such interest will not be divested by a sale of the equity of redemption under execution, but will continue until the right to redeem expires (*e*).

A and B were mortgagees of a vessel (the latter, however, not being named in the mortgage) and an insurance was effected by A in his own name, after which the vessel was wrecked and totally lost. A not being in possession did not abandon the vessel, and no notice of abandonment was given, but there was an actual abandonment by the mortgagor, after which the agent of the defendants took charge

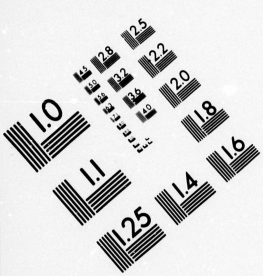
(*a*) *Clark v. Western Assce. Co.* 25 U. C. Q. B. 209; *Tilt v Silverthorne* 11 U. C. Q. B. 620. See also *Box v. Prov. Ins. Co.* 18 Grant 284.

(*b*). *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124.

(*c*) *Richards v. Liverpool and L. Ins. Co.* 25 U. C., Q. B. 400; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497.

(*d*). *Smith v. Royal Ins. Co.* 27 U. C. Q. B. 54; *Davies v. Home Ins. Co.* 24 U. C. Q. B. 364.

(*e*). *Strong v. Manufacturers Ins. Co.* 10 Pick (Mass.) 40.



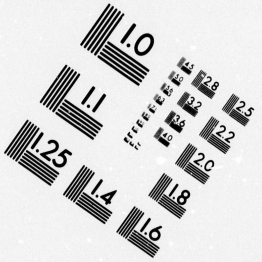
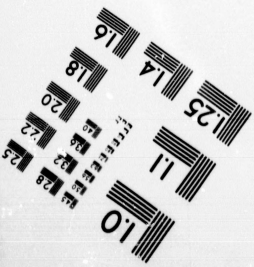
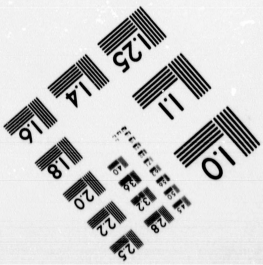


IMAGE EVALUATION
TEST TARGET (MT-3)





of her. *Held*, that A had an insurable interest in the vessel to the amount of the mortgage, and that he could recover this amount in an action brought on his own behalf and on behalf of B (*a*).

A party having a chattel mortgage on goods as mortgagee, has an insurable interest in the goods before default in payment of the mortgage, although the mortgagor continues in actual possession of the goods (*b*). But in such case, if the mortgage is under seal, and the insurance is effected before default, the mortgagee is not entitled to recover on his policy more than the amount appearing on the face of the mortgage at the time of insurance. He could not tack other advances made to the mortgagor to the sum covered by the mortgage, so as to acquire an insurable interest in respect of such other advances, nor would he be permitted to prove such advances by parol evidence. But it seems if the policy was effected for the joint benefit of mortgagor and mortgagee, and this was notified to the insurers at the time the mortgagee might recover in respect of the mortgagor's interest as well as his own (*c*).

But where there is an equitable mortgage created by the deposit of title deeds, or a pawn of the goods, or a lien thereon, subsequent advances, or other and additional debts, may be tacked by oral declaration or charge, and after default, equity would not decree redemption without the payment of the whole. But in the case of a chattel mortgage, where the mortgagor continues in possession the mortgagee has not such actual possession as to entitle him to tack by analogy to the above cases (*d*). The mortgagor of personalty has also an insurable interest (*e*).

A husband who is tenant by the curtesy, and has had issue born to him has an insurable interest in the property

(*a*). *Crawford v. St. Lawrence Ins. Co.* 8 U. C. Q. B. 135.
(*b*) *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497.
(*c*). *Ib.*
(*d*) *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497.
(*e*) *Allan v. Franklin F. Ins. Co.* 9 How, N. Y., 501.

of his wife and may recover the whole amount of loss not exceeding the sum insured though the wife's title is only in the right of a joint tenant (*a*). In such case the husband may effect a valid insurance on the property in his own name (*b*).

A husband has an insurable interest in goods settled to his wife's separate use, they residing together and sharing in the use of the property (*c*).

So a husband has an insurable interest in a house built on land in which his wife has an estate for years (*d*).

The holder of a bill drawn by the captain of a ship on the owners for supplies in a foreign port has an insurable interest in the vessel on the bill being refused acceptance, he being told by the captain to insure if the bill was not honored and the amount to be charged to his and the ship's account (*e*).

A tenant from year to year has an insurable interest in the buildings demised to him, though he cannot recover the value of the buildings in case of loss by fire, but only the value of the lease, his interest being merely the right to possess and occupy the buildings for the unexpired portion of the year for which they were demised (*f*). So a lessee holding over after the expiration of his lease, and who would at law be a tenant at will, or after payment of rent, tenant from year to year, has an insurable interest (*g*). So the incumbent of a benifice, who is bound to repair and is responsible for dilapidations, has an insurable interest (*h*).

(*a*) *Franklin Ins. Co. v. Drake* 2 B. Monroe, Ky., 47.

(*b*). *Harris v. York Mutual Ins. Co.* 50 Penn. St., 341.

(*c*) *Davies v. Home Ins. Co.* 24 U. C. Q. B. 375; *Goulstone v. Royal Ins. Co.* 1 F. & F. 276.

(*d*) *Abbott v. Hampden Ins. Co.* 30 Me., 414.

(*e*) *Tasker v. Scott* 6 Taun, 234.

(*f*) *Niblo v. North Am. F. Ins. Co.* 1 Sandf. N. Y., 551.

(*g*) *Calloway v. Ward* 1 Ves. Sr., 318.

(*h*) *Wise v. Metcalf* 10 B. & C., 290; *Bird v. Smith* 4 B. & Ad., 826; *Downes v. Craig*, 9 M. & W., 166.

A tenant having his landlord's covenant to pay the value of the buildings erected upon the premises, or else renew the lease at the end of the term, has an insurable interest during the continuance of the term. It would seem that this insurable interest would continue after the expiration of the term if the covenant were binding on the personal representatives of the landlord (*a*). But such a covenant by a rector will not give the tenant of glebe lands an insurable interest in the premises after the death of the rector if the covevant is not binding upon his successors, and the latter repudiate the lease and eject the lessee. The insurable interest of the tenant will it seems determine as soon as his interest in the term and his rights under the covenant cease and determine (*b*). In the ordinary case of a covenant to renew if the landlord elect not to renew he should consider the premises his own for the purposes of insurance (*c*).

A covenant by the lessee to insure premises demised to him will give an insurable interest even after the expiry of the term. A granted to B by one instrument a lease of certain premises for five years and a half, and also of certain other premises for sixteen years the rent for both being £120 during the first five years and a half and £100 during the residue. B covenanted "during the said terms" to insure the said premises in the sum of £2,000. There was no provision for any reduction in the amount of insurance after the expiration of the five and a half years term. It was held that B was bound to insure for £2,000 during the continuance of the longer term and that the covenant did not cease with the expiration of the shorter term (*d*). A covenant to insure contained in a mortgage would, it seems, create an insurable interest as much as such covenant in a lease (*e*).

(*a*) *Lucena v. Crawford* 2 N. R., 324; *Shaw v. Phœnix Ins. Co.* 20 U. C. C. P., 170.

(*b*) *Shaw v. Phœnix Ins. Co. supra.*

(*c*) *Ib.* 181.

(*d*) *Heckman v. Isaac*, 6 L. T., N. S. 383.

(*e*) *Smith v. Prov. Ins. Co.* 18 U. C., C. P. 226.

An insurable interest does not mean a perfect legal interest and a person having an equitable interest in property, of which he is in possession under a contract of purchase may insure, and this though he has failed in making his payments punctually, if notwithstanding, he has obtained a decree for specific performance of the contract (*a*); and it is laid down that the *cestui que trust* or equitable owner may insure in his own name although the legal estate may be outstanding and the actual possession may be in another (*b*).

The general doctrine that a purchaser in possession of the property purchased, has an insurable interest, is well settled in the courts of the United States. Nor does it seem to make any difference whether the whole of the purchase money is paid or not (*c*).

A and B being in partnership, bought a piece of land from C. giving a bond for the balance of the purchase money. There was no actual conveyance between the parties, *held* that this was sufficient to give an insurable interest. On the dissolution of the partnership, B. did not by any legal instrument convey his equitable estate to A. He merely in the deed of dissolution consented that A his co-partner should have possess and enjoy it. The deed contained no operative words of grant, and both still continued bound to the vendor for the unpaid purchase money, *held* that B had sufficient interest in the property to enable him to join in an action at law upon the policy though he might be considered as allowing his name to be used for the benefit of A. (*d*)

But if B. had assigned his interest to a stranger and not to

(*a*) *Milligan v. Equitable Ins. Co.* 16 U. C. Q. B. 314; *Laidlaw v. Liverpool & L. Ins. Co.* 13 Grant 377.

(*b*) *Bunyon on F. Ins.*, 8, citing ex parte yallop 15 ves. 60; Ex parte Houghton, 17 ves. 253.

(*c*) See *McGivney v. Phœnix Ins. Co.* 1 Wend. N. Y. 85; *Columbian Ins. Co. v. Lawrence* 2 Peters U. S. 25; *Tyler v. Ætna Ins. Co.* 16 Wend. N. Y. 385; 12 Wend. N. Y. 507.

(*d*) *Mann v. Western Assce. Co.* 19 U. C. Q. B. 314.

his co-partner with whom and himself the policy was effected, the case might have been different (*a*).

A *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of *property* or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after enquiry of the true state of the property, and the applicant need not represent the particular interest he has at the time unless enquired of by the company. A and B being in partnership, the firm out of its assets built the building insured on land, the title to which, was in A. On the dissolution of the firm, this building, was considered as partnership property, and A transferred to B all his right, title, and interest, in the building and stock, for a consideration of $1,750, payable in three notes: the first for $600, payable in one year; the second for $600, payable in two years; and the third for $550, payable in three years. The firm was dissolved on the 28th of March, 1868, the insurance was effected on the 12th of May, 1868, and the fire occurred on the 28th of September following. There was no deed of the property from A. to B., but the latter was in possession and the agreement for sale to him was proved so far as verbal testimony could prove it, *held* that B had a sufficient equitable interest in the property to be the subject of an insurance (*b*).

In order, however, to create an insurable interest, there must be such a right as the law will recognize and enforce, and a mere moral title will not be sufficient. Thus, if a purchase of personalty is void for want of compliance with the formalities prescribed by the statute of frauds, it will not give the purchaser an insurable interest (*c*).

Upon the same principle, the purchaser of an estate who has merely entered into a verbal contract cannot insure the

(*a*) *Mann v. Western Assce. Co.* 19 U. C. Q. B. 325; *Powles v. Innes* 11 M. & W. 10.

(*b*) *Whyte v. Home Ins. Co.* 14 L. C. J. 301; *Converse v. Citizens F. Ins Co.* 10 Cush. Mass. 37.

(*c*) *Stockdale v. Dunlop*, 6 M. & W. 224. See also *Stainbank v. Fenning* 6 Eng. L. & E. Reps., 412; *Hebden v. West*, 9 Jur. N. S., 747.

property, but if any act has been done constituting such a part fulfilment of it as would entitle him to a specific performance of it in a court of equity, he may insure, for an equitable title creates an interest which the law will recognize (*a*).

There must be some vested interest such as the law can recognize, and a mere expectancy, as that of an heir at law who has a moral certainty of succeeding to the estate of his ancestor, will not confer an insurable interest (*b*).

Yet still it can scarcely be said that the insured must have an actual interest in the property, for if he is responsible to the owner for its destruction, he may insure, though he has no other interest in the property. Thus, in the case of re-insurance, the re-insurer has no interest in the property beyond his liability to the original insurer for its loss by fire (*c*); and thus it will be seen that insurable interest is distinguishable from *ownership*, and independent of actual interest in the subject insured.

A case decided in Canada illustrates this proposition (*d*). It was there held that a creditor had a right to insure his debtor's chattels, on the ground that their destruction would diminish his security for the debt, and lessen the ability of the debtor to pay, though the creditor had no actual interest in or title to the goods. Thus where A effected an insurance on goods which he afterwards sold to B, to whom, with the assent of the insurer, he assigned the policy, and B afterwards sold the goods to C, taking his (C's) notes in part payment, it was held that D, who had endorsed these notes for C's accommodation, on the understanding that the goods should be sold and the proceeds paid to D to retire,

(*a*) *Tidswell v. Ankerstein*, Peake, 151; *Fletcher v. Commonwealth Ins. Co.* 18; 18 *Pick* (Mass.) 419; *Angell on Ins.* 112.

(*b*) *Lucena v. Crawford* 2 N. R., 324; *Macarty v. Commercial Ins. Co.* 17 La., 365.

(*c*) See *Joyce v. Swann* 17 C. B. N. S., 104.

(*d*). See *Davis v. Home Ins. Co.* 3 E. & A. Reps. 269, reversing the judgment in 24 U. C. Q. B. 364.

the note had an insurable interest in the goods on the policy being subsequently assigned to him with the assent of the company.

On the same principle, although A is merely the agent of B in obtaining from C an advance of money on certain goods, yet if he renders himself liable to C for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loan (*a*).

A sheriff's title to goods seized by him under an execution is defeasible on a tender or payment by the execution debtor of the amount of the debt and costs, and notwithstanding the levy by the sheriff the execution debtor may still have an insurable interest in the goods. Thus, where the sheriff took actual possession of the goods under execution, but left them in the store of the insured with the doors and windows fastened up, and then went out of town, taking the key of the store with him, a fire having destroyed the goods in his absence, it was held that the insurable interest of the debtor was not affected (*b*).

So a sheriff, who has goods in his custody under process, has a special property giving him an insurable interest therein (*c*).

If a consignee who has never been in possession of the goods sues for indemnity under a policy effected in his own name upon goods belonging to another, and consigned to him, he must show an insurable interest in such goods to entitle him to recover, and he can only recover to the extent of such interest. But a consignee, factor or agent having a lien on goods in his possession to the amount of his advances, acceptances, and liabilities in respect to them, stands in this respect precisely in the situation of a mort-

(*a*). *O'Connor v. Imperial Ins. Co.* 14 L. C. J. 219.
(*b*). *Franklin Ins. Co. v. Findlay*, 6 Whart. (Pa.) 483.
(*c*). *White v. Madison*, 26 N. Y., 117.

gagee. A debt is due to him by his principal for which he holds the property as collateral security; he has, therefore, an insurable interest to the amount of his lien, and whether this lien arises from expenses or charges on account of the specific goods, or is for a general balance, can make no difference. If the lien exists, the right of indemnity attaches (*a*).

The assignee of a bond conditioned for the conveyance of real estate, upon which valuable improvements have been made by the obligee, has an insurable interest in the property therein described (*b*).

The deposit by the insured of bills of sale and documents requisite for shewing ownership of a vessel with the collector of customs for registration pursuant to the Con. Stats. Can. c. 41 is sufficient to give an insurable interest although actual registration is not made until after the destruction of the vessel by fire. And even if this were not sufficient, the insured might fall back upon any anterior title registered, from which he can deduce insurable interest.

On the 10th day of April, 1865, A the registered owner of the steamer Empress, executed a bill of sale thereof, to B and C as trustees for a certain company. This bill of sale, as also a bill of sale by way of mortgage from B and C to A were duly registered pursuant to the statute on the 11th day of April, 1865. On the 3rd of December, 1867, the mortgage was discharged. On the 19th of April, 1866, B. and C. executed an instrument purporting to be a bill of sale of the steamer, to the company for which they were trustees. On the 20th March, 1867, the steamer was sold to B at public auction, and from that date until the fire, she remained in his possession. The bill of sale was formally executed by the company on the 3rd of July, 1867. The release of the mortgage to A was deposited with the collector of customs

(*a*). *Cusack v. Mutual Ins.* Co. 6 L. C. J., 97. See also *De Forest v. Fulton F. Ins.* Co. 1 Hall (N.Y.) 84.

(*b*). *Sayres v. Hartford F. Ins.* Co. 17 Iowa, 176.

at Kingston for registration on the 3rd of December, 1867, the day of its date, and the bill of sale from B and C to the company, together with their bill of sale to B after the auction were deposited with the collector of customs for registration between the 8th and 19th days of July, 1867, and remained so deposited until the 5th day of December, 1868, but these instruments were not registered by the collector of customs until the latter date because the certificate of ownership was not produced. The fire occurred between the time of their actual registration and their delivery to the collector. *Held* that B was not bound to produce to the collector the certificate of ownership, that B had done all he contracted to do, on the deposit of the instrument for registration that it was then the duty of the collector to have promptly registered, the bills of sale presented to him, and that B could not be prejudiced by his default, that even if this was not sufficient, B might rely upon the registered instrument from A to B and C, dated the 10th of April, 1865, and before the fire; that the fact of B and C being trustees for the company as found by the jury, though not expressed in the instrument, was immaterial for no condition of the policy required B to declare particularly his interest as that of trustee or mortgagor. Nor did the mortgage from B and C to A dated 11th April, 1865, affect the insurable interest, for under the act it did not change the ownership of the steamer; *held* further that it was immaterial that B and C were not each registered for 32-64ths of the steamer in conformity with the statute for this objection could only be good, if at all, before registration (*a*).

Where the insured held the fee simple in the property insured, which consisted of a mill, etc., but an agreement was entered into between the assured and one H. J., that "the expenses incurred thereby, and profits derived therefrom, should be equally borne and shared;" it was held that this did not vitiate the policy, or show that the insured

(*a*) *Moore v. Home Ins. Co.* 14 L. C. J. 77.

owned only half the property, and that he was not estopped from showing that he was legal owner of the whole, and recovering the full amount of the policy by reason of a statement in the notice of loss that H. J. had a joint interest with him in the mill (*a*).

The ownership of the property insured is a proper question for the jury, and when it is fairly left to them the court will not disturb their verdict, though on the evidence they may be somewhat dissatisfied with the finding (*b*).

A bailment in trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment. Whenever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject matter in its original or an altered form, this is a transfer of property for value, it is a sale and not a bailment. Where, therefore, corn was deposited by farmers with a miller to be stored and used as part of the current consumable stock or capital of the miller's trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of an equal quantity on the day on which he made his demand, with a small charge for general purposes; but they had no right to claim a re-delivery of the *identical wheat*, or a share of the specific bulk in which it was mixed by their consent; *held* that such a transaction amounted to a sale by the farmer to the miller, and was not a bailment of the corn, and entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured or described as required by the conditions of the policy as "goods held in

(*a*). *Rice v. Prov. Ins.* Co. 7 U. C. C. P. 548.
(*b*). *Merrick v. Prov. Ins.* Co. 14 U. C. Q. B. 439.

trust and on commission" upon which condition the claim was resisted by the insurers (*a*).

A widow having continued for four years after her husband's death in possession of a house built on land of which he was the lessee for years and paid the ground rent, insured the house in her own name. No administration was taken out to the husband's estate, nor was any claim made thereto on behalf of any legal representative of the deceased husband, *held* that she had an insurable interest on any one of these several grounds: first, as the presumptive owner of the house; secondly, as executrix *de son tort*, and thirdly as widow under the statute of distribution (*b*).

If a party holds lands under a deed obtained from a lunatic, this will be sufficient to give him an insurable interest, as against the insurers strangers to the lunatic and his heirs, and not claiming in any way, by, through, or under him or them, and this will be the law, though the deed is obtained by fraud or without consideration, for it will be valid until avoided, and only the party defrauded, or his representatives, have a right to complain of the validity of the deed (*c*).

A person in possession of property as apparent owner, and responsible to those who are the real owners, has an insurable interest. A party was on his own petition discharged under the Insolvent Debtors Act 1 & 2 Vic. c. 110. He afterwards acquired property and insured it in his own name, but after insuring the original order of discharge was annulled, and he was adjudged to be imprisoned for twelve months; *held*, nevertheless, that he had an insurable interest (*d*).

(*a*) *South Australian Ins. Co. v. Randell* L. R. 3 P. C. App 101.

(*b*) *Lingley v. Queen Ins. Co.* 1 Hannay, 280; see also *Marks v. Hamilton*, 7 Ex., 323.

(*c*) *Hickman v. North B. & M. Ins. Co.* 2 Hannay, 235.

(*d*) *Marks v. Hamilton* 7 Ex., 323.

The assignee of the estate and effects of an insolvent, has an insurable interest after the assignment (*a*).

So an action has been maintained by such an assignee, where the estate vested in him by assignment after the loss occurred (*b*).

No person can have an insurable interest in freight, except the owner of the vessel, or the shipper or owner of the goods, who has advanced the whole or a portion of the freight as freight to the owner or charterer of the vessel, in anticipation of its being earned, but before it is earned. Such advances must be made strictly on account of, and in part payment of, the freight expected to be earned and to become due, and without recourse against the owner or charterer of the vessel personally. The advance must bear analogy to *bottomry* or *respondentia* loans in which the advance is put in hazard, and risked upon the success of the adventure or expected voyage, and a stranger to the property in both the vessel and the goods, cannot create an insurable interest in the freight by spontaneously advancing the amount to the master or owner of the vessel, by way of loan to *him*, and not in part payment of the expected freight, without personal recourse against the master or owner (*c*).

The following interests may be insured:—Freight (*d*); money advanced on freight (*e*); the profits on a cargo (*f*); the profits of a business (*g*); salvage paid by the owner, for he has a lien for the same on the goods (*h*). Property consigned, though consignees have only a defeasible interest for the goods, may be stopped in *transitu*, or the consignees

(*a*) *Cameron v. Monarch Ins. Co.* 7 U. C. C. P., 215; *Cameron v. Times & B. F. Ins. Co.* 7 U. C. C. P., 234. See also *Herkimer v. Rice* 27 N. Y., 163.
(*b*) *Kerr v. British Am. Assce. Co.* 32 U. C. Q. B., 569.
(*c*) *Orchard v. Ætna Ins. Co.* 5 U. C. C. P., 445.
(*d*) *Flint v. Flemyng* 1 B. & Ad. 45; *Devaux v. J'Aanson* 5 Bing N. C., 519.
(*e*) *Mansfield v. Maitland* 4 B. & A., 582.
(*f*) *Barclay v. Cousins* 2 Ea. 554; *McSwiney v. Royal Assce. Co.* 14 Q.B., 634.
(*g*) *Wright v. Poole* 1 A. & E., 621.
(*h*) *Briggs v. Traders' Assce. Co.* 13 Q. B., 174.

may be changed (*a*); a pawn of goods created by endorsement of bill of lading (*b*); a pledge of a bill of lading (*c*); a vessel under hypothecation, though by such an instrument the creditor has no property in the vessel, but a claim or privilege only, to be enforced by the process of the court (*d*).

Goods consigned to one to be delivered to another may be insured by the one to whom they are to be delivered, though he did not order them to be sent (*e*).

Inchoate rights, founded on subsisting titles, unless forfeited by positive law, are insurable. Freight *respondentia* and bottomry are of this description, the profit is prospective, but they are founded on existing charter-parties, bonds and agreements (*f*).

Ships seized by the officers of the crown as prizes of war before condemnation, though they may be restored by the crown before condemnation (*g*). So a bill of exchange drawn for freight, which, therefore, pledges the freight, is an equitable assignment of the freight, and consequently creates an insurable interest (*h*).

Several cases have been decided in the United States, showing that a mechanic has an insurable interest in buildings or other subjects on which he has expended his time, labor and skill, and that this interest is co-extensive with his lien (*i*).

(*a*) *Sterling v. Vaughan* 11 Ea., 628; *Boehm v. Bell* 8 T. R. 158—161; *Lucena v. Crawford* 2 N. R. 293.

(*b*) *Sutherland v. Pratt*, 12 M. & W., 16.

(*c*) *Ib.*; *Wolfe v. Horncastle* 1 B. & P., 323.

(*d*) *Stainbank v. Fenning* 11 C. B., 88; *Stainbank v. Shepard* 13 C. B., 438, 442.

(*e*) *Hill v. Secretan*, 1 B. & P. 315; *Lucena v. Crawford*, 2 N. R. 291

(*f*) *Lucena v. Crawford*, 2 N. R. 294.

(*g*) *Crawford v. Hunter*, 8 T. R. 13; *Boehm v. Bell*, 8 T. R. 154; *Lecras v. Hughes*, 3 Doug. 81.

(*h*) *Wilson v. Martin*, 11 Ex. 684.

(*i*) *Longhurst v. Star Ins. Co.* 19 Iowa, 364; *Carter v. Humboldt F. Ins. Co.* 12 Iowa, 284; *Stout v. City F. Ins. Co.* 12 Iowa, 371; *Protection Ins. Co. v. Hall*, 15 B. Monro, 8 Ky. 411.

A recent Act of the Ontario Legislature has created a lien in favor of mechanics, machinists, builders, etc., and under this Act no doubt the mechanic will have an insurable interest in all property subject to his lien.

It would seem that an Insurance company with whom the actual owner of a house, without fraud or wilful misrepresentation, effects an insurance cannot set up the legal title of a stranger to the land on which the house stands, as a defence against the claim of the insured and to show that the latter as no insurable interest. But the company are not, it seems, in the situation of third parties, who could not dispute the title of the claimant on the ground of their having no interest in it; if so, the insurers have an undeniable right to dispute the interest of the plaintiff in the subject matter insured. The plaintiff insured with defendants a house in his possession, which he had purchased with the land on which it stood, as part of lot A, but, which was afterwards found to be upon the adjoining lot B, having been built there in consequence of an unskilful survey. The Con. Stats. U. C. c. 93 s. 53, enacts, that if an action of ejectment is brought against a person who, in consequence of unskilful survey, has improved upon land not his own, the value of the improvements shall be assessed by the jury, and no writ of possession shall be awarded until such value is paid. *Held*, that this statute gave the plaintiff, as purchaser, an insurable interest in the property, although he had no actual legal title thereto (*a*).

(*a*) *Stevenson v. London & L. F. Ins. Co.* 26 U. C. Q. B., 148.

CHAPTER IV.

THE EXTENT AND NATURE OF THE RISK.

In determining the extent and nature of the risk assumed by the underwriter various circumstances are to be considered. The losses for which he is liable, when the insurance is against fire, are only such as result directly and immediately from the peril, and even this liability may be subject to slight modification by the terms of the particular policy. In some policies the contract is to pay all "immediate" loss or damage, etc., in others the word "immediate" is not inserted. The memorandum articles which are not covered by the policy, unless specificially insured, may be different in different policies. So the liability of the company for losses by theft or for injuries to goods in removal will in many cases depend on the terms of the contract. It is therefore in all cases material to refer to the conditions and stipulations of the particular policy, for the rights and liabilities of the insurer and insured are entirely governed thereby, and in the present state of insurance law in Canada the conditions of the policies are not by any means uniform. It would scarcely be apparent to the ordinary reader that there is any difference in the liability of the insurers under a condition that they shall be liable for loss on property injured by lightning and a condition imposing such liability when the property is *burnt* by lightning. Yet such a distinction has been taken as is recognized by the courts. In the former case, when any damage or injury is done by lightning, though the property is not burnt by fire, the insurer will be liable; in the latter there must be an actual burning by fire. In all these cases the courts endeavor to arrive at the meaning of the parties to the contract and construe it according to their intention, as collected from the words they have used. The difficulty with the party

proposing to insure is to become acquainted with the terms of the contract, to understand the effect of the conditions of the policy by which he is insured; for in addition to the fact that the conditions are not all uniform, new conditions are constantly being adopted, or old conditions are being modified to meet the exigencies of new cases decided by the the courts. For instance, when the courts decided that a condition prohibiting alterations in *the building* insured did not apply to *additions* to such building several of the companies framed their conditions so as to prohibit alterations in the additions to the building insured as well as the building itself.

It is also material to consider what property is covered by the policy. What, for instance, will be the effect of a particular description of a specified subject of insurance? Thus, if a person who is not a linen draper insures his "stock in trade, household furniture, *linen*, wearing apparel, and plate," this will not protect linen drapery goods subsequently purchased on speculation, for the word linen in the policy must be confined to household linen or linen used by way of apparel. (*a*)

The rule is to construe the subjects covered by the policy according to the maxim *nos citur a sociis*. In other words, the meaning of any particular expression in the policy is to be ascertained by reference to the other expressions with which it is connected.

The contract of insurance is to be construed liberally and according to the intention of the parties, and whether a specific commodity or building is covered by a policy must be inferred from the general scope of the policy. (*b*) Although the subject matter of the insurance must be properly described, the value of the interest may in general be left at large. Thus, where carriers by water insured goods on board their boats "as interest may appear hereafter" it was

(*a*) *Watchorn v. Langford* 3 Camp., 422.

(*b*) *Ellis on Ins.* 27; *Diggs v. Albany Ins. Co.* 10 Barb., 440.

held that they could recover the full value of the goods. (*a*) But in the absence of a condition to the contrary a misdescription only takes place where the representation made is false at the time of making it. If, therefore, in effecting an insurance the building insured is described as of a particular character and the representation is true at the time of the making of the policy, its subsequently ceasing to conform to the description, will not avoid the policy, provided the conditions thereof as to giving notice, etc., are complied with on such change taking place. (*b*).

The policy usually contains a condition that applications for insurance must be in writing and specify the construction and materials of the building to be insured, by whom occupied, whether, as a private dwelling house, or how otherwise, its situation with respect to contiguous buildings and their construction and materials, and whether any manufacture is carried on within or about it. It will thus be seen that the giving of a full and accurate description of the property is incumbent on the insured by the terms of the contract.

A policy was effected on premises by the description of a "granary" and "a kiln for drying corn, in use." The conditions of the policy provided, that persons insuring should forfeit their right to the sums insured, unless the buildings insured, or containing the goods insured, were accurately described, the trades carried on therein specified, and the nature of the property correctly stated; and the sixth condition provided, that if any alteration were made either in the buildings, or the business carried on therein, notice should be given to the insurers, an additional premium if required paid, and an endorsement made on the policy, otherwise the same should be void.

The insured carried on no trade but that of drying corn, but on one occasion a vessel laden with bark sunk near the

(*a*) *Crowley v. Cohen* 3 B. & Ad., 478; and see *Palmer v. Pratt*, 2 Bing. 185.

(*b*) *Foy v. Etna* [illegible] *Co.* 3 Allen, 356.

premises, and he allowed the bark to be dried gratuitously at his kiln.

The jury found that corn drying and bark drying were different trades, that the latter was more dangerous than the former, and that the loss happened from the use of the kiln in drying the bark. It was held, that there was no misdescription, for the condition applied only to the state of the premises at the time of insuring, and nothing which occurred afterwards, not even a change of business, could bring the case within that condition, which was fully performed when the risk attached. It was held, further, that there was no breach of the sixth condition, for it related only to an alteration of business, a change of a permanent and habitual character, as by dropping the one business and taking up the other, but in the case in question there was no change of business, the permission being granted gratuitously on one occasion only (*a*).

If the description of the premises is substantially correct when made at the date of the policy, this will in the absence of fraud and of a condition to the contrary, be sufficient to entitle the assured to recover, notwithstanding a subsequent change in their construction and arrangement or the carrying on of a more hazardous trade on the premises; and where a condition provided that, "In the insurance of goods, etc., the building or place in which the same are deposited is to be described, the quantity and description of such goods, also, whether any hazardous trade is carried on, or any hazardous articles deposited therein; and if any person shall insure his or their building or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force," It was

(*a*) *Shaw v. Robberds* 6 A. & E., 75.

held, that the condition referred only to the date of the policy, and the policy was not avoided by the circumstance that subsequently to the date of the policy, a more hazardous trade had, without notice to the company, been carried on upon the premises (*a*).

The decision in this case has rendered it necessary for the insurers, if they wish to protect themselves against the risk arising from the subsequent commencement of a hazardous trade on the premises, that they should provide for it by an appropriate condition. A condition is now usually inserted in the policy to the effect that if, after insurance effected, the building or premises insured shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance shall be void and of no effect. When the policy contains such a condition, the insured is not at liberty to commence a hazardous trade, or in any other manner increase the risk after the date of the policy.

If there be such a variance between the description of the property intended to be insured and its actual description as will amount to a breach of warranty in any material respect, the policy will be void, although the insured intended to effect an insurance on the property by whatever description might be correct (*b*). And where the description amounts to a warranty, as where a building is described as of one class instead of another, where a larger premium would have been required for that other, the policy becomes completely void; and in such case it is utterly immaterial whether or no the misdescription produces the loss or increases the risk (*c*).

Where the description of the premises is incorporated into and forms the basis of the contract, on the faith of which the underwriter subscribes the policy, the descrip-

(*a*) *Pim v. Reid* 6 M. & G., 1.

(*b*) *Tesson v. Atlantic M. Ins. Co.* 40 Mo. 33.

(*c*) *Newcastle F. Ins. Co. v. McMoran* 3 Dow, 255.

tion amounts to a warranty that the assured shall not, during the time specified in the policy, voluntarily do anything to make the condition of the premises vary from that description so as thereby to increase the risk or liability of the underwriter. Thus, where a description was made out in October, 1850, on the faith of which the policy was executed on the 7th of April, 1851, covering a risk from the 1st of February, 1851, it was held that the description amounted to a warranty that the premises corresponded with it at the date of the policy; and the warranty not having been complied with, and the risk of the underwriters being thereby in some degree increased, that the insured could not recover (*a*).

In this case the house was changed from a two to a three story house, and its value increased about £1,000; and it was admitted that the insurer was liable to make good any partial loss on the increased value. It does not, therefore, directly overrule that of *Pim v. Reed*, (*b*) though the judges lay down a principle at variance with the principle enunciated in that case.

Where the subject matter of insurance, as described in the body of the policy so far as material, was as follows:—"On a range of buildings of three stories, etc., part of lower story being used as a stable, coach-house, and boiling-house. No steam engine employed on the premises, the steam from the said boiler being used for heating water and warming the shops." A memorandum at the end of the description of the property was this:—"N. B. The process of melting tallow by steam in the said boiler-house, and the use of two pipes, are hereby allowed." After the making of the policy the insured erected a steam engine in the stable, and worked it by steam generated in the existing boiler. More steam was used than before, but the jury found that the risk was in no way increased. *Held*, that it was an essential part of the contract that there should be

(*a*) *Sillem v. Thornton* 3 E. & B., 868.
(*b*) 6 M & G. 1.

no alteration in the subject matter insured after the date of the policy, and that the insurers only assumed liability on the building in its then state, and that the alteration substituted a new contract and avoided the policy, though the risk was not increased (*a*).

A condition provided that in case of any steam engine or any other description of fire heat being introduced, or operation being carried on, etc., notice thereof should be given, etc. It appeared that the insured, who was a cabinet-maker, placed a small steam engine on the premises, with a boiler attached, and used it in a heated state for the purpose of turning a lathe, not in the course of his business, but for the purpose of ascertaining by experiment whether it was worth his while to buy it to be used in the business. After the engine had been used on the premises for several days a fire happened: it was held that the proper construction of the condition was that the mere introduction of the engine with fire applied to it would avoid the policy; and nothing being said about the intention of the parties as to the particular use, and the danger being the same no matter what the object was in using the engine, it was immaterial that it was used only by way of experiment; so also the time of user was of no consequence, nor the fact that the risk was not increased thereby. The policy was therefore held void (*b*).

Where a condition provided that the policy should be void unless the nature and material structure of the buildings and property insured be fully and accurately described, and at the date of the policy there was a steam engine on the premises, which was mentioned in the policy. The engine was then used to hoist goods, of which the company was notified; afterwards, machinery was put up for grinding and attached to the engine, of which the company had notice; and subsequently, a renewal of the policy was

(*a*) *Stokes v. Cox* 1 H. & N. 320.

(*b*) *Glen v. Lewis* 8 Ex., 707: 17 Jur., 842.

executed. It was held, that the alteration did not render the description in the policy inaccurate within the meaning of the condition so as to avoid the policy (*a*).

A condition requiring that if the property insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void, will be sufficiently complied with in the case of mortgaged property, if it is specified in the application as mortgaged property; and if by the terms of the policy the application is made a part of the policy, for by the legal effect of the latter provision the mortgage interest will be represented to the company and expressed in the policy in writing (*b*).

Where the error in the description of the premises arises entirely from the act of the company themselves, through their agents, and there is no misrepresentation or concealment whatever on the part of the insured, the description being altogether made out in the office of the defendants, under the direction of their agents, a mistake in the description will not disentitle the assured to recover if it is shewn that the premium charged was proper according to the actual state of the premises (*c*).

In this case it does not appear that there was any condition in the policy providing that the agent of the company should be considered as the agent of the assured for the purposes mentioned.

Some companies insert such a condition in their policies. In other cases it is provided, that when the policy is made and issued upon a survey and description, such survey and description shall be taken and deemed to be a part and portion of such policy, and a warranty on the part of the insured. Where the insurers prepare the policy after a careful examination of the premises by their own surveyor,

(*a*) *Baxendale v. Harvey* 4 H. & N., 445.

(*b*) *Fourdrinier v. Hartford Fire Ins. Co.*, 15 U. C. C. P., 403.

(*c*) *Somers v. Athenæum Ins. So.* 3 L. C. J., 67.

and with a full knowledge of the nature of the risk, any misdescription in the policy must be deemed the fault of the insurers, and the insured is not responsible for the consequences (*a*).

When the insurance is effected on premises "where no fire is kept, and no hazardous goods are deposited," these words refer only to the habitual use of fire, or the ordinary deposit of hazardous goods, and in the absence of an express stipulation to that effect the occasional introduction of fire for a temporary purpose connected with the occupation of the premises will not vitiate the policy. (*b*)

It is sufficient if the description contained in the policy substantially defines and ascertains the property intended. Thus, where goods were described as "in the dwelling house" of the insured, and it turned out that he had but one room *as a lodger*, in which the goods were, it was held that they were correctly described within a condition that "the houses, buildings and other places where goods are deposited shall be truly and accurately described"—such condition relating to the construction of the house and not to the interest of the insured in it. (*c*)

If the premises are substantially well described and a more accurate description would not vary the risk or the rate of premium, it is immaterial that the strictly accurate description is not given. (*d*)

An insurance on "merchandize" such as is usually kept in country stores is not void because hardware, china, glassware, looking glasses, etc., are not specificially mentioned, if the articles are such as are usually kept in country stores. (*e*).

A coffee house is not an inn within the meaning of a

(*a*) *Benedict v. Ocean Ins. Co.* 1 Daly (N. Y.), 8.
(*b*) *Dobson v. Sotheby* 1 M. & M., 90.
(*c*) *Friedlander v. London Assce. Co.* 1 M. & Rob., 171.
(*d*) *Dobson v. Sotheby* 1 M. & M., 90.
(*e*) *Franklin F. Ins. Co. v. Updegraff* 43 Penn. St., 350.

policy of insurance against fire, ennumerating the trade of an innkeeper with others as doubly hazardous. (*a*)

It is very material that any change in the occupation of the premises should be communicated to the insurers and their consent obtained thereto, otherwise the policy may be void; and where the description of the place in which the goods are, involves a warranty that they shall continue in such place during the currency of the policy, any removal will render the policy void. The plaintiffs effected an insurance on goods, wares, and merchandises contained in premises described as being occupied by them as a bonded and general warehouse, and by other tenants as offices, and subsequently sub-let and gave possession of part of the premises to a common warehouseman to be used for storage of goods, without giving notice to the insurers, as required by the condition endorsed on the back of the policy, it was held that the description, taken in connection with the facts proved, involved a warranty that the goods insured were and should continue to be in the place occupied by the assured; that this warranty was broken by the granting of the lease and the delivery of possession to the lessee, and consequently the policy was void (*b*).

It is of the essence of the contract of insurance of moveables that the things and their position should be known and understood by both parties; that the place in which the goods are is always a *motif determinant* of or for the contract. When goods are insured in a building, there ought to be communicated to the insurer all information to enable him to appreciate the risk; for instance, of what materials the building is, its situation, distance from other buildings, whether connected with others, and so forth. There must be a perfect understanding as to the subject insured, else there can be no true convention. But if both parties have agreed upon the sub-

(*a*) *Doe d Pitt v. Laming* 4 Camp., 73.
(*b*) *Chapman v. Lancashire Ins. Co.* 13 L. C. J., 36.

stance, if the insurer know what he is taking risk upon, a mere inaccuracy of description may not hurt. For instance, if the policy describes the goods insured as in buildings Nos. 317, 19 in a certain street, Nos. 317 and 319 being meant, it will be so intended, and the inaccuracy in the description of No. 319 will not vitiate the policy (*a*).

The insurance of goods described as being in Nos. 317-19 St. Paul Street does not cover goods in the third story of No. 315 adjoining, though there is a door of communication between the third story of Nos. 317-19 and No. 315, but no entrance from the street, it not being shown that the agent of the company knew of the communication (*b*).

It seems, also, it would be immaterial that the agent was aware of the communication, for if a man own a store comprised of three or ten houses in a street, any one of these may be the subject of insurance, though they are all connected together and used in one trade, and make up one establishment of the insured. So an insurance company may insure a flat of a house, or goods in it, or goods in a wing of a house (*c*).

A condition is sometimes inserted in the policy, providing that on the removal of personal property from the place mentioned in the application, the policy shall be void unless the removal is approved of by endorsement on the policy.

An agreement endorsed on the policy, authorising the removal of the goods to another building, and continuing the policy in force after the removal, is valid and binding, and constitutes a new contract between the parties, and a new risk taken by the company, and it is immaterial that some elements of risk prohibited by the original policy still exist if they are known to the company when the new risk is taken (*d*).

(*a*) *Rolland v. North British Mer. Ins. Co.* 14 L. C. J., 72. See also *Casey v. Goldsmid* 4 L. C. R., 107; 2 L. C. R., 200.

(*b*) *Rolland v. North British Mer. Ins. Co.* 14 L. C. J., 69.

(*c*) *Ib.* 73.

(*d*) *Rathbone v. City F. Ins. Co.* 31 Conn., 183. See also *West v. Old Colony Ins. Co.* 9 Allen (Mass.), 316.

A condition preventing the use of gunpowder upon the premises is not unreasonable. A condition declared that the policy should be void if there should at any time be more than 56 pounds weight of gunpowder on the premises, unless specially provided for in the policy; and another condition enumerated certain hazardous goods, among which was gunpowder. The policy was effected "on stock in trade of general merchandise, including hazardous." It was held, that this description of the subjects insured did not nullify the condition as to gunpowder, or amount, to a special provision in the policy allowing its introduction; and it appearing that more than 56 pounds were on the premises when the fire occurred, the policy was held void, though the insured were dealers in gunpowder (*a*).

In the ordinary case of a merchant insuring his stock in trade, as the policy is a continuing contract of indemnity, it attaches on any goods of a like description with those insured which may be brought into the premises during the continuance of the policy, although they are not the identical goods which were insured; nor does it make any difference that the merchant sells out his whole stock by one contract of sale to an individual purchaser, and afterwards gets back the same goods, or others of a similar description, from the purchaser. In other words, the rescission of such a sale, and the revesting of the goods in the vendor, would not prevent the revival of the risk, although it was suspended during the currency of the contract of sale (*b*).

So it has been held in the United States, that when a merchant insures his stock in trade, the risk is a continuing one to the amount specified upon such goods as the insured has in his store within the term covered by the policy, and it is not confined to such as were there at the time of assuming the risk. An alienation of the specific goods in the store at the date of the policy, and the purchase of others

(*a*) *McEwan v. Gutteridge* 13 Moore's P. C. Cases, 304.

(*b*) *Crozier v. Phœnix Ins. Co.* 2 Hannay, 200. See also *Kunzze v. American Ex. F. Ins. Co.* 2 Robert, (N. Y.) 443.

from time to time, will not prevent the policy from attaching on such goods as are in the store at the time of the loss (*a*).

An open policy upon merchandise will not cover articles kept wholly or partially for *use* in and about the building, but only articles kept for *sale*; but an open policy upon "property" contained in specific buildings, will cover articles kept for use as well as those kept for sale (*b*).

The terms "stock in trade," as used in a policy in reference to the business of a *mechanic*, have a more extended meaning than when applied to the business of *merchants*. In the former cases not only the stock in trade but all tools and implements necessary for carrying on the business will be protected. (*c*)

A factor or commission merchant who has the consignments of the merchandise of several employers may cover the whole with one insurance in the name of the consignee who has the actual possession and charge of the whole, and the same special property in all. The form now in use is a general policy in the name of the commission merchant on *all the goods* that may be in his warehouse *at any time* within a given period to a specified amount, whether held by him as owner, or in trust, or on commission. Under such a contract the insurers will be answerable for loss or damage by fire within the terms of the insurance to whatever merchandise or property may happen to be in the warehouse at the time of the fire, and be then held by the insured as general or special owner, without regard to the time of his receipt of the goods in store or the persons who may be interested in them. A policy thus made cannot be considered as attaching specifically and solely on the goods in the hands of the factor at the date of the policy, for it will and must often happen that no part of the specific goods

(*a*) *Lane v. Maine M. F. Ins.* Co. 3 Fairf. (Me.), 44.

(*b*) *Burgoss v. Alliance Ins.* Co. 10 Allen (Mass.)221.

(*c*) *Moadinger v. Mechanics F. Ins. Co.* 2 Hall (N. Y.), 490.

originally covered by the policy is exposed to loss when any fire may take place. (*a*)

A policy of insurance upon a building is an insurance upon the building as such and not upon the materials of which it is composed. If from any defect of construction or overloading the building fall into ruins and subsequently the materials take fire, the insurer is not liable for the loss. (*b*) If the building falls it ceases to exist as such by reason of a peril not insured against, for to recover fire must be the efficient cause, and the loss the direct effect of the fire. To meet a loss arising from the fall of a building a condition is sometimes inserted in the policy that if a building shall fall except as the result of a fire, all insurance on it or its contents shall immediately cease and determine. When the insurance is against fire the loss must of course arise from fire; but a policy against fire covers all losses which necessarily follow from the occurrence of a fire whenever the injury arises directly or immediately from the peril or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided. (*c*) The extent of the liability of the insurers may of course be modified by the language of the particular policy; but in general it is as already explained restricted to such *immediate* loss or damage as may arise from the peril insured against.

An insurance against fire effected upon a certain quantity of coal covers not only the coals deposited at the time of insurance but those deposited afterwards, and covers also risk arising from the spontaneous combustion of coal. (*d*)

The term "fire" in a policy of insurance signifies ignition or actual combustion. The term should be construed in its ordinary signification; that is, it should not be confined to

(*a*) *De. Forest v. Fulton F. Ins. Co.* 1 Hall (N. Y.), 84; *Millaudon v. Atlantic Ins. Co.* 8 La, 557; *Angell on Ins*, 138–9.

(*b*) *Nave v. Home M. Ins. Co.* 37 Mo. 431.

(*c*) *Brady v. North W. Ins. Co.* 11 Mich., 425.

(*d*) *British Am. Ins. Co. v. Joseph* 9 L. C. R., 448.

any technical and restricted meaning which might be applied to it by a scientific analysis of its nature and properties, nor should it receive that general and extended signification which, by a figure of speech, is sometimes applied to the term, but it should be construed in its ordinary and popular sense. Therefore in the case of live stock struck by lightning the mark of fire must appear upon the carcass, otherwise it may be a case of death occasioned by the electric shock alone, which is not a loss by fire (*a*). A loss by lightning without any combustion is not a loss by fire (*b*). Where the policy covers losses from "fire" produced by "lightning" the insurers are not liable for the destruction of the dwelling house insured by its being rent and torn in pieces by lightning without being burnt, and in such case unless there be an actual ignition and combustion, which is the proximate cause of the loss, the insurers are not liable. (*c*)

But if the terms of the contract gave the insured a right to indemnity for property *injured* by lightning it seems the company would be liable in such case as above.

Fire insurance companies are liable for all losses which are the immediate consequences of fire or burning, and, therefore they would be liable in cases where goods are injured by the fire engines in putting out a fire when the building containing the goods was actually on fire, or by the removal of the goods under the same circumstances, although the goods may not have been burnt, but in fact were injured by water, or by breaking in the act of saving them from fire, and this is on the ground that the fire is the proximate cause of the injury, and by a liberal construction of the policy the goods may be said to have suffered damage by means of fire, and it has been, it is believed, the custom of insurers to pay losses in such cases. (*d*)

(*a*) *Beaum. on Ins.*, 39.

(*b*) *Kenniston v. Mer. Co.*; *M. Ins. Co.* 14 New Hamp., 341.

(*c*) *Babcock v. Montgomery Co. M. Ins. Co.* 6 Barb. N.Y., 637; see also *Andrews v. Union. M. Ins. Co.* 37 Me., 256.

(*d*) *Angell on Ins.*, 151.

It is clear that an injury to goods by water thrown upon them to extinguish a fire would not be an injury to goods by actual ignition, and yet no case can be found where an insurance against damage by fire has been held not to extend to such a case. (*a*)

If neither the stock of goods insured nor the house containing them are touched by the fire, but the goods are damaged in the removal, under a reasonable apprehension, that if allowed to remain they will be burnt, the fire having taken the fourth house from that of the insured in the same block; the injury sustained by the insured in the removal of his goods, is not a loss covered by a policy against fire (*b*). But whatever loss or damage is necessarily sustained by the insured, in the removal of the property when the danger of its destruction by fire is so direct and immediate that a failure to have made the removal while he had the power, would have been gross negligence on his part, he is entitled to recover under the policy (*c*). Goods may be so carelessly removed, and so wantonly and unnecessarily exposed, as to relieve the insurance company from all liability on account of the injury (*d*), and an omission by the insured to remove his goods when he has the power, when the building containing them is on fire, or the danger of their destruction is direct and immediate, would be gross negligence, and the company would not be liable. On this point the conditions generally provide, that in case of fire, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property, and if they shall fail to do so, the company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. But, damage done in removal, where it takes place in the exercise of a just discretion, would seem as much within the risk as an

(*a*) *Case v. Hartford F. Ins. Co.* 13 Illinois, 676.
(*b*) *Hillier v. Alleghany Co. Mut. Ins. Co.*, 3 Penn. 470.
(*c*) *Case v. Hartford F. Ins. Co.*, 13 Illinois 676.
(*d*) *Case v. Hartford F. Ins. Co.*. 13 Illinois 676.

injury done by the actual burning of the property (*a.*) A condition is inserted in some policies, that in case of damage by removal from a building in which the property is exposed to loss by fire, the damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured. The policy usually contains a condition, that in case of removal of property to escape conflagration, the company will contribute ratably with the insured and other companies, to the expenses of salvage and the damage the property may sustain by such removal, but the company will not hold itself liable for any loss or damage upon property removed from any building not actually on fire, contrary to the declared desire of the officer or agent of the said company. When the policy contains such a condition as this injuries to goods by wet or in any other manner from the exposure during the confusion, etc., before they can be got to a place of safety, and goods lost or stolen in the confusion occasioned by the fire, are within the terms of the policy; but in suing for such loss the plaintiff should describe the occasion and manner of loss according to the facts. (*b*).

Where the plaintiff declares alleging that the goods were burnt, consumed, and destroyed by fire and issue is joined on this allegation, in strictness he can only recover for such goods as he shews to have been destroyed or injured by fire or for such as the jury, in the absence of any other account given of the loss, may fairly presume to have been destroyed by fire. (*c*)

In the ordinary case of insurance against fire, where the policy contains no exception as to losses by theft, the insurers will be liable for goods stolen while in process of removal from a building actually on fire. (*d*)

(*a*) *Bunyon on F. Ins.*, 44; *Tindall v. Bell*, 11 M. & W. 228.

(*b*) *Thompson v. Montreal Ins. Co.* 6 U. C. Q.B., 319; see also *Whitehurst v. Fayetteville M. Ins. Co.;* 6 Jones Law N.C., 352.

(*c*) *Ib.*

(*d*) *Independent M. Ins. Co. v. Agnew* 34 Penn. St., 96; *Tilton v. Hamilton F. Ins. Co.* 1 Bosw. (N.Y.) 367; S. C. 14 How. N.Y., 363; *Witherell v. Maine Ins. Co.* 49 Me., 200; *Talaman v. Home & C. M. Ins. Co.* 16 La. An., 426.

If the theft is occasioned directly by the fire, the precise time of its occurrence is unimportant, as the liability of the insurers is not restricted to the period when the fire is extinguished. (*a*)

But it seems if the goods are stolen after their removal from the burning building the insurers would not be liable. (*b*)

A claim for goods injured will include goods destroyed, because goods injured are partly destroyed, but there must be satisfactory evidence that any missing goods claimed for were insured, and in the absence of satisfactory evidence that certain goods, the value whereof is claimed under a fire policy are either actually destroyed or damaged by fire or stolen the claim therefor cannot be recovered. (*c*)

In all cases of claims for goods lost or stolen in removal, reference must be had to the conditions of the policy, the particular loss may be altogether excluded or left unprovided for, as already explained.

If the premises are blown up by gunpowder by order of the municipal authorities of a city, to arrest the progress of a conflagration, this is a loss by fire and is covered by the policy, where it appears that the buildings all around were on fire and were afterwards destroyed, and according to every probability the fire would have destroyed the premises in question if they had not been blown up (*d*).

So a loss by the explosion of gunpowder is a loss by fire, for as the explosion is caused by fire, the latter is the proximate cause of the loss (*e*).

So "loss or damage by fire" includes a loss caused partly by an explosion of gunpowder on the premises and partly by burning (*f*).

(*a*) *New Mark. v. London & L. F. & L. Ins. Co.* 30 Mo. 160.

(*b*) *McGibbon v. Queen Ins. Co.* 10 L.C. J., 227.

(*c*) *Harris v. London & L. F. Ins. Co.* 10 L.C. J., 268; see also *McGibbon v. Queen Ins. Co.* supra.

(*d*) *City F. Ins. Co. v. Corlies* 21, *Wend* (N. Y.) 367.

(*e*) *Waters v. Louisville Ins. Co.* 11 Peters, (U. S.) 213; *Grim v. Phœnix Ins. Co.* 13 John's (N. Y.) 451.

(*f*) *Scriptur v. Lowell M. Ins. C.* 10 Cush. (Mass.) 356.

But if the whole damage is produced by the explosion and not by the fire, the insurers will not be liable (*a*).

A policy of fire insurance contained the following exception: "Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas. It was held that the word gas in the policy meant ordinary illuminating coal gas. Secondly, that the exemption of liability for loss by explosion, was not limited to cases where the fire was originated by the explosion but included cases where the explosion occurred in the course of the fire, and that it exempted the defendants in respect, both, of the damage from the explosion itself and of the damage done by the further fire caused by the explosion (*b*).

If the proximate cause of the loss is the concussion of the atmosphere caused by an explosion, the insurers are not liable. Thus when the insurance is "from loss or damage by fire according to the exact tenor of the conditions and stipulations endorsed" on the policy, and the conditions provide "that losses by lightning will be made good where the property insured by the corporation has been actually set on fire thereby and burnt in consequence," and that "gunpowdew will not be insured or comprehended in any insurance effected by the company, nor will any loss be made good when more than 25 pounds of gunpowder shall be deposited or kept on the premises." Losses under such an insurance are confined to such as occur from the direct action of fire on the premises as the proximate and immediate cause of the loss, and the insured are not entitled to be indemnified for the shattering of the windows and window frames, and the damaging of the structure generally by the atmospheric concussion caused by the explosion of a large quantity of gunpowder about half a mile from the premises, by which no

(*a*) *Millaudon v. New Orleans Ins. Co.* 4 La. An., 15.

(*b*) *Stanley v. Western Ins. Co.* L. R. 3 Ex. 71.

part of the premises are set on fire or burnt, heated or scorched (*a*).

The same rule applies when the fire breaks out in a contiguous building and causes the explosion. If, however, the explosion is caused by a fire upon the premises insured, the loss occasioned by the explosion will, in the absence of a condition to the contrary, be within the policy (*b*).

And where there is a condition providing that the insurers shall not be liable for explosion of any kind, they will not be liable for loss by explosion caused by a steam engine covered by the insurance, even though the engine was necessary and ordinarily used in carrying on the business on the premises insured (*c*).

In all insurances the proximate and not the remote cause of the loss is to be looked at in determining the liability of the insurers, and when the insurance is against fire, the insurers are not liable unless fire is the proximate cause of the loss.

Thus, where by a policy of insurance, plate glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatever, *except* fire, breakage during removal, alteration or repair of premises," none of the glass being "horizontally placed or moveable." A fire broke out in premises adjoining those of the plaintiff, and slightly damaged the rear of his shop, but did not approach that part where the plate glass was. Whilst the plaintiff, assisted by neighbours, was removing his stock and furniture to a place of safety, a mob attracted by the fire, tore down the shop shutters and broke the windows, for the purpose of plunder. *Held*, that the proximate cause of the damage was the lawless act of the mob, and that it did not

(*a*) *Everett v. London Assce. Co.* 19 C. B. N. S. 126; See also *Taunton v. Royal Ins. Co.* 10 Jur. N. S. 291.

(*b*) *Caballero v. Home M. Ins. Co.* 15 La. An. 217.

(*c*) *Hayward v. Liverpool and L. F. & L. Ins. Co.* 7 Bosw. (N. Y.) 385.

originate from fire or breakage during the removal, within the exception in the policy (*a*).

Any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of the window, or even the destroying of a neighbouring house by an explosion, for the purpose of checking the progress of the flames; in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy (*b*).

When the insurance is against fire, there must be an accident by fire to lay the foundation of a claim, but, it is not necessary that the property insured should be on fire, for losses by smoke and water when the fire has not touched the objects insured, are covered. All that appears to be necessary is, that something should have caught fire and damage have been thereby occasioned to the insured property (*c*).

The loss must arise from some of the causes insured against. Thus, where the policy was for an insurance against *fire* in a manufactory for sugar baking, containing some seven or eight stories, fitted up with a stove on the ground floor, and a flue or chimney therefrom up through the several stories, with a register at each floor, with an aperture into the room whereby more or less heat could be introduced at pleasure. One morning when there was only the usual fire in the stove necessary to carry on the manufacture, through a neglect to open the register, the smoke, sparks and heat, were completely intercepted in their progress through the flue, and were forced into one of the rooms where the sugars were drying. The sugar was much damaged in consequence; but nothing was consumed by fire, and the loss arose from the negligent management of the machi-

(*a*) *Marsden v. City & C. Assce. Co.*, L. R. 1. C. P. 232; see also *Hillier v. Alleghany Co. M. Ins. Co.*, 3 Barr. (Penn.) 470.

(*b*) *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71.

(*c*) *Bunyon on F. Ins.* 32-3.

nery and the confinement of the heat. It was held not a loss within the terms of the policy (*a*).

A policy of insurance against fire was effected "on the hull of the steamship Indian Empire, lying in the Victoria Docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy." It was held, that these words did not confine the risk to the Victoria Docks, and the dry docks adjoining thereto, or to any particular dry dock; nor did it exclude the risk of transit from one dock to another, but that nevertheless, the risk did not attach on the ship while moored in the river Thames not for the mere purpose of transit from one dock to another; and therefore, where it appeared that the vessel proceeded from the Victoria Docks to Lungley's Dry Dock, about two miles up the Thames from the Victoria Docks, and after being there repaired, was towed down to the Government Buoys, off Deptford, between 600 and 700 yards from the Victoria Docks, and was burned while lying there at her moorings; the insurers were not liable, it appearing that the risk in the river was greater than in the dry dock (*b*).

The allowing by a bank manager of over drafts without security is an irregularity within the meaning of a policy guaranteeing the bank against such loss as might be occasioned to the bank by the want of integrity, honesty and fidelity, or by the negligence, defaults or irregularities, of the manager, where, in the opinion of the court, the evidence established that the manager concealed the fact of the over drafts from the head office by fictitious returns, and acted in improper concert with the parties whom he allowed to withdraw (*c*).

One of the objects of insurance against fire is to guard

(*a*) *Austin v. Drewe*, 6 Taun. 436, 4 Camp. 360; see also *Sun M. Ins. Co. v. Masson*, 4 L. C. J. 23.

(*b*) *Pearson v. Coml. Union Assce. Co.*, 15 C. B. N. S. 304, 9 L. T. N. S. 442.

(*c*) *Bank Toronto v. European Assce. Co.* 14 L. C. J. 186; S. C., 13 L. C. J. 63 overruled.

against the negligence of servant and others, and therefore, the simple fact of negligence has never been held to constitute a defence. Nor does it make any difference whether the negligence is that of a servant or of the assured himself. In all such cases, in the absence of fraud, the proximate cause of the loss is alone to be regarded (*a*).

Where a risk has not been increased within the conditions of a policy, it is not a defence to an action upon it, that the plaintiff might have been more careful in the management of a business, which he was permitted by the terms of the policy to carry on (*b*).

If the negligence be so gross as to amount to wilful misconduct or fraud, the insured could not recover. (*c*) And the insured may be guilty of such gross misconduct not amounting to a fraudulent intent to burn the building as to deprive him of his right to recover on the policy. (*d*)

Losses by the negligence of tenants on policies against fire are within the risks taken, and so losses by the criminal wantonness or misconduct of mere trespassers, or intruders or felons, are within the common policies against fire. (*e*)

In the absence of any condition restraining the liability of the insurers they would be liable for the wilful or felonious acts of servants or strangers, and therefore a condition is usually inserted in the policy protecting the insurers from liability for losses arising from invasion, insurrection, riot, civil commotion, or any military or usurped power. The Con. Stats. L. C. c. 68. s, 3, and the Con. Stats. U. C. c. 52,

(*a*) *Shaw v. Robberds*, 6 A. & E. 75; see also *Busk v. Royal Ex. Assce. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Bishop v. Pentland*, 7 B. & C. 219. *Columbian Ins. Co. v. Lawrence*, 10 Peters U.S. 507; *Matthews v. Howard Ins. Co.*, 13 Barb. N. Y. 234; *Johnson v. Berkshire M. F. Ins. Co.*, 4 Allen (Mass.) 388.

(*b*) *Brown v. King's Co. F. Ins. Co.*, 31 How. N. Y. 508.

(*c*) *Ripon v. Cape* 1 Camp. 434; *Foy v. Etna Ins. Co.* 3 Allen, 36; *Shaw v. Robberds*, 6 A. & E., 79.

(*d*) *Chandler v. Worcester M. F. Ins. Co.* 3 Cush. (Mass), 328.

(*e*) *Catlin v. Springfield F. Ins. Co.* 1 Sumn. C.C., 434; and see *Hollingworth v. Brodrick*, 7 A. & E., 40.

s. 10, as to mutual companies, provide that insurances may be effected against loss or damage by fire, whether the same happens by accident, lightning, or any other means, excepting that of design in the insured, or by the invasion of an enemy, or by an insurrection. The words "usurped power" refer only to invasion from abroad, or internal rebellion when armies are employed and the firing of towns is unavoidable, and therefore the insurers would be liable for the act of a *common* mob in setting fire to the premises. (*a*)

The mere excess of jurisdiction by a lawful magistrate is not an "usurped power" within the meaning of a policy, and therefore the order of a mayor of a city to blow up a building to prevent the spread of a conflagration, though an illegal exercise of power does not come within these terms (*b*).

The words "civil commotion" mean an insurrection of the people for general purposes, though it may not amount to a rebellion where there is an usurped power (*c*).

Where a policy excepts "losses by fire occasioned by mobs or riots," the exception clause does not extend to a loss by fire occasioned proximately by the burning of an adjoining bridge by order of the military authorities to prevent the advance of an armed force of the public enemy (*d*).

Where a house is destroyed by a riotous assembly and there is a clause in the policy excepting a loss of that character, the insurance company is not liable for the loss, and it is in such case immaterial that the rioters originally assembled for a lawful purpose and afterwards were guilty of riot (*e*).

It is not necessary in such case that the guilt of the rioters should be first established in a criminal prosecution (*f*).

The profits of any trade or business cannot be recovered

(*a*) *Drinkwater v. London Ins. Co.* 2 Wils., 363.
(*b*) *City F. Ins. Co. v. Corlies* 21 Wend. (N.Y.), 367.
(*c*) *Longdale v. Mason* 2 Marsh on Ins., 792.
(*d*) *Harris v. York M. Ins. Co.* 50 Penn. St. 341.
(*e*) *Dupin v. Mutual Ins. Co.* 5 La. An. 482.
(*f*) *Ib.*

unless they are insured as such ; for on an insurance against loss or damage by fire on a building *simply*, and its injury or destruction by the peril insured against, the assured cannot recover for his loss occasioned by the interruption or destruction of his business carried on in such building, nor for any gains or profits which were morally certain to accrue to him if it had remained uninjured to the expiration of his policy (*a*).

So if the insurers elect to reinstate the premises the insured cannot, as part of the indemnity, recover rent for the period occupied in so doing. Such rent forms a distinct insurable interest (*b*)

In general consequential damages are not recoverable, and it seems they could not be recovered without a distinct contract to that effect. The only damages recoverable under the ordinary policy is the actual loss by fire and interest on that sum, from the time it was due (*c*).

Insurance against fire does not cover consequential damages from loss of occupancy while the buildings are under repair. Nor wages of servants, which occupant had to pay, though, in consequence of the fire he could not employ them (*d*).

The underwriter, in entering into a contract of insurance on a mechanical establishment, can be presumed to insure only against risks arising from the usual and appropriate mode of carrying on such business. But if a new invention, not in common use, be introduced, materially increasing the risk, without the consent of the company, it may avoid the policy (*e*).

It has been held that upon a double insurance, the insured is not entitled to two satisfactions; but upon the first action,

(*a*) *Niblo v. Nor'h American Ins. Co.* 1 Sandf. N. Y. 551; *Leonarda v. Phœnix Assce. Co.* 2 Rob. La. 131.

(*b*) *Ib.*

(*c*) *Elmaker v. Franklin Ins. Co.* 5 Penn. St. 183.

(*d*) *Menzies v. North British Ins. Co.* 9 cases in the Court of Sessions N.S. 694.

(*e*) *Washington Co. M. Ins. Co. v. Merchants and Manufacturers M. Ins. Co.* 5 Ohio St. 450.

he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurer (*a*).

At the present day under the condition that in the event of other insurance the company shall only be liable for such rateable proportion of the loss or damage happening to the subject insured, as the amount insured by the company shall bear to the whole amount insured thereon the insured could not recover the whole amount but only a rateable proportion in the first action.

When a building insured is totally destroyed by fire, the cost of rebuilding does not furnish the true rule of damages. Under such a rule the amount recovered would be more than a fair indemnity. There is no rule of damages applicable to such cases, and where no rule of damages is established by law, the jury are to decide the question, and to their decision there can be no legal exception (*b*).

The actual damage only is recoverable, irrespective of the sum insured; and in estimating such actual damage, the cost of replacing the building or other property with new materials may be ascertained, and from this the actual value of the building or other property immediately before its destruction may be deducted, and thus the actual value of the subject insured may be determined (*c*).

When the true and actual cash value of the property at the time of the loss, is the criterion of damage the insured may recover the actual value of imported goods then in the custom house, although the duties have not been paid or secured (*d*).

A clause providing that the loss or damage shall be estimated according to the true and actual cash value of the property at the time of the loss, must be construed strictly.

(*a*) *Newby v. Reed* 1 W. Black. 416.
(*b*) *Brinley v. National Ins. Co.*, 11 Met. (Mass.) 195.
(*c*) *Vance v. Forster*, 2 Craw. & Dix. C. Rep. (Irish) 118.
(*d*) *Wolf v. Howard Ins. Co.* 1 Sandf. (N. Y.) 124; affirmed 3 Seld. (N. Y.) 583.

For instance, in the case of machinery, the cost of construction could not be taken into consideration, when, through a defective principle of construction, the machine is only valuable for the materials of which it is composed, it being wholly unadapted for the purpose for which it was intended. In such case, the actual value of the wood and iron composing the machine would be the measure of damages (*a*).

When goods insured against fire are destroyed the insurer is bound to pay their value at the time of the loss; but if damaged only he is bound for the difference between their value in their sound and damaged condition. When the goods are so much damaged as not to be saleable in the ordinary mode a fair sale at auction made by the insured after reasonable notice to the insurers, or with their knowledge, may be considered by a jury in estimating the damage and in ascertaining the amount of the indemnity. But the price for which such damaged goods are sold at auction by the insured without notice to or knowledge by the insurers of the sale is not sufficient evidence of the value of the goods in their damaged condition (*b*).

The amount for which indemnity is to be made is the market value of the articles at the time and place of the commencement of the risk, and when they have been purchased near that time and place, the cost to the insured is the most satisfactory, though not the only criterion of their value (*c*)

If the goods are those which the insured deals in at wholesale or are manufactured, the price for which similar goods are generally sold by wholesale dealers or manufacturers, may be considered by the jury in estimating their value in an action upon a policy to recover for their loss (*d*).

(*a*) *Commonwealth Ins. Co. v. Sennett*, 37 Penn. St. 205.

(*b*) *Hoffman v. Western M. & F. Ins. Co.* 1 La. An., 216.

(*c*) *Marchesseau v. Merchants Ins. Co.* 1 Rob. La., 438.

(*d*) *Hoffman v. Etna Ins. Co.* 1 Robert (N.Y.) 501; affirmed 32 N.Y., 405.

A policy of insurance on a steamer provided that the loss or damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen." *Held*, that in estimating the loss the plaintiffs were not entitled to have taken into account a depression in the market value of steamers generally, which might only be temporary, arrising from circumstances occurring recently before the loss, and having no reference to the original cost or actual condition of the boat (*a*).

If the policy contains a provision "that the insurers shall not be liable for more than the sum insured in any case whatever," or "that partial losses shall be paid in full not exceeding the amount insured," the insurers will not in any case be liable for more than the amount insured; and if they have already on one loss occurring paid a portion of the sum insured, they will only, on a subsequent loss, be liable for the balance of that sum. Thus, if the whole amount insured was $1,000, and a loss occurred of $300, and was duly paid, the insurers would not, on a second loss occurring, be liable for more than $700, though the amount of loss equalled or exceeded the sum insured. In other words, the sum paid on any loss will reduce the liability *pro tanta*, and when the total payments equal the amount insured, the liability ceases (*b*).

Where a mutual company undertake to pay all such loss or damage not exceeding the amount insured which shall happen during the currency of the policy, their liability is not extinguished by the payment of one loss not equal to the amount insured. Thus, when the buildings, being destroyed by fire, were reinstated by the company at a cost less by $550 than the amount insured, it was held that the insured, on a loss afterwards occurring before the expiry of the term, was entitled to recover this $550, making up the full amount insured, notwithstanding the previous loss and reinstatement (*c*).

(*a*) *McCuaig v. Quaker City Ins. Co.* 18 U. C. Q. B., 130.

(*b*) *Crombie v. Portsmouth M. Ins. Co.* 6 Fost. N. H., 389; *Curry v. Commonwealth Ins. Co.* 10 Pick. (Mass.) 535.

(*c*) *Trull v. Roxbury M. Ins. Co.* 3 Cush. (Mass.), 263.

CHAPTER V.

WARRANTY, MISREPRESENTION, AND CONCEALMENT.

An express warranty in the law of insurance is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the entire contract depends (*a*).

No particular form of words is necessary to constitute an express warranty, the word "warranty" or "warranted," for instance, is in no case necessary. Thus, in marine insurance the words "to sail on such a day," or "in port," or "all well," on such a day, "or carrying so many guns and so many men," would amount to an express warranty requiring a literal fulfilment as much as though there was a formal clause to the same effect (*b*).

To make a stipulation an express warranty it should be inserted in writing on the face of the policy, or in a detached paper expressly stipulated to be a part of the policy (*c*).

A warranty in whatever form created is a condition or contingency, and unless that be performed there is no contract. It is styled a condition precedent, which means that it is perfectly immaterial for what purpose the warranty is introduced, and that no contract exists unless the warranty be literally complied with. The only conceivable cases in which a compliance with an express warranty might be excused would be "if the state of things contemplated by the warranty were to cease, or if a subsequent law should pass rendering a compliance with a previous law illegal." (*d*)

(*a*) *Sayles v. North-western Ins. Co.* 2 Curtis C.C. U.S. 612; see also *Commonwealth Ins. Co. v. Monninger* infra.

(*b*) *Arnould on Ins.* 544; *Kenyon v. Berthon*, 1 Doug. 12.

(*c*) *Commonwealth Ins. Co. v. Monninger* 18 Ind. 352; *Lothian v Henderson*, 3 B. & P. 499; *Pawson v. Watson*, Cowp. 790.

(*d*) 1 *Arnould on Ins.* 546-8; see also *Nicol v. American Ins. Co.*, 3 Wood. & Min. C. C. U. S. 529.

A non-compliance with an express warranty that certain things shall be done by a certain time does not vac the contract from the commencement of the risk, but oni and after such non-compliance.

Where the warranty is clear and explicit no parol evidence *a' nde* can be admitted to contradict control, restrain or extend it. (*a*)

An implied warranty is something contracted for which necessarily results from the terms of the contract. (*b*)

A warranty will in no case be extended by construction to include anything not necessarily implied in its terms. Thus where there was a warranty that "the ship should have twenty guns," and it appeared that although in fact the ship did carry twenty guns, yet she had only twenty-five men, a number short of the necessary complement for twenty guns, it was held that this warranty did not imply that she should carry a competent number of men to work the guns, and therefore as there was no ground to impute fraud that the warranty had been sufficiently complied with. (*c*).

A warranty may apply either to matters subsequent or to matters precedent (*d*).

It appears from the case of *Borradaile v. Hunter* (*e*), that two classes of conditions are usually inserted in policies of insurance; the first pointing to the time of the contract, the second to things which may occur at a time subsequent. In the former case the stipulation is called an *affirmative* and in the latter a *promissory* warranty (*f*); and a breach of warranty consists either in the

(*a*) *Beaum. on Ins.* 29, 30; *Rodgson v. Richardson*, 1 Bl. 463; *Carter v. Boehm*, 3 Burr. 1909; *Flin v. Tobin*, 1 M. & M. 367.

(*b*) *Dixon v. Sadlier*, 5 M. & W. 414.

(*c*) *Hyde v. Bruce*, 3 Doug. 213.

(*d*) *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488.

(*e*) 5 M. & G. 639.

(*f*) 1 *Arnould on Ins.* 578; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Garrett v. Prov. Ins. Co.*, 20 U. C. Q. B. 200.

falsehood of an affirmative, or in the non-performance of an executory stipulation (*a*).

The leaning of the courts is to hold stipulations to be representations rather than warranties in all cases where there is room for such a construction (*b*).

A representation, in the technical sense which the word bears to the law of insurance, and as distinguished from warranty, has been well defined as follows: "A verbal or written statement made by the insured to the underwriter before the subscription of the policy as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it" (*c*).

Representations are part of the proceedings preliminary to the contract (*d*). A representation precedes and is no part of the contract of insurance and need be only materially true, but a warranty is part of the contract, and must be exactly and literally fulfilled, or else the contract is broken, and the policy becomes void (*e*).

It is a first principle in the law of insurance that where a representation is material it must be complied with, but if there is a warranty, it is part of the contract that the matter is such as it is represented to be, and the materiality or immateriality is of no consequence, whether the non-compliance therewith arises from fraud, mistake, or the negligence of an agent, or otherwise (*f*)

Where the premises insured were warranted as of one class, and they turned out to be of another, it was held immaterial that there was no difference in the risk, the only

(*a*) *De Hahn v. Hartley*, 1 T. R., 343.

(*b*) *Daniels v. Hudson R. F. Ins. Co.* 12 Cush. (Mass.) 416. See also *Lycoming Ins. Co. v. Mitchell* 48 Penn. St., 367.

(*c*) *Commonwealth Ins. Co. v. Monninger*, 18 Ind., 352; *Arnould on Ins.* 476.

(*d*) *Williams v. New England F. Ins. Co.* 31 Me., 219.

(*e*) *Glendale W. Co. v. Protection Ins. Co.* 21 Conn. 19.

(*f*) *Newcastle F. Ins. Co. v. McMoran* 3 Dow, 255. See also *Duncan v. Sun Ins. Co.* 6 Wend. (N. Y.) 488; *Delonguemare v. Tradesmen's Ins. Co.* 2 Hall (N. Y.) 589.

question being, what was the building *de facto* that was insured? (*a*)

In this respect a warranty differs from a mere representation, for in the latter case if anything has been falsely represented which would increase the risk, the policy will not be avoided by it where no fraud was intended, unless the loss can be shown to have arisen from the circumstances in regard to which the insurer has been misled (*b*).

The representation must not only be false but material, either in relation to the rate of premium or as offering a false inducement to the underwriter to take the risk at all. Where the representations are made with intent to deceive, the fraud vitiates the contract in all cases, even though the loss happen in a mode not affected by the falsity. A misrepresentation renders the contract void on the ground of fraud; a non-compliance with a warranty is an express breach of the contract (*c*).

The main distinction between a representation and a warranty, *in form*, is that the former may be made orally or in writing, but in neither case is introduced into the policy, whereas the latter must always be in writing, and appear on the face of the policy (*d*).

A misrepresentation of a fact which is in no way material to the risk, and can have no effect in increasing the premium if known, will not make the policy void, no matter whether it be contained in the policy or be outside of it. But a false representation of a material fact is sufficient to avoid a policy of insurance underwritten, on the faith thereof whether the false representation be by mistake or design. And, a misrepresentation made by an agent in procuring a

(*a*) *Newcastle F. Ins. Co. v. McMoran*, 3 Dow 255. See also *Garrett v. Prov.. Ins Co.* 20 U. C. Q. B. 200.

(*b*) *Gillespie v. British A. F. & L. Ins. Co.* 7 U. C. Q. B., 119; *De Hahn v. Hartley* 1 T. R., 343.

(*c*) *Angell on Ins.* 178; *Williams v. New England F. Ins. Co.* 31 Me. 219.

(*d*) 1 *Arnould on Ins.*, 477.

(*e*) *Roth v. City Ins. Co.*, 6 McLean C. C. U. S. 324.

policy is equally fatal, whether made with the knowledge or consent of the principal or not (*a*).

It would seem that statements of facts material to be known, made on applying for a fire policy, are more in the nature of warranties than of representations, at all events, under policies in which the party applying "covenants and engages, amongst other things, that his application contains a full, just, and true exposition of his interest in the property insured, so far as the same are known to him (*b*).

There is a material destinction between representations made to an insurance company of the condition of the premises at the time the policy is granted, and representations that may be considered as expressing the intention of the parties, that the premises during the whole period the policy is in force, will continue in the same condition as they are when the insurance is applied for. The former is called an affirmative and the latter a promissory misrepresentation. If there be a misdescription of the risk at the time the policy is granted, and such description is made a part of the policy, which provides that if any material fact or circumstance shall not be fairly represented, the policy shall be void then, whether in a life, fire or marine policy the insurance is void, if the misrepresentation consists in omitting a statement of a fact, which ought in fairness to be stated according to the reasonable requirements made on the applicant. Even if such misrepresentation by the assured or his agent were made innocently through inadvertence, mistake or negligence, without any fraudulent intention whatever, it will vitiate the policy and discharge the insurer as much as if there had been an actual fraud; with this difference that in all cases where an actual fraud has been committed by the assured or his agent, the underwriter is allowed to retain the premium, but when the misrepresentation arises from a mistake he cannot do so (*c*).

(*a*) *Carpenter v. American Ins. Co.*, 1 Story C. C. U. S. 57.
(*b*) *Hopkins v. Prov. Ins. Co.* 18 U.C.C.P., 81.
(*c*) *Hopkius v. Prov. Ins. Co.* 18 U. C. C. P. 80.

The rule that on sales of property a warranty does not extend to defects which are known to the purchaser, does not apply to warranties in contracts of insurance, and if the warranty is not complied with the knowledge by the insurer that the fact was otherwise than as warranted is immaterial (*a*).

Where a policy on cotton mills contained a warranty that they "worked by day only," and to a declaration on this policy, the defendant pleaded that a steam engine and horizontal shafts being *parts of the mills*, were without defendant's consent worked by night and not by day only; the plea was held bad, as showing no breach of warranty, for a part of the mills might be worked as for supplying water, and yet the mills not be worked in their usual way (*b*)

A policy of insurance was effected on certain cotton mills, millwrights' work, including standing and going gear therein, engine house adjoining and the steam engine therein, and recited; that the aforesaid buildings were brick-built and slated; warmed exclusively by steam; lighted by gas; worked by the steam engine above mentioned; in tenure of one firm only; standing apart from all other mills, and "*worked by day only*." It was held that the words "worked by day only" referred to the mills only and not to the steam engine or the shafts connected with it, by which the moving power of the steam engine was conveyed to other mills, and that it was no breach of the policy that the steam engine was kept going by night, and that the machinery in other mills were turned by it, the mills insured being worked by day only, conformably to the terms of the policy (*c*).

The importance of a representation in effecting a contract of insurance, depends upon its materiality, and upon a substantial compliance with it. The test of the materiality is

(*a*) *Kennedy v. Ins. Co.*, 10 Barb. (N. Y. 285.)

(*b*) *Mayall v. Mitford*, 6 A. & E. 670.

(*c*) *Whitehead v. Price*, 2 C. M. & R. 447.

the probable influence made on the mind of the underwriter in his determining to assume a responsibility he would not otherwise have assumed (*a*).

The materiality of a representation is matter of fact for a jury (*b*). But, if the jury find the representation to be material, the consequence is matter of law, that the policy is void (*c*); and it seems, that if the materiality of the representation appears from the policy and conditions, it is not a question for the jury (*d*).

In regard to representations, there is a distinction between marine and fire insurance. In the former cases, a misrepresentation or concealment of a fact material to the risk, will avoid the policy, although no fraud was intended, and the error or suppression was the result of mistake, accident, negligence, or forgetfulness. The insured is bound, *although no inquiry is made*, to disclose every fact within his knowledge which is material to the risk. But this doctrine is not applicable in its full extent to policies against fire. In the latter case, if the insurer makes no enquiry, he cannot complain if the risk proves greater than he anticipated, unless the insured is chargeable with some misrepresentation concerning the nature and extent of the risk. It is therefore necessary, and it is believed to be usual with companies which insure against fire, to make enquiries of the insured in some form, concerning all such matters as are deemed material to the risk, or which affect the amount of premium to be paid. When this enquiry is made of the insured, he is bound to give a true and full representation concerning all matters brought to his notice (*e*). This is on the ground

(*a*) 1 *Arnould on Ins.*, 493; *Sibbald v. Hill*, 2 Dow P. C. 263.

(*b*) *Grant v. Howard F. Ins. Co.*, 5 Hill (N. Y.) 10.

(*c*) *Beaum. on Ins.*, 30; *Rodgson v. Richardson*, 1 Bl. 463; *Lindenau v. Desborough*, 8 B. & C. 586.

(*d*) *Marshall v. Times F. Ins. Co.*, 4 Allen 618.

(*e*) *Burritt v. Saratoga Co. M. F. Ins. Co.*, 5 Hill N. Y. 188; *Holmes v. Mutual F. Ins. Co.*, 10 Met. (Mass.) 211.

that an enquiry will make a fact material which otherwise would not be so (*a*).

This distinction between marine and fire insurance arises from the fact, that the owner of a vessel is generally in a situation to ascertain her state and condition, and the underwriter is not; whereas, in the case of fire insurance, the property is generally available to inspection by the insurer. There is really no difference in *principle* between the two classes of insurance in regard to concealment, the question in each being, whether the special facts upon which the contingent chance is to be computed, are within the knowledge of the underwriter (*b*).

By express stipulation a representation in relation to particular facts may be placed on the same footing as a warranty (*c*).

And in the same way what would otherwise be a warranty may, by express stipulation be converted into a representation only (*d*).

Where in the case of a mutual insurance company the application is to be read as part of the policy, and the latter provides that any misrepresentation in the answers given to the several queries in the application will vitiate the policy, etc., a representation as to the "present estimated cash value" of the property is not a warranty, but should be treated as a representation on the part of the insured, that the amount stated is really and truly a fair and reasonable estimate of the value stated; and if to the knowledge of the insured it is not such, the policy will be void (*e*).

If the insured signs a declaration, which is to be taken as the basis of the contract that the goods are of the value of $, it would seem that he would so warrant them to be

(*a*) *Strong v. Manufacturers' Ins. Co.* 10 Pick. (Mass.) 44.

(*b*) *Carter v. Boehm*, 3 Burr. 1909; *Vale v. Phœnix Ins. Co.*, 1 Wash. C.C. 283.

(*c*) *Burritt v. Saratoga C. M. F. Ins. Co.* 5 Hill, N. Y. 188.

(*d*) *Arnould on Ins.* 478.

(*e*) *Riach v. Niagara Dis. M. Ins. Co.* 21 U. C. C. P. 464.

of that actual value, and his belief that they were so, would not suffice if they were not so in fact (*a*).

When the application is made a part of the policy and the party in the application calls the property "his property," this does not constitute a warranty on his part that he holds the fee simple thereof unencumbered (*b*).

Where an insurance company required applications for insurance to be made on printed forms containing certain questions which were to be minutely answered and were declared to form the basis of the insurance and one of the questions was: Is the property involved in law or mortgaged, if the latter, to whom and for what amount? The answer was "There is a mortgage on the house for £300," which was untrue. This application was referred to in the policy, one of the conditions of which, was, that if the buildings were described otherwise than they really were, the insured should not be entitled to any benefit under the policy. It was held that the answer to this question formed an essential part of the contract, and being untrue, rendered the policy void (*c*).

The various answers contained in an application and referred to in the policy as representations are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking of the character of both, and it is sufficient if they are made in good faith and are substantially correct as to existing circumstances, and substantially complied with so far as they are executory and regard the future (*d*).

In fact, where the policy contains no covenant making the answers of the insured to questions in the application warranties, the answers are representations only, and a mistake or false answer does not necessarily avoid the policy (*e*).

(*a*) *Reach v. Niagara Dis. M. Ins. Co.* 21 U. C. C. P., 471; *Fowkes v. Manchester and L. Assce. Co.* 3 B. & S. 930.

(*b*) *Mutual Ins. Co v. Deale*, 18 Md. 26.

(*c*) *Marshall v. Times F. Ins. Co.* 4 Allen 618.

(*d*) *Houghton v. Manufacturers M. F. Ins. Co.* 8 Met. (Mass.), 114.

(*e*) *Columbia F. Ins. Co. v. Cooper*, 50 Penn. St. 331.

But if an application for insurance is expressly made a part of a policy, an answer in the application falsely denying the existence of encumbrances on the property to be insured will avoid the policy (*a*).

If the application is referred to in the policy, "as forming a part thereof," it becomes a part of the contract and warranty (*b*).

But a mere reference to the application does not make it a part of the contract unless expressly stated (*c*).

It has, however, been held that a reference to a survey was in effect incorporating it into the contract, and that all answers applicable to the subject matter insured were obligatory on the insured (*d*).

To make an application, the conditions, or any other document, a part of the contract, there must be an express stipulation that the policy was made and accepted in reference to such other document or paper. An application describing a building is not a warranty unless thus referred to in the policy (*e*). But where the policy refers to the application for a description of the property insured, the application must be regarded the same as if incorporated in the policy itself (*f*).

When the statements in the application are made a warranty, the policy will be rendered invalid if there is any inaccuracy or defect in the answers to the questions in the application (*g*).

Though a survey is referred to in the policy, if it is not expressly made a part thereof it will be a representation

(*a*) *Murphy v. Peoples Equitable M. F. Ins. Co.* 7 Allen (Mass.), 239.

(*b*) *Burritt v. Saratoga M. F. Ins. Co.* 5 Hill, N.Y., 188; *Kennedy v. St. Lawrence Co. M. Ins. Co.* 10 Barb., N.Y., 285; *Williams v. New England M. F. Ins. Co.*, 31 Me., 219; *Battles v. New York Co. M. Ins. Co.*, 41 Me., 208.

(*c*) *Wall v. Howard Ins. Co.*, 14 Barb. (N.Y.), 383.

(*d*) *Sheldon v. Hartford F. Ins. Co.*, 22 Conn., 235.

(*e*) *Jefferson Ins. Co. v. Cotheal* 7 Wend. (N. Y.) 72.

(*f*) *Gahaghan v. Union ins. Co.* 43 N. H., 176.

(*g*) *Abbott v. Shawmut F. Ins. Co.* 3 Allen (Mass.) 213.

merely, and not a warranty (*a*). But the survey and description accompanying the written application may, by express contract, be made to contain a warranty, and if they are false no recovery can be had on the policy (*b*),

The word "survey" in the policy imports only a plan and description of the present existing state, condition, and mode of use of the property (*c*).

On the principle already explained, that the party employing an agent is responsible for his mistake or negligence if an application is intentionally defective on a point well known to the agent of the insurers, the latter and not the insured must be the sufferers (*d*).

When the risk is taken on the faith of representations made by the insured, he is required truly and completely to express his knowledge of the dangers to which the property is exposed, and the contract will be void if he does not; but where the insurers depend on their own knowledge, the representations of the insured are immaterial, though a withholding of information increasing the risk would be in bad faith, and would avoid the contract. As to these matters, the insured, even in a mutual company, deals with the company as a stranger (*e*).

The insured is responsible for the truth of representations in his application if signed by his agent, although the agent signed it in blank, and left it to be filled up by the company, or one of the company's officers, unless the latter exceed their implied authority conferred upon them by the insured, by sending them the application in blank. If they exceed their authority, then to that extent and no further the insured are absolved from all liability for the representations contained in the application. If the signature and

(*a*) *Snyder v. Farmers' Ins. Co.* 13 Wend. (N. Y.) 92; affirmed 16 Wend. (N. Y.) 481.

(*b*) *Ætna Ins. Co. v. Grube* 6 Minn., 82.

(*c*) *Denny v. Conway S. & M. Ins. Co.* 13 Gray (Mass.) 492.

(*d*) *Campbell v. Merchants' & F. M. Ins. Co.* 37 N. H., 35.

(*e*) *Cumberland Valley M. P. Co. v. Schell*, 29 Penn. St. 31.

authority of the insured's agent is admitted, any evidence to show that it is not their application would be inadmissible (*a*).

All false statements made by the applicant for insurance absolutely avoid the policy. Thus, where an applicant for life insurance in answer to the printed questions misstates his age, or declares that his health is good when it is bad, or fails to disclose the name of medical attendants, and answers that he has none when he has several, and a policy is issued upon such answers, which, with the application, form a part of the contract between the parties, the policy is void (*b*).

A representation made by the insured to the first underwriter extends to all the subsequent ones on the same policy, and if the representation is such as to avoid the policy against the first, all the others may take advantage of it unless the misrepresentation has been corrected and the true state of the facts explained to them. The rule, however, is strictly confined to those matters of intelligence relating to the subject insured, with regard to which it is reasonable to suppose that the first underwriter would require information, and without which it may be presumed he would not have subscribed the policy (*c*).

When the applicant for insurance represents to the insurer that another company have accepted the risk at a particular rate of premium, and this representation is false and made with the intent to induce the insurer to accept the risk at the same rate, the policy will be void (*d*).

A description of premises sought to be insured in reference to the uses to which they are then being applied is not to be regarded as a warranty that they shall not be used during the existence of the policy for any other purpose. The application is a mere representation of the insured, and he

(*a*) *Liberty Hall Assce. Co. v. Housatonic M. F. Ins. Co.* 7 Gray (Mass.) 261.
(*b*) *Hartigan v. International L. Assce. Co.* 8 L. C. J. 203.
(*c*) *Grant v. Ætna Ins. Co.* 11 L. C. R. 128.
(*d*) *Sibbald v. Hill*, 2 Dow, 263; *Trail v. Baring*, 10 Jur. N. S. 377.

is not bound to set it out and prove its truth. Its falsity is a matter of defence (*a*).

In such a case as the foregoing the statement is a warranty only as to the present use. To make a continuing warranty it must be so expressed by appropriate words (*b*).

So a description of a house in a policy of insurance as "occupied by" the insured, is a description merely, and is not an agreement that the insured should continue in the occupation of it; and if vacant at time of fire, the policy will not be void (*c*).

The occasional use of articles denominated hazardous, or the occupation of the premises insured for purposes called hazardous in the conditions annexed to a policy, will not avoid the policy if such an occupation was connected with the building insured. There must be a direct appropriation of the property to such use or purpose before the covenant is broken. And if, during such occasional or temporary use, the property should be destroyed, the underwriters will still be held if there is no fraud on the part of the insured (*d*).

Where a policy is silent in reference to the use of premises adjoining those insured, and there has been no representation or suppression of any fact relating to the subject-matter, the insured has the same right to use his adjoining property, and is governed by the same obligations is respect to its use, as any other owner would be (*e*).

Whenever the nature of the interest insured might have an influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium, it must be deemed material to the risk, and a misrepresentation or concealment of it will avoid the policy. A decisive

(*a*) *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill., 221.

(*b*) *Smith v. Mechanics & Traders F. Ins. Co.*, 29 How. (N.Y.), 384.

(*c*) *Joyce v. Maine Ins. Co.*, 45 Me., 168.

(*d*) *Merchants & Manufacturers M. Ins. Co. v. Washington Mutual Ins. Co.*, 1 Hand., Ohio, 408.

(*e*) *Miller v. Western Farmers Mutual Ins. Co.*, 1 Hand., Ohio, 208.

test of materiality is to ascertain whether, if the true state of the title had been known, it would have enhanced the premium. This question of materiality is one of fact for the jury; and, there is no presumption of law that a misdescription of the premises material to the risk, did reduce the premium; the inference in such case being one of fact to be left to the jury (*a*).

In mutual insurance, the representations of the insured in respect to the title, stand upon the same ground with other representations, and the legal presumption is, that they are true until they are proven false (*b*).

If a representation as to encumbrances upon the property is untrue, but not fraudulently made, and the agent of the company knows the true state of the facts, and writes the statement from his own knowledge, and fails to state it truly, such misrepresentation will not avoid the policy, although the statement is adopted and signed by the agent of the insured (*c*).

Where applicant stated that the premises to be insured were encumbered for "about $3,000," when in fact there was a mortgage on them for $4,000. *Held*, that the representation as to incumbrance was a material one, which assured was bound to make substantially true; and that having failed to do so, he could not recover (*d*).

If the property is represented as unincumbered, when in fact it has been sold for taxes, it is a misrepresentation that will avoid the policy (*e*).

A bond for the conveyance of the premises insured, upon the payment of a sum of money, at a specified time, is not an encumbrance on such premises, if the time has expired,

(*a*) *Columbian Ins. Co. v. Lawrence*, 10 Pet. U. S. 507.

(*b*) *Nichols v. Fayette M. Ins. Co.*, 1 Allen (Mass.) 63.

(*c*) *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452.

(*d*) *Hayward v. New Egland M. Ins. Co.*, 10 Cush. Mass. 444; see also *Brown v. Peoples' M. Ins. Co.*, 11 Cush. Mass. 280.

(*e*) *Wilbur v. Bowditch M. Ins. Co.*, 10 Cush. Mass. 446.

and the money has not been paid, even if the obligor has verbally waived the time (*a*).

It would seem that if the vendor take a bond from the vendee for the unpaid purchase money the bond would not form such a lien on the land of the vendee in case of an insurance thereof by him, as to amount to an "encumbrance" within the meaning of a condition. Thus when A and wife conveyed to B and wife in consideration of B giving a bond for the maintenance of A and wife during their lives, and B gave the bond and afterwards insured the property, the court were of opinion there was no encumbrance on the property within the meaning of a condition against incumbrances (*b*).

The condition in a policy that "it shall be void if the party insuring his goods or buildings shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than is herein proposed" relates to a mis-description of the property, and not to the character of title or interest in it (*c*).

The insurer may waive the benefits of a condition that any misrepresentation or concealment on the part of the insured shall avoid the policy (*d*).

A notice by an insurer, under a condition of the policy authorizing him at his election to rebuild or repair in case of loss, that he elects to rebuild or repair, is a waiver of any defence based upon misrepresentations by the assured at the time of the application; if the fact of such misrepresentations be known to the insurer when he gives the notice (*e*).

If the insurers renew the policy after having obtained full knowledge of the risk, any misrepresentations contained in

(*a*) *Newhall v. Union M. Ins. Co.* 52 Me. 180.

(*b*) *Mason v. Agricultural M. Assce. Co.* 16 U. C. C. P. 493, affirmed in appeal, 18 U. C. C. P. 19.

(*c*) *Franklin F. Ins. Co. v. Coates* 14 Ind. 285.

(*d*) *Bersche v. Globe M. Ins. Co.* 31 Mo. 546.

(*e*) *Ib.*

the original application must be deemed to be waived and the insurers are bound by the policy (*a*).

It is a usual condition of the policy that all insurances original or renewed shall be considered as made under the original representation so far as it may not be varied by a new representation in writing which in all cases it shall be incumbent on the insured to make, when the risk has been changed, either within itself or by the surrounding or adjacent buildings. This condition does not bind the insured to make a new representation during the currency of the policy.

And although there has been a change in the risk, yet if the original representation is true and the time for renewal has not arrived. When the fire occurs the policy is not avoided, for the insured is only required to make the representation at the time of the renewal (*b*).

To obviate the effect of this decision a few of the offices require the new statement to be made immediately after the risk has been changed or varied without reference to the time for renewal.

Where the policy containing this condition prohibited carrying on upon the premises any hazardous trade, except after notice and consent, etc., and after the original insurance a hazardous trade was commenced and carried on upon the premises, it was held that the insured was bound to communicate this fact on renewing the policy, and on neglect to do so that he could not recover (*c*).

A policy was subject to this condition, and the insured covenanted that his application contained a just and true exposition of all the facts respecting the condition, etc., of the property insured, and that if any material fact should not have been fairly represented the policy should be void. On the application for insurance the insured was asked

(*a*) *Witherell v. Maine Ins. Co.* 49 Me. 200.

(*b*) *Heneker v. British Am. Assce. Co.* 13 U. C. C. P. 99; *Lomas v. British Am. Assce. Co.* 22 U. C. Q. B. 310.

(*c*) *Merrick v. Prov. Ins. Co.* 14 U. C. Q. B. 439.

whether there was any incumbrance on the property, to which he answered in the negative. Subsequently in consequence of an agreed reduction in the premium a new policy was issued on the same property and for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an encumbrance on the property. *Held*, that in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the then existing written statement by the assured as to the general state and title of the property, and that the insurers, unless explicitly notified to the contrary, had a right so to consider it, and consequently the insured could not recover (*a*).

The concealment of an incumbrance on the property will vitiate the policy, though its existence is known to the local agent of the company with whom the insurance is effected (*b*).

The contract of insurance is a contract *uberrimæ fidei*, and all matters material to the risk must be disclosed. Where the plaintiffs in applying for an insurance with the defendants, a mutual company had represented themselves as owners of an unincumbered estate in fee simple in the premises to be insured, it appearing that they were interested only as mortgagees in fee, and for a less sum than that insured for. *Held* that they had not represented their title truly as the statute requires, and that they could not recover on the policy (*c*).

The plaintiff's application for an insurance with defendant contained the following questions and answers:—*Question*. Occupied by applicant or tenant? *Answer*. Tenant. *Q*. Title by deed or how? *A*. Deed. *Q*. Encumbered or not; if not, say no? *A*. No. The plaintiff afterwards made affidavit "that he is the *bona fide* owner of the said property

(*a*) *Martin v. Home Ins. Co.* 20 U. C. C. P. 447.

(*b*) *Ib.*

(*c*) *Brown v. Gore D. M. Ins. Co.* 10 U. C. Q. B. 353.

and of the said policy; that the said property is not and was not in any way encumbered by mortgage or otherwise." It appeared that the plaintiff was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price, and that there was a mortgage from M. to one H., including the property insured. *Held* that, irrespective of the mortgage, the plaintiff had misrepresented his title, and could not recover on the policy (*a*).

In this case there was evidence that the fact of any incumbrance on the property was material to be made known to the insurers.

When, by a decree of the Court of Chancery, the insured was declared to be mortgagee in possession of the insured property, it was held that an answer to this effect in his application was not an untrue representation of his title, the decree being at the time unreversed, though an appeal therefrom was pending (*b*).

Where a party, on applying to effect an insurance, in answer to one of the interrogatories indorsed on the printed form of application (which, by the conditions, he was bound to answer fully), said that he was the owner of the estate, subject to a mortgage in favor of a building society for $1,500, the facts being that he only held a contract of purchase, and that a portion of the purchase money—not, however, exceeding $1,500—remained unpaid and that a mortgage for the amount mentioned had been agreed for, but not *executed*, of which facts the company, through their agent, were aware. *Held*, that the insurance was not avoided by the inaccuracy of the statements in the application, it not being shown that such misstatement was intentional or material (*c*).

To an action on a policy of insurance of chattel property

(*a*) *Walroth v. St. Lawrence C. M. Ins. Co.* 10 U. C. Q. B., 525.

(*b*) *Rowe v. London & L. Ins. Co.* 12 Grant, 311.

(*c*) *Laidlaw v. Liverpool & L. Ins. Co.* 13 Grant 377.

defendants pleaded that plaintiff in his application falsely, etc., stated that he held the property in which the goods insured were by deed and unencumbered, whereas said property was largely mortgaged, and that this should have been communicated to defendants, by reason of which, etc. The evidence given in support of this plea was that to a question contained in a printed form of application, wholly inapplicable in many of the questions to an insurance on chattel property alone, whether the property was encumbered, defendants agent at plaintiff's dictation filled in the answer that there was no encumbrance. It further appearing that on this question being put plaintiff was about to explain that the *land* was mortgaged, when the agent stopped him, stating that this was of no importance, as the proposition was merely for insurance of goods, and that the question related only to realty, whereupon the goods not being incumbered the agent wrote the answer accordingly. *Held* that the question must be considered as relating to the goods insured and not to the real property, and that the plea was therefore not proved (*a*).

If it is intended that the insured shall disclose all subsequent incumbrances as soon as they are created the condition must be express to that effect, for under the ordinary condition requiring the applicant to disclose all incumbrances existing on the property he is not bound to disclose such as are created after the date of the policy (*b*).

Where a policy granted upon several parcels of property, each separately valued, requires that the insured should accurately state his title, a failure to disclose his true title as to any one of the parcels will avoid his policy as to all of them (*c*).

Where an insurance is effected in separate sums on differ-

(*a*) *Ashford v. Victoria M. Ins. Co.*, 20 U.C. C.P., 434.

(*b*) *Howard Ins. Co. v. Bruner*, 23 Penn. St., 50; *Dutton v. New England M. F. Ins. Co.*, 9 Fost, (N.H.), 153.

(*c*) *Day v. Charter Oak F. Ins. Co.*, 51 Me., 91.

ent subjects of property, one of which is not covered by mortgage, while the others are; the non-disclosure of the mortgage as to the latter, contrary to the conditions of the policy, will vitiate the contract as to the whole, if the different subjects of insurance are included in one policy, and the property unincumbered is within such a distance from the other buildings insured, as to increase the risk of each (*a*).

Where by its terms a policy is to be void "unless the true title of the assured and the encumbrances on the same be expressed therein," the existence of an encumbrance is a fact material, as a matter of law, to be disclosed; and, if not set forth, the policy will be void, unless it be shown that the encumbrance was known to the insurer, and not fraudulently concealed (*b*).

When there is entire good faith, non-disclosures are not to be deemed material simply because their communication might have excited suspicion in the insurer. Where there is no intention to deceive, and the disclosure is withheld simply from a conviction of its unimportance, it should appear clearly in order to avoid the policy, that the facts would have been deemed material by every prudent underwriter, as really enhancing the risk, and justifying an increase of premium (*c*).

A party on applying to insure, omitted, unintentionally, from his description of the property, some particulars which he was not asked respecting, but which, had the company's agent known he swore, he would not have insured. *Held*, there being no fraudulent concealment, the omission to set forth the particulars referred to, did not render the policy void (*d*).

In *Barsalow* v. *Royal Ins. Co.* (*e*), it was held under

(*a*) *Bleakley v Niagara D. M. Ins. Co.*, 16 Grant, 198.
(*b*) *Gahagan v. Union M. Ins. Co.*, 43 N.H., 176.
(*c*) *Grant v. Ætna Ins. Co.*, 11 L. C. R. 140.
(*d*) *Laidlaw v Liverpool & L. Ins. Co.*, 13 Grant 377.
(*e*) 15 L. C. R. 1.

the facts shewn in that case, that there was concealment on the part of the insured, in not stating that a wing alleged to contain merchandise, was also partly occupied as a kitchen, and that such concealment, although not fraudulent, avoided the policy.

The plaintiff in his application to insure a building stated that it was owned by himself and one P. and worked by them as a mill. At that time the mill was in possession of a tenant, under a lease for five years, was mortgaged to its full value, and a line of railway had been laid out through the land for which the plaintiff claimed damages, alleging that it destroyed the mill. There was nothing in the policy or the application requiring these matters to be disclosed. *Held,* that the materiality of their disclosure was a proper question for the jury (*a*).

A mortgagor may insure to the value of his property without disclosing the incumbrance, unless there is a stipulation in the policy requiring it.

Under the Con. Stats. U. C., c. 52, s. 27, when the assured has a fee simple unincumbered, he need state nothing whatever about his title or incumbrances in his application for insurance, for when no estate is expressed it will be assumed he has a fee simple unincumbered. If he insure as having such a title, whether he state so expressly or say nothing about it, from which therefore such a title is to be inferred, but have in fact a less estate, or if the premises be incumbered, then the policy shall be void. If he have such lesser estate, or if the premises be incumbered, he must then state his true title, and the incumbrance on the premises, otherwise the policy will be void (*b*).

If there is *any* encumbrance on the property, and it is not communicated to the company at the time of the insurance, the policy will be void under the Con. Stat U. C., c. 52 s. 27. It is immaterial that in the case of a mortgage

(*a*) *Perkins v. Equitable Ins. Co.* 4 Allen, 562.

(*b*) *Williamson v. Niagara Dis. M. F. Ins. Co.* 14 U. C. C. P. 15.

there is only a small sum due thereon, and that the property is ample security as well for moneys due on the mortgage as for the premium notes, and evidence as to the value of the land would be inadmissable (*a*).

Where the policy was avoided by the non-communication of an encumbrance, as above mentioned, the court inclined to think that the insured could obtain no relief in equity, though he acted as agent of the mortgagee, on the agreement that any moneys due to him for services should be credited on account of the mortgage, and before applying for the policy, delivered to the latter a claim against certain persons, which was accepted, and this claim, together with the moneys then paid, having equalled the mortgage debt the same was cancelled and paid, but no formal legal discharge executed before making application for the policy (*b*).

Under a simple issue as to whether the plaintiff has a title in fee simple to the premises, the plaintiff will be entitled to recover, though it appears there is an outstanding mortgage on the property (*c*).

Where, at the time of the application and of the execution of the policy, a mortgage to one B existed on the property, and the provisions of Con. Stats. U. C., c. 52 s. 27, as to notice of the encumbrance, were not complied with, but afterwards the agent of the company, acting for the insured, gave a notice of the mortgage to the company, and recommended an assignment of the policy to the mortgagee, but the notice did not state that the mortgage was made before the insurance was effected, nor did it state the true sum for which the mortgage was given; the company, in fact, believing that the mortgage was given after the policy, assented to the assignment of the policy to the mortgagee. *Held*, that their assent was not binding on them, there

(*a*) *Muma v. Niagara D. M. Ins. Co.*, 22 U. C, Q. B.. 214.

(*b*) *Ib.*

(*c*) *White v. Agricultural M. Assce. Co.* 22 U. C. C, P., 98.

being at least a concealment, if not an actual misrepresentation of the date of the mortgage (*a*).

If neither in the policy nor conditions any mention is made of a particular class of goods, which in the insurers instructions to their agents only is classed as extra hazardous, the omission of the insured to inform the insurer that such goods are stored on the premises, will not necessarily vitiate the policy, for the insured cannot be taken to be aware of what is stated in the instructions to the insurer's agents (*b*).

The omission of a mortgagor in effecting an insurance in the name of the mortgagee to mention the amount of the mortgage does not render the policy void; (*c*) for if the insured has an insurable interest in the property that is sufficient, although the nature of such interest be not declared or inserted in the application or policy (*d*).

Where several fires have occurred in and about the house before applying for insurance, a failure to disclose such facts to the insurers is a concealment fatal to the policy; but if enough is made known to put the insurers or their agent upon enquiry for more, and they fail to enquire, the insured is not bound to enforce his knowledge upon them (*e*).

It has been held that an omission when application is made for a policy to disclose to the insurers repeated incendiary attempts to destroy the property of the applicant will not avoid the policy (*f*).

The fact that a fire has occurred adjoining the building insured on the day the application is made is material to be communicated, though the fire is extinguished before the insurance is applied for, and the plaintiff is not guilty of

(*a*) *Johnston v. Niagara Dis. M. Ins. Co.* 13 U. C. C. P., 331.
(*b*) *Merrick v. Prov. Ins. Co.*, 14 U. C. Q. B. 439.
(*c*) *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497.
(*d*) *Geach v. Ingall*, 14 M. & W. 95; *Crowley v. Cohen*, 3 B. & Ad. 478; *Carruthers v. Shedden* 6 Taun 14.
(*e*) *Beebe v. Hartford M. Ins. Co.*, 25 Conn., 51.
(*f*) *Clark v. Hamilton M. Ins. Co.*, 9 Gray, (Mass.) 148.

any fraud in the matter, and the conditions of the policy do not require such fact to be disclosed (*a*)

So, if a party insuring a dwelling house, omitted to disclose the fact that its windows overlooked some dangerous manufactory, he could not recover, although the loss was not occasioned by the existence of the structure not disclosed to the insurer (*b*).

The general rule is that it is the duty of the insured to communicate all facts that are material to the risk, and which are not known or presumed to be known to the underwriter; and the neglect to disclose all such circumstances, even through inadvertance and without fraud, will vitiate the policy (*c*).

The suppression or misrepresentation of material facts, though from ignorance, mistake, or negligence, stands on the same ground in its effect on a policy as if such suppression or misrepresentation were wilful; but the principle on which this rule is founded can have no application to the conduct of the insured subsequent to the making of the contract (*d*).

The underwriter is bound to know everything that is open to enquiry, and nothing need be disclosed which he waives being informed of, but he is not bound to seek elsewhere for information that might be given by the insured. A condition that the policy shall be void if the assured *omit* to communicate any matter material to be made known to the insurer, does not apply to something which it may be well presumed was known to the insurers or their agent. The jury may presume such knowledge if the subject insured is used openly and publicly for the purpose in question, and the company's agent resides in the neighbor-

(*a*) *Bufe v. Turner*, 6 Taun. 338; see also *Walden v. Louisana Ins. Co.*, 12 La. 134; *Uzielli v. Coml. Union Ins. Co.*, 12 L. T. N. S. 399.

(*b*) *Wedderburn v. Bell*, 1 Camp. 1.

(*c*) *Beebe v. Hartford M. Ins. Co.* 25 Conn., 51; *Carter v. Boehm* 3 Burr., 965; *Dennison v. Thomaston M. Ins. Co.* 20 Me., 125.

(*d*) *Miller v. Western F. M. Ins. Co.* 1 Hand. (Ohio) 208.

hood, and is well acquainted with the subject of insurance (*a*).

If the insurer takes the risk without enquiry, relying on his own knowledge, the policy will not be avoided unless there is something unusual to enhance the risk (*b*).

Assured is not bound to disclose the nature of his title to the insurers, unless it is enquired about, or required to be disclosed by a condition of the policy (*c*); and a failure to disclose the true title or extent of interest, in absence of fraudulent concealment or misrepresentation, will not avoid the policy, no enquiry as to title or interest being made (*d*).

Where assured has only a qualified interest, the mere fact of not disclosing the nature and extent of that interest, in the absence of enquiry on the subject, and calling the property "his" in the policy, will not avoid it, unless that interest be misrepresented, or some artifice is used to conceal it, or to prevent the insurer from enquiry respecting it, in which case it is a question for the jury to decide whether the misrepresentation or concealment is of a character to prejudice the insurer and amounts to a fraud (*e*).

The insured is not bound to communicate his own conclusions, speculations, apprehensions, hopes, or fears as to the risk. His duty of communication is limited to *facts*.

The concealment, to avoid a policy, must be of something which the assured was, *a priori*, bound to disclose, of a fact material to be known as bearing upon the amount of premium, or the nature, or situation, or state of the property respecting which the insurance was proposed, or of some matter the knowledge of which was essential to enable the insurer to understand fully what his undertaking would extend to, so that the risk undertaken would not be different from that which was contemplated by him, varying the

(*a*) *Pimm v. Lewis* 2 F. & F., 778.
(*b*) *Clark v. Manufacturing Ins. Co.* 8 How. (U. S.) 235.
(*c*) *Curry v. Commonwealth Ins. Co.* 10 Pick. (Mass.) 535.
(*d*) *Morrison v. Tennessee Marine & F. Ins. Co.* 18 Mo. 262.
(*e*) *Sussex Co. Ins. Co. v. Woodruff* 2 Dutch (N. J.) 541.

object of the policy so far as he is concerned. Therefore, the not communicating at the time of the proposal for an insurance the fact that there was an insurance already effected with another company is not such wrongful concealment as to sustain a plea that the policy was obtained from defendants by plaintiff by the fraud, covin, and wrongful concealment of certain material information which ought to have been communicated to defendants, and by the misrepresentations of the plaintiffs, etc. (*a*)

The assured must communicate to the insurer every fact known to the assured and not known to the insurer, material for his guidance in respect of the premium to be demanded. Actual knowledge, however, is not essential if the insurer has the means of knowing the fact, as by making an enquiry at a particular place and he choose not to make it (*b*).

But perfect good faith must be observed by the assured towards the insurer and any material untruth or concealment, fraud or misrepresentation will avoid the policy (*c*).

The criterion for determining whether any fact should be communicated, depends upon whether it is in itself material and not upon the opinion of the party whether it is so (*d*).

An applicant for insurance is bound to state to the assurers all material facts and he is not excused by his ignorance that material facts undisclosed are really material (*e*). This being the law, it seems the applicant would be bound to inform the company of the existence of a mortgage on the property, even independent of the provisions of the Con. Stats. U. C. c. 52 s. 27. Where, by the terms of the policy, the agent of the company is to be considered as the agent of the applicant in effecting the insurance and the company are

(*a*) *McDonell v. Beacon F. Ins. Co.* 7 U. C. C. P., 308.

(*b*) *Foley v. Tabor* 2 F. & F. 663.

(*c*) *Davis v. Scottish Prov. Ins. Co.* 16 U. C. C. P. 189; *Carter v. Boehm*, 3 Burr. 1909.

(*d*) *Moens v. Hayworth*, 10 M. & W. 155.

(*e*) *Lindenau v. Desborough* 8 B. & C. 586, 92; *Jones v. Prov. Ins. Co.* 3 C. B. N. S. 65; *Bates v. Hewett L. R.* 2 Q. B. 607.

not to be bound by any statements made to the agent not contained in the application, if the application does not disclose the existence of an incumbrance on the property, the policy will be avoided under the statute, even though the agent of the company acts for the applicant in filling up the answers to the queries and omits any question as to the incumbrance (*a*).

A policy of insurance issued by defendant, provided, that "This insurance shall at all times, and under all circumstances, be subject to such conditions as are contained in the printed proposals issued by the company, a copy of which conditions is printed on the back hereof." One of these conditions was, that persons desirous of making insurance, were to "deliver in" to the office or its agent, the following particulars, namely: a statement as to the construction, etc., of the building, and whether any hazardous trade was carried on, or any hazardous goods were deposited in the premises containing the goods insured. There was also a condition that certain specified machinery and heating apparatus should, if used upon the premises, be particularly described. Plaintiff by his agent, applied to defendants agent for an insurance on his stock in trade, utensils and shop furniture. At the time of the application, certain goods of the class denominated hazardous, and certain machinery, etc., of the kind provided against, were in use on the premises in question. The defendant's agent presented to the plaintiff's agent a printed blank form of application for insurance, which made no allusion to hazardous goods or trade, or machinery, and required no special statement of the construction of the buildings, etc., or description of the machinery used. The application was duly filled up and signed by plaintiff's agent, and accepted by defendant's agent, and the premium was thereupon paid. It appeared from the policy, that the foregoing conditions were intended to be contained in proposals for assurance

(*a*) *Bleakley v. Niagara D. M. Ins. Co.* 16 Grant 198.

issued by defendants, and it was the intention of the company that these proposals should be delivered to the applicant at the time of effecting the insurance, so that he might know what the terms and requirements and responsibilities of the company were. The plaintiff's agent knew of the of the nature of these conditions, but he was not required by the company to do more than fill up the printed application for insurance. Defendant's agent, when taking a risk a year previously on the same property, and on the same premises, had enquired, and was told by plaintiff's agent, the full particulars respecting plaintiff's business, and the premises in which it was carried on; and was also informed about the machinery, etc., upon the same, having been, moreover, referred to another company, by whom a risk on the same property had been taken, for all requsite information on the subject. It also appeared, that the nature of the plaintiff's business was well known by advertisement in the local papers, and otherwise; *held*, that the agent of the defendants had power to receive the proposals for insurance and to judge of the sufficiency of the information supplied to him, and that the agent having accepted the information contained in the application only, as sufficient, the company were bound in the absense of any fraud or concealment, or falsehood practised upon him; that the previous knowledge of the plaintiff's agent as to the nature of the conditions, did not require him to do more than the company required of him; that if the applicant had been asked to give the information required by the printed proposals, and had neglected to do so, the case would have been different, but, that defendants were at liberty if they pleased, to waive the presentment of their printed proposals, and that under the circumstances, it appearing that the defendants by their agent did, in fact, know, and had the means of knowing, the nature of the plaintiff's business, and the processes by which it was carried on, the defendants were liable for the loss sustained by plaintiff (*a*).

(*a*) *Davis v. Scottish Prov. Ins. Co.*, 16 U. C. C. P., 176.

Where premises insured against loss by fire have been thoroughly examined by the agent of the insurers, it is conclusive upon the latter as to whatsoever is apparent (*a*).

When the office undertakes to survey the premises and fix the rate, and this is done by a skilled officer of the company to whom the whole premises are shown, and there has been no attempt at concealment and there is a sufficient description in general terms, it would seem impossible to contend that any further express disclosure was wanting of any fact or circumstance patent upon that survey or that in the absence of any subsequent alteration the policy can be affected by the want of it (*b*).

An insurance company is chargeable with knowledge of all the facts stated by an applicant to the company's agent, respecting an applicant's title and interest in the premises; and if the applicant truly states to the agent the real condition of the property, he cannot be held to have made any misstatement, or practised any concealment, notwithstanding the written application varies from such statement (*c*).

(*a*) *Michael v. Mutual Ins. Co.* 10 La. An. 737.

(*b*) *Pimm v. Lewis* 2 F. & F. 778; *Bunyon on F. Ins.* 63.

(*c*) *Hodgkins v. Montgomery Co. M. Ins. Co. New York*, Sup. Ct. General Term 5th District 1861; *American Law Register* Feb. 1862, Philadelphia.

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

The conditions endorsed on the policy are generally by the express terms of the contract made a part thereof, and are to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not otherwise provided for. When such is the case, they must be strictly complied with to entitle the insured to recover. The conditions in connection with the operative part of the contract constitute the terms on which the insurers contract to indemnify the insured, and the insured by paying the premium and accepting the policy agrees to the conditions as part of the contract. The cases seem to show that it is immaterial that the condition is capricious or unreasonable or impossible of performance on the part of the insured. So long as the conditions are not contrary to law they are binding on the insured, for he has deliberately assented to them as part of the contract and in general a compliance with the conditions of the policy is a condition precedent to the right to recover unless such compliance is dispensed with by the acts of the insurers.

The recent Act of the Ontario Legislature to consolidate and amend the laws having reference to Mutual Fire Insurance Companies provides that every condition endorsed upon or affecting any policy of insurance which shall be held by the court or judge before whom any question relating thereto shall be tried not to be just and reasonable, shall be absolutely null and void. The writer is not aware of any other statutory enactment in Canada affecting the power of the company to impose such conditions as they may see fit; and independent of the question of the expediency of the office imposing unreasonable and unnecessary conditions, as a matter of law they have a right to declare the terms on which alone they will contract with the insured. In the

case of mutual companies the Legislature has interposed, as already explained, and affixed a limit to the power of the company in framing their conditions. There is, however, nothing in the statute to prevent them from making such reasonable conditions as may be necessary in order to guard against fraud (*a*).

The conditions of the policy are of three kinds—conditions precedent, express conditions, and implied conditions. Conditions precedent are those which are to be performed before the obligation commences. Express conditions are those created by the express words of the contract. Thus a condition in the policy that the application is true is an express condition, but such condition does not make the application a part of the contract. Implied conditions result from the nature of the contract, and are such as the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Thus, it is an *implied* condition of the insurance contract that it is free from misrepresentation or concealment, whether from fraud or through mistake. In order that compliance with any particular stipulation of the policy may form a condition precedent to the right to recover, it is not necessary that there should be an express provision that on non-compliance with the stipulation the policy shall be void. Where the contract is altogether based upon the terms of the condition being literally and honestly observed; where, in other words, the condition goes to the whole consideration of the contract, a compliance with it is a condition precedent, though it does not in express terms provide that the policy shall be void on non-compliance. Thus where a condition provided that insurances effected with other companies should be notified to the board, and if approved, be endorsed on the policy and signed by the secretary without expressly providing that on default the policy

(*a*) *Langel v. Mutual Ins. Co.*, Prescott 17, U.C. Q.B., 524.

should be void. It was held that compliance was a condition precedent to the bringing of the action (*a*).

The conditions of the policy do not in any instance create a duty that the underwriter may compel the insured to perform; and although their violation by the insured may constitute a valid defence for the underwriter, it never furnishes a substantial cause of action.

The insured is not bound to comply with the condition of a policy where the insurer has either prevented the performance or rendered it impossible or unncessary by his own act or neglect. Thus, where a policy, guaranteeing to the extent of $20,000 the honesty and care of one W. while in the plaintiff's employment as cashier, contained a condition that it should be void on the neglect of the plaintiffs to make known to the directors of the society in Canada any act or omission of W. discovered by them giving a claim under it, it was held a sufficient excuse for plaintiff's not giving notice, that before any neglect by W. the society had ceased to have any directors in Canada, and had consequently, by their own act, rendered it impossible to comply with the condition (*b*).

Though the insurers are a foreign corporation, if the policy is made in this country the conditions will be equally binding as if all parties were British subjects. But the conditions would not be binding here if the policy was made in a foreign country and by the law prevailing there they were not binding (*c*).

The conditions of a policy, unless where the law may have attached some definite and special meaning to them, must be construed by the light of ordinary reason and common sense, and if any doubt exists as to their meaning, they

(*a*) *McBride v. Gore Dis. M. F. Ins. Co.*, 30 U.C. Q.B., 451; see also *Marshall v. Emperor L. Assce. Co.*, L.R. 1 Q.B., 35.

(*b*) *Royal C. Bank v. European Assce. Co.* 29 U. C. Q. B., 579.

(*c*) *Ketchum v. Protection Ins. Co.* 1 Allen, 136.

should be received most strongly against that party by whom they are imposed (*a*).

The conditions are to be construed strictly against those for whose benefit they are reserved, when they impose burdens on other parties (*b*).

In construing a condition which prohibits the carrying on of certain hazardous trades, etc., reference should be made to the kind of danger intended to be guarded against; and although the term used as descriptive of the trade prohibited is not strictly applicable to the trade sought to be brought within the prohibition, yet if the mischief in both cases be the same the expression will extend to both. Thus, the expression "hat-bleaching" in the condition has been construed to extend also to bonnet-bleaching; but it would extend to bonnet bleaching independent of the above rule, for a bonnet is a species of a hat (*c*).

The conditions are not subject to be contradicted and superseded by evidence of what took place between the parties at the time of making the contract, or of what facts were known to the agent or underwriter.

If an express condition of a policy is violated, it is quite immaterial whether the loss is occasioned by the violation or not. Thus, in the case of marine insurance, a wilful deviation, although the loss is not occasioned by, nor attributable, to it, exonerates the underwriters from liability (*d*).

So in England, in the case of a life policy containing a stipulation, that the assured is not to go beyond the limits of Europe; if the party insured goes, even for an instant, out of Europe, though without the least injury to his health, this condition of the policy attaches, and the policy becomes void (*e*).

(*a*) *Foy v. Ætna Ins. Co.* 3 Allen, 33-4.
(*b*) *Catlin v. Springfield F. Ins. Co.* 1 Sumner, C. C. U. S., 434.
(*c*) *Merrick v. Prov. Ins. Co.* 14 U. C. Q. B., 439.
(*d*) *Beacon L. & F. Assce. Co. v. Gibb*, 13 L. C. R. 87; 7 L. C. J. 57; 6 L. T. N. S. 735.
(*e*) *Ib.*; see also *Grant v. Equitable F. Ins. Co.*, 14 L. C. R. 493.

So, where a condition prohibits any alteration in the insured premises, the policy will be void if an alteration is made, although the risk is not increased by the alteration (*a*).

The breach of the conditions of a policy do not *ipso facto* avoid it, but only if the assurance company so elect, and the right of avoiding the policy may be waived, either by express agreement, or by the acts of the parties. Where breaches of the conditions had occurred before the loss, and the company, after being notified of such breaches, took no notice thereof, but called for the proofs of loss, which were required on the footing of the policy, being a subsisting instrument. On these being furnished, to the satisfaction of the company, they were held precluded from afterwards setting up the forfeiture (*b*).

So the receipt by the company of the renewal premium, after violation of the condition, will be a waiver of the right to insist on the forfeiture (*c*).

The conditions of some policies now provide, that a breach of the conditions shall *ipso facto* avoid the policy.

It does not necessarily follow that a policy of insurance subject to such conditions as are contained in the printed proposals is not subject to other conditions printed on the back of the policy. The plaintiff, in his declaration, alleged that the policy was "subject to such conditions as are contained in the printed proposals issued by the said company," and averred that he had observed, performed, and kept all conditions precedent on his part, "according to the true intent and meaning of the said policy of insurance and of such conditions as are contained in the printed proposals issued by the said company." The defendant, in his plea, alleged that the policy was subject to such conditions as are printed on the back of it, with allegations shewing a clear violation of this condition and a consequent avoidance of

(*a*) *Lyndsay v. Niagara D. M. F. Ins. Co.*, 28 U. C. Q. B. 326.

(*b*) *Canada L. C. Co. v. Canada A. Ins. Co.*, 17 Grant, 418; *Turquand v. Armstrong*, 9 Ir. Com. L. Reps. 32.

(*c*) *Wing v. Harvey*, 5 De. Gex. M. & G. 265.

the policy. *Held* on demurrer, that it was not necessary for the defendant to shew, in his plea, that the condition set forth was contained in the printed proposals, for the declaration did not allege that the policy was not subject to any other conditions (*a*).

Where a policy of insurance contained on the face of it these words, "provided also that this insurance shall at all times and under all circumstances be subject to such conditions as are contained in the printed proposals issued by the said company, a copy of which conditions is printed on the back of these presents." The plaintiff, after a trial was allowed to amend his declaration so as to show that the policy was to be subject to such conditions only as were contained in the printed applications for insurance on which it was granted, though the court intimated an opinion that such an amendment would be of no avail (*b*).

The conditions of nearly all the offices provide that applications for insurance must be in writing, and specify the construction and matreials of the building to be insured or containing the property to be insured; by whom occupied; whether as a private dwelling or how otherwise. The application is generally contained in a printed form prepared by the company, with terms, descriptive of the property insured superadded in writing. The application must, as already explained, (*c*) be clear and unambiguous, and any uncertainty or ambiguity therein will be taken most strongly against the company.

The conditions usually go on to provide that in the insurance of buildings which contain any steam engine, furnace, kiln, stove, oven, or other instrument in or by which heat is produced (common fire places, stoves, and ovens in private use excepted), the construction and circumstances of the same must be particularly described at the time of effecting the insurance, or if subsequently introduced either

(*a*) *Jacobs v. Equitable F. Ins. Co.*, 18 U.C. Q.B., 373.
(*b*) *Jacobs v. Equitable Ins. Co.*, 18 U.C. Q.B., 14.
(*c*) *Ante* p. 18.

in the building insured or in any addition thereto due notice must be given to the company and the same sanctioned by them, otherwise the policy shall be void.

Where a condition of a policy provided that in case of any alteration being made in the building insured, or if any steam engine, or any other description of fire heat, were introduced, not comprised in the original insurance, notice thereof should be given, etc., it was held that the mere introduction of a steam engine by way of experiment, and using it in a heated state, avoided the policy, for the clause implied that the simple introduction of a steam engine and using it with fire heat avoids the policy, without reference to the intention of user or the time for which it is used (*a*).

That part of the condition referring to the introduction of steam engines, furnaces, etc., into any addition to the building insured, was introduced in consequence of a case in which it was decided that when the condition merely prohibited the introduction of furnaces, etc., into *the buildings* insured, but did not refer to *additions* to such buildings, the introduction of furnaces, etc., into such additions did not avoid the policy (*b*) Under the present form of the contract the introduction of a furnace into any addition to the building insured will, of course, avoid the policy.

Another condition almost invariably inserted, is : If after the insurance effected, either by an original policy or by the renewal thereof, the risk shall be increased by any means whatever within the control of the insured, or any tenant or occupant of the building insured, or in which such goods are placed or kept, or if such buildings or premises shall be occupied in any way, so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect.

It is necessary that a condition of this nature should be

(*a*) *Glen v. Lewis* 8 Ex., 607.

(*b*) *Heneker v. British Am. Assce. Co.* 13 U. C. C. P., 99 ; *Lomas v. British Am. Assce. Co.* 22 U. C. Q. B., 310.

inserted, for if the insurers wish to make it a condition precedent to the validity of the policy, that there shall be no alteration in the circumstances, whether the risk is increased or not, they must do so in distinct terms (*a*). And if there is no violation of the law, and no fraud in the assured, an increase of risk to the subject matter of insurance, its identity remaining, though such increase of risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance (*b*).

Under the condition as it now stands, if the risk is increased after the date of the policy, it will avoid the insurance, unless the condition is complied with. Thus, where the premises covered by a policy of insurance, were in the application described as a store, and were after insurance used as a printing office (the latter being an extra risk) without notice to the company, or the settlement and payment of any additional premium for the increased risk contrary to the ordinary condition endorsed, it was held that the policy was vitiated (*c*).

A condition prohibiting alterations by which the risk is increased is not avoided by any alteration, but only by an alteration which does in fact increase the risk (*d*).

But where a condition avoids the policy in the event of any hazardous trade being carried on upon the premises: if such trade is carried on it is immaterial whether the fire arose from the carrying on of such trade or whether it was in fact in its nature dangerous, or whether the risk was thereby increased (*e*).

It would seem that in all cases the conditions of the particular policy must be looked to in determining whether a mere alteration without an increase of risk will avoid the

(*a*) *Stokes v. Cox*, 1 H. & N. 533; *Baxendale v. Harvey*, 4 H. & N. 445.

(*b*) *Thompson v. Hopper*, E. B. & E. 1049; see also *Pim v. Reid*, 6 M. & G. 1; ante p. 85–6.

(*c*) *Hervey v. Mutual F. Ins. Co.*, 11 U. C. C. P. 394.

(*d*) *Todd v. Liverpool & L. & G. Ins. Co.* 18 U.C. C.P., 192.

(*e*) *Merrick v. Prov. Ins. Co.*, 14 U.C. Q.B., 439.

policy. If such alteration is in express terms prohibited without reference to any increase of risk the policy will be avoided, though the risk is not increased. But if an alteration *by which the risk is increased* is prohibited, then only an alteration of that character will avoid the policy. In this, as in all other cases, the question substantially is, what are the precise terms of the contract?

Thus, where a policy provided that it should be avoided by any additions made to the building insured, unless written notice thereof were given to the secretary, and the consent of the Board of Directors thereto endorsed on the policy, signed by the president and secretary. The condition contained no statement as to increase of risk. *Held* that defendants were entitled to succeed, on showing the addition without notice, although the jury found the risk not increased by it; and as the condition of the policy did not require that the risk should be increased, an allegation in defendant's plea that the risk was increased, was rejected as surplusage (*a*).

When alterations or additions are made to a building insured, and these alterations, etc., materially increase the risk, so that the insurer would be entitled to a higher rate of premium; if the insured is required by the conditions of the policy to give notice of the alterations and he fails to do so the policy will be void, and the burden of proving compliance with the condition is on the insured. In such case it is immaterial whether the loss happen in consequence of such increase of risk or not (*b*).

Any increase of risk incident to the making of reasonable and necessary repairs, is part of the general risk assumed by the insurers, and will not avoid a policy; and such an increase of risk does not come within the purview of the general condition (*c*).

(*a*) *Lyndsay v. Niagara Dis, M. F. Ins, Co.*, 28 U.C. Q.B., 326.

(*b*) *Gardiner v. Piscataquis M. F. Ins. Co.*, 38 Me., 439; *Kern v. South St. Louis M. Ins. Co.*, 40 Mo., 19.

(*c*) *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168.

That part of the condition which relates to an increase of risk by "any tenant or occupant of the building insured," was introduced to meet a case in which the conditions merely prohibited any increase of risk by means within the control of the insured, and the court held that the condition was not violated by the act of a tenant not subject to such control. Thus, where before the making of the policy (which was on a woollen factory), the plaintiff had leased the premises to A by deed, which provided that no alteration in the arrangements of the mill or machinery should be made, without the consent of the plaintiff, and that a non-compliance in good faith with the conditions of the lease, should be good ground for having the same declared void. The lessee put up two wooden buildings, whereby it was alleged the risk was increased; *held*, that the lessee had a right to do so, and that he was not restricted from putting up additional buildings, and that therefore, the additions made by the lessee were not within the control of the plaintiff, so as to avoid the policy; *held* further, that such additions could only be within the control of the plaintiff by virtue of a special clause in the lease conferring it, and even then in the absence of an express provision in the policy, requiring the plaintiff to take advantage of a forfeiture, he would not be bound to do so, in order to avoid the lease (*a*).

If the erections had been made with the express consent of the plaintiff they would have been under his control (*b*).

Such a condition as that referred to will avoid the policy if there is an increase of risk after an insurance is effected by means within the control of the assured (*c*).

So if after an insurance is affected upon goods in a specified building, the insured rent a part of the building to other persons, who apply the same to purposes prohibited by the policy as being hazardous or extra hazardous, this will

(*a*) *Heneker v. British Am. Assce. Co.*, 14 U. C. C. P. 57.

(*b*) *Ib.*

(*c*) *Dodge Co. M. Ins. Co., v. Rogers* 12 Wis. 337.

avoid the policy, although the goods insured are not in that part of the building so let (*a*).

The erection of other buildings by assurred on his own premises, near the property insured, so as to increase the risk, avoids the policy under this condition (*b*).

In the absence of any stipulation to that effect, the erection of a building adjacent to the one insured, by the party holding the policy, though it may increase the risk, will not avoid the policy. But if such an act of the assured party is the cause of the loss to the company, the insured cannot recover, as the loss is occasioned by his own misconduct (*c*).

Where alterations were effected and the insured was informed by the agent of the company that if such alterations were made he would have to apply and pay an additional premium, but, nevertheless, the insured made no such application, but endeavoured to effect an insurance at other offices which was refused, the risk being considered too hazardous after the alterations, an acknowledgement by the insured that he knew the policy was void in consequence of his not arranging with the company for the increase of risk produced by the alterations was proved. *Held* that the policy was clearly avoided under the condition, but as a matter of form it was necessary to submit to the jury, whether the risk was in fact increased by the alterations (*d*).

It is in most cases a question for the jury whether the circumstances alleged as increasing the risk has in fact increased it, and their finding in the affirmative or negative will ordinarily be conclusive (*e*).

In some cases the question of increase of risk is for the court. Thus, if the ordinary condition as to increase of risk sets forth various trades which are considered hazardous, and which are to subject the building to such additional pre-

(*a*) *Appleby v. Firemen's Fund Ins. Co.*, 45 Barb N. Y. 454.
(*b*) *Murdock v. Chenango Mut. Ins. Co.*, 2 Comst. N. Y. 210.
(*c*) *Howard v. Kentucky & Louisville M. Ins. Co.*, 13 B. Monroe Ky. 282.
(*d*) *Reid v. Gore, D. M. F. Ins. Co.*, 11 U. C. Q. B. 345.
(*e*) *Gould v. British Am. Assce. Co.*, 27 U. C. Q. B. 473.

mium as shall be agreed on, there is no question for the jury, because the court can see what trade or business is classed among those for which an extra premium is exacted (*a*).

Under the ordinary condition a mere increase of the risk in one part of the premises where there is also such a diminution thereof in another part, that on the whole the risk is not increased, will not avoid the policy; in other words, the increase of risk in one part may be counterbalanced by the diminution in another (*b*).

But it would seem if the condition had prohibited *any* increase of risk or alteration of any kind the policy would have been avoided, and where a plea averred that after the policy was made divers buildings and erections were added to the buildings insured, and by such erections and buildings the risk was increased, and the jury found that the external risk was increased and the internal risk diminished, and on the whole the risk diminished by the alteration, the court held that it was not proper to strike a balance between the increased and diminished risk, and that the alteration was such as to avoid the policy (*c*).

In this case *additional* buildings were *erected* adjacent to the insured premises, and this erection undoubtedly increased the risk, but the insured contended he had removed from the interior of one of the insured buildings certain heating apparatus and dyeing kettles and placed them in the adjoining building and there had them secured in a much more careful and safe manner than when in the other building, so that on the whole the risk was diminished. In the case of *Date v. Gore Dis. M. F. Ins. Co.* there was no additional building erected or additional heating process used, but the same number of kettles used and the same number of flues, but their construction and situation within

(*a*) *Merrick v. Prov. Ins. Co.*, 14 U.C. Q.B., 439.

(*b*) *Date v. Gore Dis. M. F. Ins. Co.*, 15 U.C. C.P., 175.

(*c*) *Heneker v. British Am. Assce. Co.*, 13 U.C. C.P., 99.

the building insured was so altered as, on the whole, not to increase the risk. The alteration consisted merely in a change in the interior arrangements of the building insured; whereas in the case of *Heneker v. British Am. Assce. Co.* additional buildings were erected, which no doubt increased the risk.

The insurers pleaded a condition, that in the event of any alteration or addition being made by which the risk is increased, notice thoreof must be given, otherwise the policy shall be void; and it appeared that two boilers were removed from an adjoining yard into the building insured; *held*, that the question was, whether the removal, coupled with the use of the boilers, increased the risk, and the jury having been directed to find whether the mere removal increased the risk, a new trial was ordered (*a*).

When the defendants plead that the risk upon the property insured has been increased, and that thereby the policy has been avoided within the meaning of a condition to that effect, the *onus* of proving this plea lies on the defendants, and if the plaintiff makes out a *prima facie* case, he will not be non-suited, though his evidence is contradictory as to the increase of risk (*b*).

In addition to that part of the condition already referred to, there is usually inserted in the Canadian policy a further clause, that if during the insurance the risk be increased by the erection of buildings, or by the use or occupation of neighbouring premises, or otherwise; or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, etc. The two conditions or parts of conditions, are quite independent of each other; and if the first condition is not complied with, the policy will be void, though the company do not elect to take advantage of the second (*c*).

(*a*) *Barrett v. Jermy*, 3 Ex. 535.

(*b*) *Date v. Gore Dis. M. F. Ins. Co.*, 14 U. C. C. P. 502.

(*c*) *Heneker v. British Am. Assce. Co.*, 13 U. C. C. P. 99; *Lomas v. British Am. Assce. Co.*, 22 U. C. Q. B. 310.

The first part of the condition relates to the acts of the assured, or any one within his control; the last, to increase of risk by the erection of buildings by any one, for instance, by the owner of adjoining land.

In the above case, the facts pleaded did not show that the company had notice of the violation of the second condition before the fire happened.

Under this last condition there seems no doubt that the giving of the notice and the termination of the risk may be contemporaneous, and the defendants have a right to terminate the risk at any moment by simply notifying the plaintiff to that effect, and refunding to him their unearned portion of the premium, provided, of course, the circumstances contemplated by the condition concur (*a*).

A plea under this condition alleged that before the fire the company elected to terminate the insurance, and gave notice to the plaintiff of their intention to do so, and did *thereby* terminate the insurance, and after the said termination and before the loss tendered to plaintiff a rateable proportion of the premium which he refused to accept. It was objected on demurrer that the condition required a termination after election and notice, and that the introduction of the word "thereby," shewed that the insurance was terminated by and at the time of giving the notice, etc. *Held*, nevertheless, that the plea was good (*b*).

A condition is always attached to the policy, providing that notice of all previous assurances upon property assured by the company, shall be given to them and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of making assurance thereon, otherwise the policy subscribed by the company shall cease and be of no effect. And in case of subsequent assurance on any interest in property assured by the company (whether the same interest assured by the same as that assured by

(*a*) *Cain v. Lancashire Ins. Co.*, 27 U. C. Q. B. 453.

(*b*) *Cain v. Lancashire Ins. Co.*, 27 U. C. Q. B. 217.

the company or not), notice thereof must also be given in writing at once, and such subsequent assurance endorsed on the policy granted by the company, or otherwise acknowledged in writing, in default whereof such policy shall henceforth cease and be of no effect.

The object of this condition is not merely that the first insurers may know who are bound to contribute with them in case of loss, but also to guard against the effect of a temptation to fraud, which anybody is under when his property is over insured (*a*).

A non-compliance with this condition will avoid the policy (*b*).

It will not be sufficient to give notice merely of the other insurance, the notice must also be endorsed on the policy, or otherwise acknowledged by the company in writing, in compliance with the condition (*c*).

The condition requires that both these formalities should be complied with, and as the condition is within the scope of the company's powers, and not contrary to any act of parliament, it must be observed in all its terms.

It is no defence that the consent is not endorsed by reason of the neglect of the company, or its officers. The insured, by effecting the insurance, undertakes to comply with the condition, and he must do so literally. If the endorsement is required as evidence of the consent of the company, there could be no remedy against the latter for refusing to endorse, though there might be for neglecting to endorse, if it could be proved that they did in fact consent to the double insurance (*d*).

Where a condition as to second insurance provides that if the insured "shall not with all reasonable diligence give notice thereof to the insurers, and have the same endorsed

(*a*) *Jacobs v. Equitable Ins. Co.*, 18 U. C. Q. B. 14; see also *Butler v. Waterloo M. F. Ins. Co.*, 29 U. C. Q. B. 556.

(*b*) *Chapman v. Lancashire Ins. Co.*, 13 L. C. J. 36.

(*c*) *Ib.* 49; *Atwell v. Western Assce. Co.*, 1 L. C. J. 279; *per Day, J.*

(*d*) *Noad v. Prov. Ins. Co.*, 18 U. C. Q. B. 584.

on the said policy, or otherwise acknowledged by them in writing, the said policy shall cease and be of no further effect." If notice of the second insurance is given and the insurers neglect and refuse to endorse the condition will not be violated, though the policy is not tendered to them for endorsement, nor is it shewn that any special request to endorse or acknowledge in writing is made. It is doubtful whether the insurers could be charged with a breach of duty in refusing to endorse without a tender of the policy for that purpose; but an averment in a declaration that it is defendant's duty to endorse may be rejected as surplusage (*a*).

In this case the condition provided that the insurers might, on notice of the second insurance, cancel the policy on paying the unexpired premium *pro rata*, and the court held that when they neglected to take advantage of this proviso and yet refused to endorse after notice they could not retain the whole consideration of the contract and at the same time get rid of all liability thereon by treating the policy as void for want of the endorsement of the second insurance and its acknowledgment in writing.

These two cases as to endorsing consent to the second insurance may seem to be conflicting—on the one hand a mere *neglect* on the part of the company to endorse on notice duly given would seem to be no defence, and yet it would seem reasonable that the insured should be relieved from compliance with the condition if the insurers absolutely refuse to make the endorsement. The precise rights and liabilities of the parties under these circumstances do not as yet appear to be fully settled.

If the secretary reply to a letter giving notice of other insurance "I have received your notice of additional insurance," this will be a sufficient acknowledgement in writing under the condition (*b*).

The acknowledgment need not be in any writing addressed

(*a*) *Demill v. Hartford Ins. Co.*, 4 Allen, 341.
(*b*) *Potter v. Ontario & L. M. Ins. Co.*, 5 Hill, N.Y., 147.

to the insured or in his possession; a letter from the company to their own agent will suffice (*a*).

So a recitation of prior insurance, in the body of the policy, is a compliance with a condition requiring such insurance to be noted on the application or endorsed on the policy, or otherwise approved in writing by the secretary (*b*).

An endorsement written by the insurers across the face of a policy of a privilege of additional insurance is a waiver of notice of such additional insurance (*c*).

The privilege of other insurance without notice till requested, admits of any amount of additional insurance, either prior or subsequent, without question notwithstanding the printed condition of the policy to the contrary. But if the privilege is restricted to any specified sum it limits the further insurance to the sum named. Any insurance beyond the limit specified, without further specific consent of the first insurers, avoids the policy, under the stipulation requiring "notice and consent."

At law, whatever may be the rule in a case in equity, parol notice is not a compliance with the condition of the policy requiring other insurance to be endorsed in *writing* on the policy (*d*).

And where the condition requires written consent to the second insurance such consent must be obtained unless it is formally dispensed with (*e*).

Most of the policies in use in Canada would require a written notice under the general condition that whenever by the policy or by any condition endorsed thereon notice is required for any purpose such notice must be in writing or it will be of no effect. It would seem also that the general terms of the condition call for a written notice, for the notice must be endorsed on the policy in writing.

(*a*) *Osser v. Prov. Ins. Co.*, 12 U.C. C.P., 133.
(*b*) *Ames v. New York Union Ins. Co.*, 14 N.Y., 258.
(*c*) *Benedict v. Ocean Ins.* Co., 31 N.Y., 389.
(*d*) *Carpenter v. Washington Ins.* Co., 16 Pet. (U.S.), 495.
(*e*) *Hale v. Mechanics M. F. Ins. Co.*, 6 Gray, Mass., 169.

The notice need not be in writing unless so required by the condition.

Verbal notice of a prior insurance given at the time of making application to an agent authorized to make surveys and receive the cash per centage, and the premium note is sufficient where the condition relating to prior insurance only requires "that notice thereof shall be given to the company" (*a*).

But a verbal notice will not suffice where the very nature of the condition requires a notice in writing. Thus where the condition requires the notice to be endorsed on the policy, an indorsement in writing on the policy is a condition precedent. (*b*).

In general whatever the conditions require must be strictly complied with, and mere knowledge of other insurance upon the part of the agent of the company is of no avail to insured if not endorsed on the policy, where a clause in the policy requires such endorsement (*c*).

When such an endorsement is required, if the insured give a memorandum to the agent to be entered on the records of the company, the policy not being at hand, and the agent saying that such entry would answer every porpose, if the agent afterwards returns the memorandum saying that he made the entry, but has not in fact done so, the condition will be violated (*d*).

The notice should be given to the company themselves or to such of their officers as can exercise the option of cancelling the policy, and of returning the proportional part of the premium. It would not be sufficient to give it to an agent in the absence of express authority to the latter to receive it,

(*a*) *Sexton v. Montgomery Co. Ins. Co.*, 9 Barb. N. Y. 101 ; see also *Schenck v. Mercer Cy. M. Ins. Co.*, 4 Zabr. (N. J.), 447.

(*b*) *Hutchinson v. Western Ins. Co.*, 21 Mo. 97.

(*c*) *Forbes v. Agawam M. Ins. Co.*, 9 Cush. (Mass) 470.

(*d*) *Worcester Bk. v. Hartford F. Ins. Co.*, 11 Cush (Mass) 265.

or of implied authority to him to be presumed by reason of his previous dealings. (*a*).

The conditions of some policies require the notice to be given to the company, at its head office, and when such a condition is inserted it supersedes the general law, and the notice must be given as required by the condition.

When a by-law provides that consent to additional insurance may be given by the president and secretary, and no other mode of giving such consent is provided for, it cannot be given by a secretary or director (*b*).

The Consolidated Statutes of Upper Canada, c. 52, s. 29, as to mutual insurance companies, provides, that whenever notification in writing shall be given to any company by an applicant for insurance, or by a person already insured, of his intention to insure, or of his having insured an additional sum on his property in some other company, the said additional insurance shall be deemed to be assented to, unless the company so notified shall, within two weeks after the receipt of such notice, signify to the party in writing their dissent.

It seems this clause applies to any subject which the company has the right to insure, and to goods as well as to buildings (*c*).

The provisions of the statute are to be applied when the parties have made no provision on the subject, for the insurers and insured may, notwithstanding the statute, make whatever conditions they please, not opposed to it. Thus, where one of the conditions of a policy issued by a mutual insurance company provided, that further insurance on the property should be notified to the board, and their consent thereto endorsed on the policy, signed by the president and secretary; it was held, that the insured was bound to comply with this condition, although by the statute, only

(*a*) *Hendrickson v. Queen Ins. Co.*, 30 U. C. Q. B. 108; affirmed on appeal 31 U. C. Q. B. 547.

(*b*) *Stark Co. M. Ins. Co. v. Hurd.*, 19 Ohio 149.

(*c*) *Butler v. Waterloo C. M. F. Ins. Co.*, 29 U. C. Q. B. 553.

a notification in writing would be required, and on failure of the company to dissent therefrom in two weeks, their assent would be presumed (*a*).

Section 28 of this statute provides, that if an insurance on any house or building, subsists in the company, and in any other office, or by any other person at the same time, the insurance in the company shall be void, unless the double insurance subsists with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary. The provisions of the statute must be strictly complied with, and they cannot be waived by consent of parties, notice, or verbal, or tacit acquiescence. Courts of equity are bound by the provisions of the statute equally with courts of law, and no replication on equitable grounds can be of any avail, when the provisions of the statute are not literally observed. The sole question in case of double insurance, whether it is effected before or after the policy alleged to be avoided, is, whether the consent of the directors is signified by endorsement on the back of the policy signed by the president and secretary, as required by the statute (*b*).

A court of equity has no more authority than a court of law to deprive the insurers of the benefit of any condition on which they have taken a risk, if the latter have not by anything they have done fairly lost the benefit of that condition. Thus a person insured can no more be allowed in a court of equity than in a court of law, to set up against a defence founded on the breach of a condition in the policy on which he is suing that he had not the policy in his possession, and did not know what it contained, having never applied for it or asked to be allowed to see it, and being in no way deceived or misled as to its contents. In an action on a policy of insurance, defendants pleaded an insurance by the plaintiff, with another company, without notice to the de-

(*a*) *Butler v. Waterloo M. F. Ins. Co*,, 29 U. C. Q. B. 553.

(*b*) *Merritt v. Niagara Dis. Mut. F. Ins. Co.*, 18 U. C. Q. B., 529.

fendants, or endorsement thereof on their policy contrary to one of the conditions. The plaintiff replied on equitable grounds that he effected the insurance with the defendants, through N their agent, residing at E., that when he effected the second insurance complained of, he had not received the policy from defendants, and had no notice or knowledge of the said condition, that as soon as he became aware of it he gave notice to said N, that he had effected the insurance mentioned in the plea, and another insurance with the B. A. Co., and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N promised to have the insurance with the B. A. Co., endorsed on defendants' policy, and told the plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them, that after said notice the defendants made a memorandum on their policy of insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting,and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the plaintiff, that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co., and by reason of the premises, defendants waived the endorsement of the insurance mentioned in the plea. *Held* that the replication shewed no equitable answer to the plea (*a*).

The insured therefore is not relieved from compliance with the conditions of the policy, by reason of ignorance of the requirements of such conditions. The fact that the policy is not in his possession, and that therefore he cannot ascertain what is required of him, is no defence if the conditions are not complied with. The sole question seems to be, has the insured fully conformed to the terms of the contract? If he has not, a court of equity has no more

(*a*) *Jacobs v. Equitable Ins. Co.*, 18 U. C. Q. B. 14.

authority to relieve him than a court of law. The agent has not, in an ordinary case, authority to dispense with a performance of the terms of the contract, and if the agent has such power, the insured should be careful to see that the waiver is clearly expressed in writing, and in entire accordance with the condition as to waiver.

The general rule when an act of parliament makes a thing void is, that the act does not merely avoid the bad part and allow the rest to stand, but makes the whole void. Thus, where a condition is framed in accordance with section 28 of the statute, and a double insurance subsists on part only of the property, covered by one risk, and it does not appear that there are several properties comprised in one policy, upon which there are several and separate sums, taken with separate and distinct risks, the policy will be avoided as to the whole, though the insurance is effected in separate sums as to the different subjects of insurance comprised in the policy (*a*).

In this case the insurance was effected in three different sums on a wooden building, on the machinery in it, and on the stock in it; and, the second insurance was on the building and machinery, but the stock being also in the building, was subject to the same liability to loss as the other.

It seems doubtful whether the fact that the subjects of insurance were wholly unconnected, would make any difference.

The notice of the previous or subsequent insurance must in all cases be given before the fire, for, after the destruction of the goods insured, and the consequent determination of the policy, the company have no election as to whether they will or will not allow their risks to be increased or diminished. Matters must then be determined between the insurer and insured as they stood at the time of the accrual of the case of action, the time of the fire, with respect to the property the preservation of which was the subject of the con-

(*a*) *Ramsay W. C. M. Co. v. Mutual F. Ins. Co. D. J.*, 11 U. C. Q. B. 516.

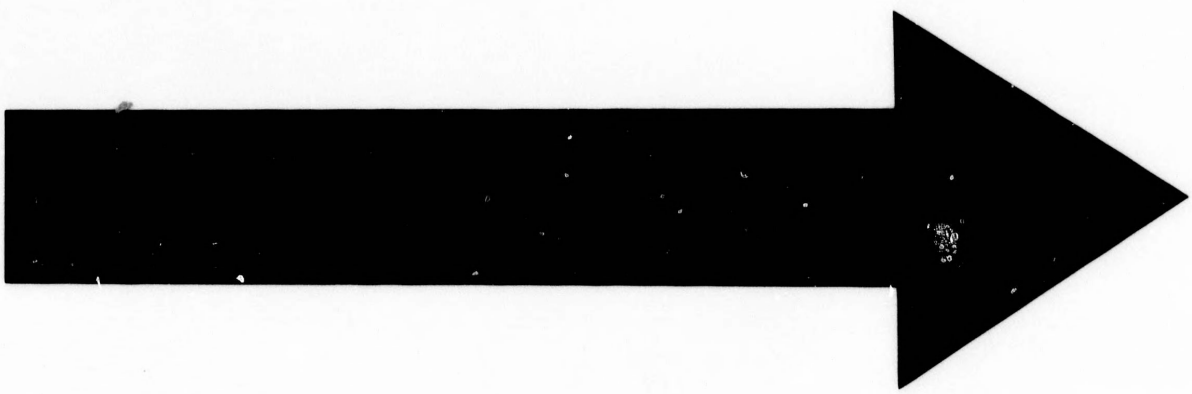
tract. Anything done after its destruction based on its continuing existence must be inoperative, unless it be done by the express agreement of the parties with a perfect knowledge of the condition of affairs at the time. It is only, however, by a positive and express agreement that the rights and liabilities of the parties can be altered after the destruction of the subject insured. Thus it was held that under the Con. Stats. U. C. c. 52 s. 29 the notice of additional insurance there referred to, could not be given after the destruction of the goods by fire, or a loss upon them to the amount insured, so that the policy had ceased to cover a continuing risk, and that an agreement to waive the notice of the further insurance, and an assent thereto, as provided by the statute, could not be raised against the company, at such time and under such circumstances, by implication merely, whether that inference was sought to be exercised in respect of their negative conduct by virtue of an Act of Parliament or otherwise (*a*).

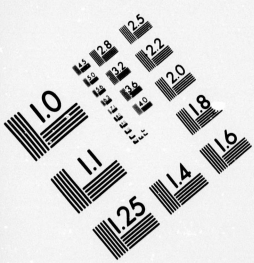
But so long as the subject insured has not been totally destroyed or not destroyed to the extent of the sum insured, so long, in fact as the policy covers a continuing risk, a notice of the additional insurance may be effectually given after a loss by fire (*b*).

In determining whether the two insurances are on the same property, the position of affairs at the time of the fire is not to be disregarded. Thus where an insurance is effected on a stock in trade of a merchant, it is not confined to goods actually in his store when the policy is granted. Therefore, if the merchant effecting the insurance has separate policies on two different stocks, but before the fire they are both blended in one common stock, the policies still continuing, there will be a double insurance on the stock in trade (*c*)

In the course of trade the insurer is selling off his stock as

(*a*) *Butler v. Waterloo M. Ins. Co.*, 29 U. C. Q. B. 553.
(*b*) *Ib.* 558.
(*c*) *Harris v. London & L. Ins. Co.*, 10 L. C. J. 268.





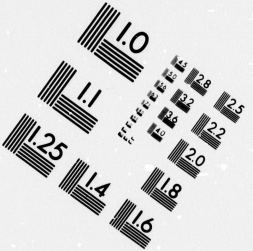
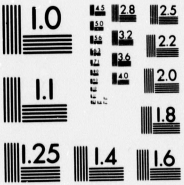
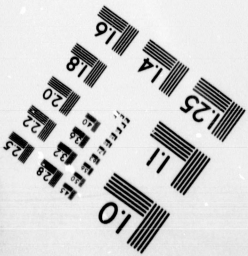
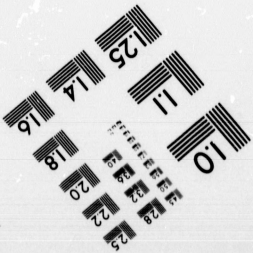


IMAGE EVALUATION
TEST TARGET (MT-3)







28
25
32
22
36
20
18

1.1
1.0

fast as he can, and any other goods of the description mentioned in the policy being brought into the premises afterwards for the same purpose are covered by the policy.

Where the condition says nothing as to the time within which the notice is to be given, it would be of no avail for the plaintiff to set up that he had a reasonable time for the giving of notice, for by the terms of the condition, the notice must not only be given to the company, but also endorsed on the policy. The condition requires both, and if a loss occurs before the whole requirements of the condition are satisfied, it would be useless for the plaintiff to set up a legal excuse for non compliance with one part of the condition when the other remained wholly unsatisfied. (*a*).

Where the policy requires the assured to give notice of subsequent insurance with all "reasonable diligence" a notice, given after the destruction of the property by fire, and seven months subsequently to the date of the second policy, is not a compliance with the condition. (*b*).

So where twenty days before the fire a second policy was taken out on the same property, of which no notice was given to the first insurers until after the fire. *Held* that the unexplained delay of nineteen days, was a conclusive proof of a want of that "reasonable diligence" which was necessary to be shown, to continue the policy in force (*c*).

Where there is an absolute independent condition requiring the assured to at once give notice in writing to the head office, of any additional insurance, and have the consent of the directors thereto, if given endorsed on the policy, otherwise it shall be void; and this condition is declared in the policy to be, notwithstanding anything contained in another condition requiring such notice to be given with all reasonable diligence; the first condition practically nullifies the second, and no question can in any case arise as to the

(*a*) *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 257.

(*b*) *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass) 33.

(*c*) *Mellen v. Hamilton F. Ins. Co.*, 5 Duer. N. Y. 101.

notice being given with reasonable diligence. The insured is bound to conform to the first condition, though a fire occurs before he could with reasonable diligence give notice of the second insurance, and if the company do not receive notice of the second insurance until after the fire, they nevertheless, may avoid their policy on receiving such notice (*a*).

When the facts are not in dispute, it is the province of the court to determine, as a question of law, what is reasonable diligence in giving notice of a subsequent insurance to the first insurers (*b*).

Where a condition requires notice of any subsequent insurance to be given to the company, with all reasonable diligence, and endorsed on the policy, or otherwise acknowledged in writing, it is not necessary to state in the notice the particular company in which the second insurance is effected, and an inadvertent mistake in the name of the company, made without any intention to defraud, and by which the insurers are not prejudiced, will not vitiate the notice. So, where there is no substantive issue raised as to the particular company with which the second insurance is effected, it need not be proved at the trial; nor would a mistake in the amount insured, stating it to be larger than it really was, made without fraud, be material, if the assured before the fire, by a second notice, informed the company of the true amount (*c*).

A policy provided, that, "if the assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, then this policy shall cease and be of no further

(*a*) *Weinaugh v. Prov. Ins. Co.*, 20 U. C. C. P. 405; *Bruce v. Gore D. M. Ins. Co.*, 20 U. C. C. P. 207.

(*b*) *Kimball v. Howard F. Ins. Co.*, 8 Gray, Mass., 33.

(*c*) *Osser v. Prov. Ins. Co.*, 12 U. C. C. P. 133.

effect." Subsequent to the taking of this policy, the agents of the plaintiff procured an insurance on the same property in the Liverpool & London Insurance Company, of which no notice was given to, or consent of defendants obtained; nor was notice given to the Liverpool & London Insurance Company, as required by a condition of its policy, of the prior insurance in defendant's company. Plaintiff claimed that the Liverpool & London policy was void, by the terms of its condition requiring notice of prior insurance, and that it did not, therefore, avoid defendant's policy; and further, that such insurance in the London & Liverpool office, was made without his knowledge; but, the court held, that there had been a violation of the condition in defendant's policy, whether such policy in London & Liverpool were valid or invalid, or whether plaintiff knew of such insurance or not (*a*).

If a company has the right to avoid the policy in the event of a second insurance, the granting of an interim receipt to the insured by the local agent of another company, will entitle the company to avoid the policy even after the occurence of the loss, if they have not received notice of the second insurance until that time.

In other words if the agent of another company having power to bind his company by an interim receipt until repudiation by the head office, grant such receipt after payment of the premium, this will be a second insurance for which the first insurance may be avoided, even after the loss happens for the interim receipt is an effectual insurance and equity would compel the execution of a formal policy, conformable to the insurance thereby effected (*b*).

If there is a second insurance, in fact, existing on the property, although it may be voidable, or not executed in

(*a*) *Campbell v. Ætna Ins. Co.* Decided in Sup. Ct. Halifax, Nova Scotia, May 31, 1860.

(*b*) *Bruce v. Gore Dis. M. Ins. Co.*, 20 U. C. C. P. 207; *Weinaugh v. Prov. Ins. Co.*, 20 U. C. C. P. 405.

proper form, yet the policy will be invalid within the meaning of the condition. The question is not whether the insured could legally recover on the second policy against the company effecting it, but whether a second insurance *de facto* exists (*a*).

But if the second policy is actually void, no notice need be given thereof, and the condition will not be violated. (*b*).

If the subsequent insurance is neither void nor voidable on its face, but merely voidable by the underwriters upon due proof of the facts, it is such an insurance as the party is required to give notice of (*c*).

If the other insurance is apparently valid on its face, and can only be shewn to be void by pleading matters in avoidance it is to be deemed only voidable. The privilege of pleading such matters can only be claimed by the company, and the insured is not entitled to show them in order to establish that notice is not required (*d*).

It is immaterial that the second insurance is with a foreign company and therefore not capable of being enforced here, for the statute and condition apply to an insurance in fact (*e*).

The proof of there being a second insurance on the property, lies on the defendants; and when the second insurance is effected with a foreign company by a person residing within their jurisdiction, and is such, that by the law of this country, neither the plaintiff nor the person effecting the insurance could sue on the policy, it not appearing that the party insured had in fact a second insurance, the policy being in the name of another person; it is necessary for

(*a*) *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250.

(*b*) *Clark v. New England M. F. Ins. Co.*, 6 Cush (Mass) 342; *Schenck v. Mercer Cy., M. Ins. Co.*, 4 Zabr (N. J.) 447; *Philbrook v. New England M. Ins. C.*, 37 Me. 137; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind 520.

(*c*) *Bigler v. New York C. M. Co.*, 20 Barb. N. Y. 635; affirmed 22 N. Y. 402.

(*d*) *David v. Hartford Ins. Co.*, 13 Iowa 69.

(*e*) *Ramsay W. C. Co. v. Mutual F. Ins. Co.*, D. J. 11 U. C. Q. B. 516.

the defendants to prove that the second insurance entitled the party insured to sue thereon, according to the law of the foreign country (*a*).

When the second insurance is proved, it is incumbent on the insured to shew that he has given notice thereof according to the condition (*b*).

Forfeitures are not favored in law, and the breach of the condition of a policy which is to work a forfeiture, must be proved strictly. Where, therefore, it was alleged that *the plaintiff* effected a second insurance without giving notice, etc., and the proof was, that the insurance was effected by one S, in his own name, after the policy sued upon, and was assigned before the loss happened, to the party for whom the plaintiff, as trustee, brought the action; it was held, that the breach was not made out (*c*).

It has been held, that the second insurance, in order to avoid the policy, must be on the same property or interest (*d*)

The conditions of some of the companies, now provide, that notice must be given of a second insurance, whether the interest insured be the same as that insured by the company or not. Of course, by such a condition the effect of the above cases is obviated.

An insured may take policies upon different parts of the same building, or of the merchandise within the building, or upon different interests in both, without effecting a double insurance (*e*).

But where the assured makes two or more insurances on the same subject, risk and interest, it is a case of double insurance (*f*).

(*a*) *McLachlan v. Ætna Ins. Co.*, 4 Allen, 173.

(*b*) *Ib.*

(*c*) *Kreutz v. Niagara M. F. Ins. Co.*. 16 U. C. C. P., 131; *Park v. Phœnix Ins. Co.*, 19 U. C. Q. B., 110.

(*d*) *Franklin F. Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Park v. Phœnix Ins. Co.*, 19 U.C. Q.B., 110; see also *Ross v. Coml. Union Assce. Co.*, 26 U. C. Q. B. 558.

(*e*) *Roots v Cincinnati Ins. Co.*, 1 Disn. Ohio, 138.

(*f*) *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14.

In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving that the two policies cover the same property, is upon the defendants (*a*).

Where the proposal for subsequent insurance refers to the existing insurance with the defendants and plaintiff in his proof of loss, swears to the fact and no evidence is offered in any way meeting this, while plaintiff, also, in his declaration admits the property insured to be the same, the question of the identity of the property sufficiently appears and should not be submitted to the jury (*b*).

But if the plaintiff were in a position to prove distinctly that it was a mistake, and that the properties covered by the first and second insurance were not the same, too much weight should not be given to the statement in the proposal (*c*).

A second insurance to avoid the policy must be by the same person or his assignee, of the same interest, in other words it must be made by the insured, or on his behalf. When, therefore, to an action by the mortgagee of the original insured, the defendants pleaded a subsequent insurance by another mortgagee of the insured, the plea was held no defence (*d*).

But a second insurance by the mortgagor after an assignment of the policy to the mortgagee, and a ratification of the assignment by the company, will be a second insurance of the same interest (*e*).

The condition in general only prohibits the insured, and his assigns from making a second insurance (*f*).

Insurance by a mortgagee of his interest is not within the

(*a*) *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray, (Mass.) 148.
(*b*) *Weinaugh v. Prov. Ins. Co.*, 20 U. C. C. P. 405.
(*c*) *Ib.*
(*d*) *Livingston v. Western Assce. Co.*, 14 Grant 461 ; *Burton v. Gore D. M. F. Ins. Co.* 14 U. C. Q. B. 342, S. C. 12 Grant 166.
(*e*) *Ib.*
(*f*) *Etna Ins. Co. v. Tyler*, 12 Wend (N. Y.) 507 ; 16 Wend (N. Y.) 385.

clause of a prior policy in favor of the mortgagor, prohibiting him from making other insurance without notice ; but if such insurance is made at the expense of the mortgagor, and may be applied to his benefit, it is within the clause and would avoid the prior policy (*a*).

When a mortgage interest was intended to be insured, but the policy was issued to the mortgagor, loss if any, payable to the mortgagee ; a second insurance by the mortgagor has held not to avoid the policy (*b*).

The by-laws provided that " if a previous policy exists, and is not disclosed, the policy in this company will be void." *Held* that a previous insurance effected by a third party (who had an interest in the property), in the name of the assured, but without their knowledge or consent, was not in violation of the above provision (*c*).

Where the by-laws provide, that prior insurance, unless expressed in the policy, shall avoid it, the by-laws must be complied with, or the policy will be void ; and will be so avoided even against the assignee of a party, to whom in case of loss the policy is made payable (*d*).

The condition as to subsequent insurance must be construed strictly. Where it was stipulated that a subsequent insurance by any other company or person, without consent, should avoid the policy, and at the time of issue an endorsement of $3,000 insurance already made, was written on the policy; it was held, that a second insurance afterwards obtained without the knowledge or consent of the company, avoided the policy, although it was to take the place of the insurance existing at the time of issue of this policy, and was for a less amount (*e*).

But the mere substitution of one office for another, will not avoid the policy. Thus, where an insurance already

(*a*) *Holbrook v. American Ins. Co.*, 1 Curtis C. C. U. S. 193.
(*b*) *Woodbury, S. B. v. Charter Oak Ins. Co.*, 31 Conn. 518.
(*c*) *Nichols v. Fayette M. F. Ins. Co.*, 1 Allen (Mass) 63.
(*d*) *Barrett v. Union M. F. Ins. Co.*, 7 Cush. (Mass.) 175.
(*e*) *Burt v. People's M. Ins. Co.*, 2 Gray (Mass.) 397.

subsisting on the property with one company, was, with the knowledge and consent of the defendants, transferred to another office, but there was no alteration in the amount insured; it was held, that this did not amount to a second insurance, within the meaning of the ordinary condition (*a*).

Where a second insurance exists for a time, as a fortnight, on the property, and is then cancelled, but during its existence it is not notified to the company, or their agent, this will avoid the policy though the agent is informed of the existence of the second insurance after it is cancelled, and then declares it is immaterial to have it noted.

It seems, also, that the insured would not in such case be entitled to any relief in equity, though by reason of the defendants's agent keeping possession of the policy, (as is usual in such cases), he had no knowledge that it contained any condition obliging him to give notice, and as soon as he became aware of such condition, he gave notice to the agent, the policy being at that time cancelled, and that the agent told him it was then of no consequence to have it noted, it not being proved that the neglect to note the policy during its existence, was chargeable to the defendants, or that they had waived the forfeiture (*b*).

The condition usually endorsed on policies of insurance respecting double insurance, is binding in law, and its performance will not be held to be waived by the company, if their agent on being notified of such double insurance after the fire make no specific objection to the claim of the assured on that ground (*c*)

An omission to give notice of the second insurance as required by the conditions of the policy will be cured if the insurer with full knowledge of the facts, accepts the

(*a*) *Pacaud v. Monarch Ins. Co.*, 1 L. C. J. 284.

(*b*) *Jacobs v. Equitable Ins. Co.*, 17 U. C, Q. B. 35; S. C. 18 U. C. Q. B. 14.

(*c*) *Western Assce. Co. and Atwell*, 2 L. C. J. 181; S. C. 1 L. C. J. 278, reversed.

premium for renewal, and renews the insurance. In such case the insurer will be deemed to declare the contract to be valid, and will be precluded from asserting either that the renewal was inoperative, or that the policy became void immediately after it was renewed (*a*)

The receipt of assessments after the insured property was destroyed by fire, for losses occurring during continuance of the policy, such losses also occurring after the policy had been forfeited by act of the insured, is no waiver of the forfeiture (*b*)

Where the company, after knowledge of certain facts avoiding the policy, receive from the insured the amount of an assessment on the premium notes, which was payable before the fire, and before the company had notice of anything wrong in the insurance, this will not set up a void policy, or entitle the assured to recover (*c*).

The proof of a waiver will be wholly inadequate, unless it be shewn that the insurers knew of the forfeiture at the time of doing the act, which is alleged to have deprived them of the power to enforce it, because, a waiver is essentially a question of intention, and cannot arise out of an act done in ignorance, or without a full knowlege of all the material circumstances. In this case it was held, that a submission of the amount of loss and damage occasioned by the fire, to arbitration, in ignorance of the fact creating the forfeiture, did not waive it (*d*). So, part payment of the loss does not amount to a waiver of the forfeiture, for so long as the whole has not been paid, the company may resist the demand for any part which remains unpaid (*e*).

A condition of a policy under seal, made by an incorporated insurance company cannot in the absence of any

(*a*) *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402.
(*b*) *Gardiner v. Piscataquis M. Ins. Co.*, 38 Me. 439.
(*c*) *Bleakley v Niagara D. M. Ins. Co.*, 16 Grant, 198.
(*d*) *Chapman v. Lancashire Ins. Co.*. 13 L. C. J. 36; *Allen v. Vermont M. Ins. Co.*, 12 Vt. 366.
(*e*) *Ib.*, 50.

special provision to that effect in the act of incorporation, be waived by parol, and it seems the condition could only be waived by an agreement to that effect under the seal of the company. A letter from the secretary, written after the fire, stating that the company declined paying, as the insured had not substantiated any claim for loss as required by the conditions of the policy, would not be sufficient. The president of such a company has not, on the general principles which govern corporate acts and liabilities, where no special authority is conferred, a right to waive such condition, it not being one of the ordinary matters which, from necessity, the company may do without employing the common seal. When, therefore, the plaintiff attempted to prove a conversation with the president of a company, not at their place of business, during which, it was alleged the president waived compliance with a condition requiring all actions to be brought within twelve months; it was held, that evidence of such conversation was rightly rejected (*a*).

The condition of a policy not under seal may before breach be waived by a parol agreement founded on a sufficient consideration (*b*).

Some of the offices provide by their conditions that the waiver must be clearly expressed in writing, signed by the secretary of the company, and delivered to the insured or his representative. Where such a condition is endorsed on the policy, it would be useless to set up a parol waiver.

It seems that a parol waiver by an agent of a condition in the policy would be of no avail if the agent's authority were not shown, for it would be setting up a substituted parol contract in answer to the sealed policy (*c*).

The Statute of Canada 27 & 28 Vic. c. 38, gave no

(*a*) *Lampkin v. Western Assce. Co.*, 13 U. C. Q. B. 237.

(*b*) *Brady v. Western Ins. Co.*, 17 U. C. C. P. 597; *Goss v. Ld. Nugent*, 5 A. & E. 58.

(*c*) *Lyndsay v. Niagara Dis. M. Ins. Co.*, 28 U. C. Q. B. 326; *Scott v. Niagara D. Ins. Co.*, 25 U. C. Q. B. 126; see, however, *Johnston v. Niagara D. M. Ins. Co.*, 13 U. C. C. P. 333.

authority to the directors to waive by parol the performance of a condition precedent, and it seems that a parol waiver would in no case have any effect, for it would be setting up a substituted parol contract in answer to a sealed instrument. Evidence of such parol waiver would not be admissible under a simple traverse of a plea setting up a breach of the condition (*a*)

Such waiver must be specially replied (*b*).

A mutual company incorporated under the Con. Stat. U. C. c. 52, might by instrument under seal, made according to their by-laws, rules and regulations, alter or rescind a contract they had made, by consent of the other party, provided they did not attempt to dispense with any thing positively negatived by the statute, which is their charter of incorporation (*c*).

The conditions generally provide, that no greater quantity of gunpowder shall be allowed in any house or building insured by the company, or the premises connected therewith, than twenty-five pounds, unless specially provided for in the policy, and that if there shall be at any time any greater quantity without such provision, the policy shall be void.

Under this condition, the deposit of gunpowder over the above mentioned weight, though for a temporary purpose, and though no damage is actually caused thereby, will avoid the policy, and this, though the gunpowder is deposited long after the making of the policy, and is removed before the loss occurs. It would be no defence, that the powder was put on the premises without the plaintiff's privity, and remained only two days, because a vessel on which it was intended to ship it to another port, had sailed without it, and that the insured had used every exertion to

(*a*) *Scott v. Niagara D. M. Ins. Co.*, 25 U. C. Q. B. 119.

(*b*) *Mulvey v. Gore D. M. Ins. Co.*, 25 U. C. Q. B. 424 ; *Hatton v. Beacon Ins. Co.*, 16 U. C. Q. B. 317 ; but see *Scott v. Niagara D. M. Ins. Co.*, Supra, 125 ; *Thames I. Co. v. Royal M. S. P. Co.*, 13 C. B. N. S. 358.

(*c*) *Scott v. Niagara D. M. Ins. Co.*, Supra 126.

find another conveyance without success, in consequence of which, it remained on the premises until a fire broke out, which eventually consumed the premises; and that long before it reached the premises, the gunpowder was removed and thrown into the harbor, and no loss or damage occasioned thereby to the goods insured (*a*).

It is a general condition of all policies, that goods on storage must be separately and specifically insured. It is necessary, that a condition of this description should be inserted in the policy, for where the insurance is general on the building, or where a store in general terms is insured, all kinds of business may be carried on, and all kinds of goods and merchandise kept in the building, except such as are expressly prohibited. Storing, within the meaning of the condition signifies, keeping for safe custody, to be delivered out in the same condition, substantially the same, as when received, and applies only where storing or safe keeping is the principal object of the deposit, and not where it is merely incidental (*b*).

Placing gunpowder in a building with a lighted match for the purpose of blowing it up, to prevent the spread of a conflagration, is not a storing of it, within the meaning of the clause prohibiting "the storing of gunpowder on the premises" (*c*).

The condition against storing or keeping hazardous articles in the premises insured, is intended merely as a protection against the appropriation of the building for the business of storing and keeping such articles, and where the policy is on merchandize, the keeping of a few hazardous articles required by the ordinary course of trade, will not violate the condition (*d*).

(*a*) *Faulkner v. Central F. Ins. Co.*, 1 Kerr, 279.

(*b*) *New York Eq. Ins. Co. v. Langdon*, 6 Wend. N. Y., 623; affirming 1 Hall, N. Y. 226.

(*c*) *City F. Ins. Co. v. Corlies*, 21 Wend. (N. Y) 367.

(*d*) *Moore v. Protection Ins. Co.*, 29 Me. 97.

Where among the trades and articles included in classes of hazards were those of "houses building, or repairing," and "oil, turpentine and paint." At the time of the fire, the house was being repaired and painted, and "oil, turpentine and paint" were in the building for that purpose. *Held* that the repairing of the house insured and the deposit of the oil, turpentine and paint for that purpose were not the trade of "houses repairing," or "storing" of the articles within the meaning of the condition (*a*).

So if a hazardous article is merely temporarily left on the premises with no intention of having it regularly stored or kept there, and the building is not devoted to nor used for that purpose, the policy will not be avoided (*b*).

The clause would seem only to prevent the appropriation or chief use of the building insured for any of the forbidden purposes and not the incidental keeping of small quantities of the forbidden articles for retail along with a general stock of goods (*c*).

In fact, when an article is ordinarily and usually kept in a retail store, the keeping of it for retail purposes, in such store is not a violation of the condition, and if the written portion of the policy authorizes the storing or keeping of a hazardous article, it will prevail notwithstanding the printed conditions to the contrary (*d*).

The keeping of articles to be exhibited, or to be used as means and instruments of a public exhibition, is not a use of the building "for the purpose of storing or keeping therein" such articles within a clause in the policy relating to hazardous articles (*e*).

If, by the terms of the contract, the policy is suspended while certain articles are stored on the premises, the policy

(*a*) *O'Neill v. Buffalo F. Ins. Co.*, 3 Comst (N. Y.) 122.

(*b*) *Hynds v. Schenectady Cy. M. Ins. Co.*, 16 Barb. (N.Y.) 119; affirmed 1 Kern (N. Y.) 554.

(*c*) *Leggett v. Ætna Ins. Co.*, 10 Rich. Law S. C. 202.

(*d*) *Phœnix Ins. Co. v. Taylor*, 5 Minn. 492.

(*e*) *Mayor of N. Y. v. Hamilton Ins. Co.*, 10 Bosw. (N. Y.) 537.

is not rendered void, though such articles are, at times, kept in the insured premises (*a*).

The keeping of "liquors" in a boarding house for sale to boarders, does not avoid the policy under the condition prohibiting the "storing therein of extra-hazardous articles," among which are included "spirituous liquors" (*b*)

An insurance company cannot set up the mere fact of non-occupation as a ground for avoiding the policy, in the absence of a special condition to that effect. If there is no special condition, it must be proved that the non-occupation increased the risk in the particular case. If, however, the occupation is abandoned with a fraudulent view to the destruction of the premises, such fraud will vitiate the policy, without reference to any condition (*c*).

A condition is usually inserted in the policy, that all changes of occupation, either by tenant or otherwise; or any vacancy of the buildings, if the same be left vacant for one month, shall be immediately notified to the manager of the company, in writing, and acceded to in writing by him, otherwise the policy shall be void.

A condition provided that in case the premises became vacant or unoccupied, the fact should be communicated to the company, and that unless such notice was given, and the company consented to retain the risk, the policy should be void. It was held that this condition did not relate to an absence from personal occupation for a day or so. When the non-occupation is longer, the policy remains valid until the assured has had a reasonable time for giving notice to the company, and if a fire occurs before the expiry of such reasonable time, the company remains bound (*d*)

The time within which notice is to be given is not uniform in all the policies. Some offices require it to be given in

(*a*) *Phœnix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9.

(*b*) *Rafferty v. New Brunswick F. Ins. Co.*, 3 Harrison N. J. 480.

(*c*) *Foy v. Ætna Ins. Co.*, 3 Allen, 29.

(*d*) *Canada L. C. Co. v. Canada A. Ins. Co.*, 17 Grant 418.

ten days, a period which must under ordinary circumstances be unreasonably short.

The mere fact of a building insured as a "dwelling house" being subsequently vacated, will not avoid the policy, although the risk be thereby increased, if the insured intended it to be used as a dwelling house, and was making reasonable efforts to get a new tenant (*a*).

A policy of insurance against fire, on a dwelling house, contained a condition, that if after the insurance was effected the risk was increased by any means within the control of the assured, or if the building should, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance should be void. A memorandum on the policy specified a number of establishments which would only be insured at special rates of premium, and a number of others which were not to be insured at any rate of premium, but an unoccupied house was not in any way specified in the memorandum. The policy described the house as belonging to the assured, and occupied by him as a dwelling house and shoe maker's shop, but at the time of the fire it was unoccupied, the plaintiff having moved away from it about three months before. There was no evidence to prove that the risk was increased by non-occupation, except the general opinion of an insurance agent, that the risk on a house would be much increased by non-occupation. It did not appear that the insured had left the house with a fraudulent intent; *held*, that this was not an increase of risk within the meaning of the condition, unless it was proved that under the circumstances and situation of the building insured, its destruction by fire was more probable when unoccupied than if the assured had continued to reside in it (*b*).

A policy of insurance which is issued upon a dwelling house, in consequence of an express oral promise, by the

(*a*) *Gamwell v. Merchants & Farmers M. F. Ins. Co.*, 12 Cush. (Mass) 167.

(*b*) *Foy v. Ætna Ins. Co.*, 3 Allen, 29.

applicant, that it shall be occupied, will not be avoided by the failure to fulfil such promise, unless fraud is proved; even though the risk is thereby increased (*a*).

The Consolidated Statutes of Upper Canada c. 52 s. 34, provides that if any alteration be made in any house or building by the proprietor thereof after an insurance has been made thereon with the company, whereby it is exposed to greater risk or hazard from fire than it was when insurance was effected, the insurance therepon shall be void unless an additional premium and deposit after such alteration be settled with and paid to the directors, but no alterations or repairs in buildings not increasing such risk or hazard shall affect the insurance previously made thereon.

A by-law passed for the purpose of carrying this clause into effect can refer only to the purpose for which the building is occupied, and not to any mere change of the occupant, and it seems that such change where there is no other alteration in the manner or purpose of occupation, will not avoid the policy (*b*).

A policy cannot be held invalid for non-compliance with a by-law in the absence of any provision in the by-law, that on non-compliance, etc., the policy shall be void (*c*).

In the case of insurance on buildings, described as dwellings, subject to a condition that should any change of occupation occur which would entitle the insurer to charge a higher premium notice of such change should be given to the insurers in writing, the approval by the insurers endorsed on the policy, and the extra premium paid to the insurers, and that in default thereof, the insurance should be null and void: the change of occupation to a tavern without formal notice to, or consent by the company, it being found by the jury that their agent was aware of it, does not render the policy void when it appears that an intermediate

(*a*) *Kimball v. Ætna Ins. Co.*, 9 Allen, Mass. 540.

(*b*) *Hobson v. W. D. M. F. Ins. Co.*, 6 U. C. Q. B. 536.

(*c*) *Ib.*

change of occupation into a vinegar factory had been sanctioned by the company, and that the risk of the tavern was not greater than that of the vinegar factory (*a*)

Where a condition in a policy provides, that if any alteration or addition shall be made in or to any risk, whether by the erection of apparatus for producing heat, or the introduction of articles more hazardous than allowed, or change in the nature of the occupation, or, *in any other manner whatsoever* by which the degree of risk is increased, notice thereof shall be given, and an additional premium paid, etc.; the means of increasing the risk are not limited to those above specified. If the risk is increased, the particular means are of no consequence, for the condition applies to an alteration of risk "in any other manner whatsoever." For the same reason, whether the change is *in the occupation* of the premises, or in the *nature* of the occupation, is immaterial. These expressions may not mean the same thing. It seems, that the expression "change in the occupancy," would signify a change in the business, trade or employment, carried on in the premises, although in strictness a change of occupancy ought to be construed as a change of the possession, a transfer of the occupation of the property from one person to another (*b*). If one means a change of the *person* occupying, and the other means a change by the person in his *manner* of occupying, as by changing the nature of his business carried on in the building, it will still be immaterial; for the question all the while is, can a change in the occupation, whichever way the expression is construed, create an alteration in the risk? and this latter is for the jury to determine (*c*).

A mere change of the *occupant* will not avoid the policy on a condition prohibiting a change of *occupation* (*d*); but,

(*a*) *Campbell v. Liverpool & L. F. Ins. Co.*, 13 L. C. J. 309.
(*b*) *Kreutz v. Niagara Dis. M. F. Ins. Co.* 16 U. C. C. P. 573.
(*c*) *Ottawa F. Co. v. Liverpool, L. & G. Ins. Co.*, 28 U. C. Q. B. 518.
(*d*) *Hobson v. Western Dis. Ins. Co.*, 6 U. C. Q. B. 536; *Gould v. British Am. Assce. Co.*, 27 U. C. Q. B. 480.

if the condition is specifically directed against a change of the *occupant*, it must be given effect to (*a*).

It seems, however, that the mere temporary introduction of painters and carpenters for the purpose of repairs, will not avoid the policy within the meaning of the condition, and that therefore, a plea alleging an increase of the risk by such means would not be sufficient, but in this particular case the court inclined to think the plea was good, because they could not know judicially, whether what was alleged as to the introduction of the painters, etc., could increase the risk, and they suggested that the plaintiffs should reply specially the circumstances under which the painters and carpenters were introduced (*b*).

It seems that the words "a change in the nature of the occupation," do not point to a mere temporary cesser of the occupation, but rather to an application of the premises insured to a purpose different from that described in the application. If the insurers desire to guard themselves against loss on unoccupied buildings, or to make continued residence a condition precedent to the right of recovering in the case of a building described as a dwelling house occupied by a tenant, they must use express language to meet the case. It seems also, if the change of occupation, etc., does not come within the legal meaning of the condition, the words "or in any other manner whatsoever," will not enlarge the operation of the condition (*c*)

It seems that a plea alleging that the building was used for and occupied as a tavern only, yet, after the issuing of the policy, the building, or a large portion of it, was occupied by J. D. as and for a store, and the business of store-keeping was carried on therein, would signify rather a change in the mode of occupying or using the building, than a change of the occupants (*d*).

(*a*) *Ottawa F. Co. v. Liverpool, L. & G. Ins. Co.*, 28 U. C. Q. B. 523, per A. Wilson, J.

(*b*) *Ib.*

(*c*) *Gould v. British Am. Assce. Co.*, 27 U. C. Q. B. 473.

(*d*) *Kreutz v. Niagara D. M. F. Ins. Co.*, 16 U.C. C.P. 573.

A condition that if the premium note is not paid at maturity, the full amount of premium shall be considered as earned, and the policy shall become void, while the note remains unpaid, only applies during the existence of the subject insured (*a*).

An assignee of the policy from the original insured is not an "applicant" within the meaning of a condition, that if after insurance effected the *applicant* incumbers his property by way of mortgage, the policy should be void unless certain notice were given, etc. Thus, where after the insurance was effected by A, he assigned the policy to B, and the latter before the fire encumbered the property by a mortgage without giving notice to the company, and without making any application for insurance, it was held that the condition was not violated (*b*)

The Con. Stat. L. C. c. 68 s. 30 only applies to an insurance on any house or building, and not to an insurance on goods. Where, therefore, a second insurance was effected on goods without the provisions of the act being complied with, it was held that the policy was not avoided (*c*).

This statute, in terms, applies only to "any house or building." *Aylwin, J.* dissented from the judgment of the court, holding that the words included insurance on goods contained in houses or buildings.

The proprietor of a house destroyed by fire, can insist strictly upon the clause contained in the policy, that the works shall be seen and examined by experts, and so long as the insurance company has not complied with this condition, even for inconsiderable works, the proprietor is not bound to receive his house in that state, and can sue the insurance company to compel it to surrender the possession of the premises in the state in which they ought to be, and after compliance with the condition of an *expertise*.

(a) *Mc Gaher v. Home Ins. Co.*, 10 U.C. C.P. 322.

(b) *Richardson v. Canada W. F. M. & S. Ins. Co.*, 16 U.C. C. P. 430.

(c) *Chalmers v. Mutual F. Ins. Co.*, 3 L. C. J. 2.

The circumstance of the proprietor having during reconstruction, made suggestions to the builder as to the manner of such reconstruction cannot be interpreted so as to deprive him of his right to an *expertise* (*a*).

The usual conditions of the policy have been referred to in different parts of this work. They will now be briefly enumerated, and such as are unusual will be pointed out. The application for insurance is almost invariably required to be in writing, and it must specify the construction and materials of the building to be insured, its occupation, and situation with respect to contiguous buildings. If the building contains any steam engine, furnace, kiln, stove, oven, or other instrument by which heat is produced, the construction and circumstances of the same must be particularly described, or if subsequently introduced, either in the building insured, or in any addition thereto, due notice must be given to the company, and the same sanctioned by them, otherwise the policy will be void. As to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates.

In the event of misrepresentation or concealment or increase of risk by means within the control of the insured, or any tenant or occupant of the building insured, an option is usually reserved to the company, to terminate the insurance and cancel the policy. No insurance original or renewed is to be binding on the company till actual payment of the premium. Goods in trust or on commission must be insured as such and goods on storage must be specifically insured.

Policies are not assignable without the consent of the company, endorsed in writing on the policy.

All previous insurances must be notified to the company when the insurance is effected, and all subsequent in-

(*a*) *Alleyn v. Quebec Ins. Co.*, 11 L. C. R. 394.

surances must be notified with reasonable diligence, and in both cases the consent of the company must be endorsed in writing on the policy.

A clause is usually inserted as to contribution between co-insuring companies in the event of several insurances, and each company is made liable for a rateable proportion of the loss, without reference to the dates of the different policies.

In case of fire the insured is required to use all possible diligence in saving and preserving the property and is not allowed to abandon the subject insured to the company.

The company will contribute rateably with other companies to the expenses of salvage. If property is removed from a building not actually on fire, the company will not be liable if such removal is contrary to the declared desire of an officer or agent of the company.

The company will be liable for losses on property burnt by lightning, but not for loss by fire happening by explosion, or by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, or any loss by theft at or after the fire.

Certain articles, such as jewels, plate, medals, etc., are usually mentioned, which the policy is not to cover unless they are specifically insured.

In the event of loss, notice thereof must immediately be given, and a particular account verified by oath or affirmation, delivered into the office. The insured must also declare on oath, whether any, and what, other insurance has been made on the property; also, the value of the property, and his interest therein; the manner in which the building was occupied, and when and how the fire originated. The insured must also procure a certificate under the hand and seal of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferer), that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent

enquiry into the facts set forth in their statement, and knows or verily believes, that he, she or they, really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers, and shall also, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her or their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination had, the loss is not deemed payable. If there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. In case of assignment where the assignee does not become the absolute owner of the property, the proofs of loss must be made by the assignor. Re-insurance for any other company to be on the basis of joint liability with said company, and in no event will the company be liable for a sum greater than such portion as the sum re-insured bears to the whole sum insured on the property by the company re-insured, and in case of loss, the company to pay their *pro rata* proportion at the same time, manner and form, as the company re-insured.

Payment of losses are to be made immediately, or within sixty days after the loss has been ascertained and proved. It is optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the premises within a reasonable time, giving notice of their intention so to do within thirty days after the preliminary proofs are received at the office of the company. The privilege of referring the adjustment of the loss to arbitration is usually reserved to the company.

Insurances once made may be continued for such further

time as may be mutually agreed upon, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same, and all insurances whether original or renewed, are considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it is incumbent on the party insured to make, when the risk has been changed either within itself or by the surrounding or adjacent buildings at any time during the currency of the policy, whether it be at the renewal of the policy or at any other time.

When a policy is made upon a survey and description of the property, such survey and description is taken and deemed to be a part and portion of such policy, and a warranty on the part of the insured.

There is always a special clause in the policy as to keeping gunpowder or other hazardous articles on the premises.

The insured is usually required to have good and substantial stone or brick chimneys in the building insured, and the stove pipe must be carried into such chimney, and the insured is not allowed to deposit ashes or embers in wooden vessels, nor is he allowed to deviate from the laws or regulations of police made to prevent accidents from fire. A special agreement must be made as to camphene burning fluid and other materials which are highly inflammable.

All changes of occupation in the building insured must be notified to the company within a certain time, and their consent thereto obtained. All actions against the company must in general be brought within the period of six or twelve months.

Whenever notice is required by the policy it must be in writing, and in some cases it is provided that no waiver of the breach of any condition shall have any effect unless clearly expressed in writing on the policy.

The foregoing conditions the writer believes are all that are usually found in the policies of companies doing busi-

ness in Canada. There are, of course, some exceptions, but the person who is familiar with these condition will easily notice any other special conditions in the policies of particular companies.

The *Commercial Union* and the *Queen* Insurance Companies require that notice be given when any other insurance on the property is dropped. Thus if a policy is obtained from either of these companies and the insured has also policies in other companies on the same property, if the latter are permitted to expire and no notice is given thereof to the Commercial Union, etc., the latter company by virtue of its conditions is only liable for such rateable proportion of the loss as it would have been liable for under the ordinary contribution clause if the other insurances had been kept up. The *Commercial Union* policy also provides that unless otherwise described in the policy, the insured shall be deemed to have been represented to the company as the absolute beneficial owner of the property insured, and if not so entitled the policy shall be absolutely void. The insured is also required in case of loss to produce his title deeds to the property and an abstract of the title thereto from the Registrar of the county or city in which the loss occurs. The agents of the company shall in no case be made personally responsible on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company, nor can their personal property be attached on account of any alleged loss by the insured. This condition as to the liability of the agent, is also to be found in the *Queen* Ins. Co., the *Liverpool & London & Globe* Ins. Co., and the *Northern* Ins. Co. The conditions as to the description of the property by the insured, the form of application, the construction and circumstances of contiguous buildings misrepresentations by the insured, etc., are, also, very special in the *Commercial Union* Ins. Co., and require very careful attention on the part of the insured. The company,

also, is not answerable for losses which shall happen or arise after war shall have been declared against the country wherein the insured property is situate, or after the invasion of any territory of such country, or during the administration of martial law, nor for any loss or damage occasioned by earthquakes or hurricanes, or by the burning of forests.

A condition of the *Citizens Ins.* Co. provides that if within fifteen days after the reception of a policy by the insured, he does not notify the company of any error, misdescription or omission therein, such policy shall be conclusively held to be in conformity with the representations of the insured in respect of the property therein mentioned, and every descriptive statement contained in the policy shall be held to be a guarantee of the continuance of the state of things therein described.

A condition is also inserted, that if *hypotheques* or privileged claims upon real estate be insured, the company shall be entitled, upon payment of the amount of loss, to demand and obtain from the assured a subrogation of such *hypotheque* or claim *pro tanto*, and applications for insurance shall be accompanied by a registrar's certificate, shewing the amount and rank of previous claims upon the property affected by the *hypotheque* or charge intended to be insured.

The *Liverpool & London & Globe* insurance company provides by its conditions, that the breach of any condition of the policy shall *ipso facto* render the policy void. Also, that the reports of the company's inspectors, or other officers or agents to the directors, or resident secretary, or chief agent, in relation to any alleged or actual loss or damage by fire, shall in every case be, and be held to be, strictly confidential.

It is also provided in the *Liverpool & London & Globe* policy, that the insurance on any building shall not be held to include anything outside thereof, such as clap-boarding, blinds, galleries, porches, *appentis*, sheds or other buildings, except the same be specially mentioned and valued in the

policy, and that no furniture usually denominated fixtures, machinery, or other legal or constructive immoveables, or shop or store fixtures; and furniture contained in any building shall be held to be insured as appertaining or belonging thereto, except such fixtures shall be especially named in the body of the policy. A condition to the same effect is contained in the *British America* Assce. Co., the *Commercial Union* Assce. Co., and the *Queen* Ins. Co. The policy of the *Liverpool & London & Globe* also provides, that persons desirous of continuing annual or other periodical insurances, must pay their respective premiums thereon on or before the commencement of each succeeding year or other periodical term, otherwise such insurance will expire, and the only evidence of such payments shall be the printed receipts issued from the office, and witnessed by one of the clerks or agents of the company. The *North British* and *Mercantile* Ins. Co. has a condition to the same effect in its policy.

The *Liverpool & London & Globe* policy also excepts losses from lightning on buildings having spires or steeples without metal conductors.

The *British America* Assce Co. also contains a condition to the same effect. The *Liverpool & London & Globe* policy also provides that on notice of other insurance being given the company shall have the right either to endorse it on the policy and continue the insurance, or cancel the policy. The proviso as to cancelling in such cases is also inserted in the *Commercial Union* Ins. Co. and the *Queen* Ins. Co, The *Liverpool & London & Globe* policy only requires notice in writing to be given of other insurances whether prior or subsequent; it is not, also, required that a consent thereto be endorsed on the policy. The usual condition it will be remembered, requires that the notice shall be given and also endorsed on the policy (*a*),

The *Queen City* Ins. Co. the *British America* Assce Co., and the *Lancashire* Ins. Co. do not require that the notice

(*a*) See *Ante* p. 153.

of *subsequent* insurance should be endorsed on the policy, but only that notice in writing thereof shall be given to the end that it may be endorsed on the policy or otherwise acknowledged in writing.

The *Liverpool & London & Globe* policy also provides that at the death or at the insolvency (under an insolvency act) of the insured, and on returning to his legal representative or assignee, the premium for the unexpired term, it shall be competent to the company either to cancel the policy or by an endorsement to continue it in force.

The *British America* Assce. Co., the *Guardian* Ins. Co., the *Northern* Ins. Co., the *Royal* Ins. Co., and the *Imperial Ins.* Co., provide by their conditions, that the interest of any deceased person in any policy may be continued to the executor or administrator respectively, or the person otherwise entitled to the property, provided the person so entitled, shall procure his or her interest therein, to be endorsed on the policy at the office of the company.

The *British America* Assce. Co., the *Queen* Ins. Co., the *Northern* Ins. Co., and the *Liverpool & London & Globe* Ins. Co., except losses by fire in any building under construction or repair. The *London* Assce. Co. and the *North British & Mercantile* Ins. Co. except losses arising from the burning of forests or the clearing of lands. It is also provided, that the policy shall cease to be in force as to any property which shall pass from the insured otherwise than by will or by operation of law, unless notice is given and consent endorsed. The policy of the latter company also contains an express clause authorizing the company or its agents or servants, in case of loss or damage, to enter on the premises and remain in possession a reasonable time, etc. It is also provided, that where the policy is void or has ceased to be in force under any of the conditions, all monies paid to the corporation in respect thereof shall be forfeited.

The *Imperial* Ins. Co. requires proof of loss to be made

by the insured, or by his servants or other credible persons (not less than three in number), who were present at the time of the accident. It also provides, that all insurances for any period less than a twelvemonth, shall terminate at four o'clock in the afternoon of the day specified in the policy.

The *Lancashire* Ins. Co. excepts losses arising from the burning of forests or the clearing of lands.

The *Provincial* Ins. Co. contains a special clause in the body of its policy to the effect that whenever the company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town or other corporation, or to prosecute therefor at the charge, and for the account of the company if requested.

All the policies in use in Canada contain an arbitration clause. Few of these clauses are so worded as to make a prior reference to arbitration, a condition precedent, but an express clause is contained in the policy of the *Queen City* Ins. Co., declaring that the obtaining the decision of arbitrators as provided in the clause, shall be a condition precedent to the right of the insured to maintain any action or suit.

The *Guardian Fire & Life* Ins. Co. requires every person effecting an insurance to state his name, place of abode and occupation. This company excepts losses arising from natural heating of hay, corn, or agricultural produce, or from bush fires, or the burning of forests, also losses from earthquakes, hurricanes or volcanic eruptions. The policy of this company also contains a special limitation clause, providing that if no claim is made within three months after the fire, or if the claim is made and rejected, and is not then judicially insisted on within three months after such rejection the claimant shall forfeit all right under the policy.

The Northern Insurance Co. provides by its conditions that each distinct building, also, each addition or *appentis* to

any building and property contained in any such distinct, or added building must be separately insured and mentioned in the policy.

Stock in trade and household furniture must be separately insured, neither shall furniture, usually denominated fixtures, machinery, or immoveables, legally or constructively, so called, contained in any building, be held to be insured, unless the same be specially mentioned in the policy. This policy also excepts losses arising from any volcano earthquake or hurricane, and from the natural heating of hay, corn or other property.

The *Queen* Ins. Co. requires the applicant for insurance to state his or her full name, address and occupation. It is also provided, that any person other than the insured who may have procured the insurance, to be taken by the company or assisted in any way thereto, shall be deemed to be the agent of the insured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to the insurance. Some other policies contain the same condition expressed in a different form. This company and several other English companies contain special provisions as to evidence of the payment of the premium. The printed receipts issued from the office are alone evidence of payment. Losses arising from natural heating of hay, corn, or agricultural produce are excepted, so also losses arising from the burning of forests or clearing of lands. It is also provided, that if a building shall fall except as the result of a fire, all insurance by the company on it or its contents shall immediately cease and determine, and no liability shall attach to the company in consequence of the falling of the building.

It is further provided, that if the insured, or any other person shall have made, or shall therafter make specific insurance in this or in any other company on any of the articles, property, or interests included in the more general and written description of this policy, and such specific in-

surance not being acknowledged or permitted by this company in writing hereon, then the insurance which would be otherwise covered by this policy on such articles, property, or interest, shall be, and is hereby declared void. The condition as to proof of loss requires the assured to produce his title deeds as the sole owner of the property. And, an express clause is added, making compliance with the condition as to proof of loss in all its terms a condition precedent.

Nearly all the English companies insert a clause in their policies, to the effect that, if the insured hold any other policy on the same property, subject to average, then the policy held with this company shall be subject to average, in the same manner.

It might be advisable for Parliament to establish a Canadian standard policy for use by all companies doing business in Canada. Such policy might have an appropriate name to distinguish it from all others, and only those companies who adopted the provisions of this policy should be permitted to use the name. It would perhaps, not be expedient to make the adoption of this policy compulsory, but companies that did not choose to adopt it should be required to file a copy of their policy and conditions with a person to be appointed for that purpose by the act, and as often as any change was made in the policy or conditions, a statement of the change should also be filed. If this plan were adopted, when the words "Canada standard policy" were stamped on the policy the public would know that it contained only such conditions and stipulations as were sanctioned by Parliament, and when these words were not to be found on the policy, its material variations from the standard policy would appear by the books of the insurance commissioner or person appointed by the Act. A form of policy will be found in the appendix, which, it is believed, contains all the conditions and stipulations which are necessary and reasonable, and if such a form as this were adopted it might in a short time become quite familiar to the general public.

CHAPTER VII.

ALIENATION OF PROPERTY AND ASSIGNMENT OF POLICY.

If, after effecting an insurance, the property covered by the policy is alienated this will on the principles of the common law, irrespective of the conditions of the policy, prevent the insured from recovering, for he must have an interest in the property at the time of the loss (*a*).

Where, therefore, the insured sells the property and parts with all his interest therein before the loss happens the insurance is at an end, unless the policy is assigned to the purchaser with the assent of the insurer, and if the insured retains but a partial interest in the property, only such interest will be protected (*b*).

But a change of property taking place after effecting the insurance will not affect the right to recover on the policy if it is the intention of the parties to continue it; unless such change is made in direct violation of any of the conditions of the policy (*c*).

The Consolidated Statutes of Upper Canada, c. 52 s. 30 provide that "In case any house or other building be alienated by sale or otherwise, the policy shall be void and shall be surrendered to the directors of the company to be cancelled, and thereupon the insured shall be entitled to receive his deposit note, or notes upon payment of his proportion of all losses and expenses that had occurred prior to such surrender, but the grantee or alienee may have the policy assigned to him, and upon certain terms may have the policy ratified and confirmed to him for his own

(*a*) See *Lynch v. Dalzell*, 3 Brown, P.C., 497; *Sadlers Co. v. Badcock*, 2 Atk., 554.

(*b*) *Etna Ins. Co. v. Tyler*, 16 Wend (N.Y.), 385.

(*c*) *Davies v. Home Ins. Co.*, 3 E & A Reps. 272; *Powles v. Innes*, 11 M. & W., 10; *Sparkes v. Marshall*, 2 Bing., N.C.; 761.

use and benefit, and by such ratification and confirmation the party causing the same shall be entitled to all the rights and privileges, and be subject to all the liabilities to which the original party insured was entitled and subjected.

The provisions of this statute are intended chiefly for the benefit of the insured, that he may not continue to be assessed on his note for losses after he has parted with the property insured, to which he would be liable if no such provision had been made (*a*).

Where a member of a mutual insurance company made a mortgage to A before the insurance was effected, but made no alienation of the property after making the insurance, and merely assigned the policy to A., it was held that the case did not come within the statute, but was merely the assignment of an ordinary chose in action (*b*).

An alienation, to come within the statute, must be an alienation upon sale, or otherwise, *i. e.* by gift, exchange, devise, etc., so that the insured ceases to be owner; and a demise of the premises insured for one year is not an alienation within the act (*c*).

The execution of a mortgage is not an alienation within the statute (*d*), nor is a conditional sale an alienation (*e*).

It has been held in the United States, where the condition provided that if the property should "in any way be alienated the policy should be void," that a voluntary assignment in insolvency was an alienation within the meaning of the condition (*f*). Such is also the law in this country.

(*a*) *Kreutz v. Niagara Dis. M. F. Ins. Co.*, 16 U. C. C. P. 134.

(*b*) *Johnston v. Graham*, 14 U. C. C. P. 9.

(*c*) *Hobson v. W. D. M. F. Ins. Co.*, 6 U. C. Q. B. 536.

(*d*) *Jackson v. Massachusetts M. F. Ins. Co.*, 23 Pick. (Mass.), 418; *Conover v. Mutual Ins. Co.*, 3 Denio (N. Y.) 254; *Smith v. Monmouth M. F. Ins. Co.*, 50 Me. 96.

(*e*) *Tittemore v. Vermont M. F. Ins. Co.*, 20 Vt. 546; see *Burton v. Gore D. M. F. Ins. Co.*, 14 U. C. Q. B. 342.

(*f*) *Young v. Eagle F. Ins. Co.*, 14 Gray (Mass.) 150; *Adams v. Rockingham M. Ins. Co.*, 29 Me. 292.

One of the conditions of a mutual insurance policy provided, that "whenever any one hereafter insured shall alienate conditionally by mortgage, his policy shall be void," unless written notice thereof be given to the board of directors, etc.; *held*, looking at the rest of the condition (which referred to the sale of real estate), and the constitution and working of mutual insurance companies, that the alienation referred to was of the land on which the premises insured were situate (*a*).

In this case the plaintiff had insured a house and furniture in separate sums. The land on which the house stood had been devised to his wife, and a mortgage in fee was proved, of which no notice had been given, executed by himself after the insurance, his wife joining to bar dower. It was not proved when she was married or acquired the property, so as to shew whether the Married Woman's Act, Con. Stat. U. C., c. 73, would apply. *Held*, that the policy was void, for, unless that act applied, his conveyance would pass a freehold interest in the land, and as against him it would be presumed *prima facie* that he had power to mortgage, as he had assumed to do.

Held, also, that the policy was avoided, as to the furniture as well as the house (*b*).

Where there are several distinct subjects of insurance, separately valued in the same policy, and one of them is conveyed, this will only avoid the policy as to the property alienated, though the provision avoids the policy if the property insured, "shall in any way be alienated." (*c*)

The levy of an execution on the premises will not avoid such a policy as being an alienation, for until the expiration of the time for redemption, the insured still retains an interest in the premises (*d*).

(*a*) *Russ v. Mutual F. Ins. Co.*, 29 U. C. Q. B. 73.

(*b*) *Ib.*

(*c*) *Clark v. New England M. Ins. Co.*, 6 Cush. (Mass) 342.

(*d*) *Ib.*, see also *Vice v. Tower*, 1 Gray (Mass) 426.

In such case the constructive possession of the sheriff will not prevail over actual possession by the insured (*a*).

An agreement by the insured to convey the premises insured at a future day, on payment of the purchase money, is not such an alienation as to defeat a policy, where a loss occurs after the agreement and before the conveyance, and the insured remains in possession of the property (*b*).

A condition that in case of transfer or change of title in the property insured, the policy shall become void, is not violated by a lease of the property, which only changes the possession (*c*).

A release by one partner to another does not avoid the policy under a condition declaring it to be void " in case of a sale of the property insured, without the consent of the insurers." (*d*)

Where the condition provided that if the property should be " sold or conveyed without the consent of the insurance company," a sale and conveyance by one partner to the other of all his interest in property insured in the joint names was held to avoid the policy (*e*).

It has also been held that a transfer from one tenant in common to his co-tenant, or from one partner to another will avoid a policy which provides that alienation by sale or otherwise shall forfeit the policy (*f*)

But where the policy expressly prohibits alienation by sale or otherwise, a sale by one partner to the other will be within the prohibition (*g*).

A mere contract to sell where none of its conditions are

(*a*) *Phœnix Ins. Co. v. Lawrence* 4 Metc. (Ky) 9.
(*b*) *Trumbull v. Portage Co. M. Ins. Co.*, 12 Ohio. 305.
(*c*) *West Branch Ins. Co. v. Helfenstein*, 40 Penn. st. 289.
(*d*) *Hoffman v. Ætna F. Ins. Co.*, 1 Robert (N. Y.) 501 ; affirmed on appeal 32 (N. Y.) 405.
(*e*) *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523.
(*f*) *Buckley v. Garrett*, 47 Penn. st. 204.
(*g*) *Finley v. Lycoming M. Ins. Co.*, 30 Penn. St., 311 ; ***Dix v. Mercantile** Ins. Co.* 22 Ill., 272.

ever performed, nor any conveyance made nor purchase money paid, will not avoid a policy prohibiting alienation by sale or otherwise (*a*).

The descent of title to the heirs of the insured is not an alienation within such a policy (*b*).

But where the policy declared that on any sale, transfer or change of title the policy should cease, it was held by the Supreme Court of New York, on appeal, that the descent of the property to the heirs was a change of title within the condition and avoided the policy.

Where the policy prohibits any sale, transfer, or alienation of the property a merely nominal transfer it seems will not be within the prohibition (*c*).

Where the prohibition relates to chattels the execution of a chattel mortgage on the property by the insured to a third person without notice to the insurance company or their assent obtained will avoid the policy (*d*).

Although the property insured is by the assignment vested in the assignee, he cannot recover unless there is also an assignment of the contract to him although by endorsement on the policy he is entitled to the money in the case of loss. Thus where the original insured sold the property to the plaintiff and endorsed on the policy "For value received, pay the within in case of loss to F. & H," and the endorsement was assented to by the president of the company, it was held as their was no assignment of the contract, but a mere right to the insurance moneys, the plaintiff could not recover (*e*).

The law is that on an assignment of the property insured

(*a*) *Masters v. Madison Co. M. Ins. Co.*, 11 Barb., N.Y., 624; *Perry Ins. Co. v. Stewart*, 19 Penn. St., 45.

(*b*) *Burbank v. Rockingham Ins. Co.*, 4 Fost., N.H., 550.

(*c*) *Ayres v. Home Ins. Co.*, 21 Iowa, 185, *Ayres v. Hartford F. Ins. Co.*, 17 Iowa, 176.

(*d*) *Tullman v. Atlantic F. Ins. Co.*, 29 How, N.Y., 71.

(*e*) *Fogg v. Middlesex M. Ins. Co.* 10 Cush. (Mass.) 337.

the title to the policy must either be vested in the assignee or in some one as trustee for him (*a*).

And the policy of insurance being a chose in action is not in its nature assignable, but the interest of the assured therein is transferable if regularly assigned and in that case the action must at the common law be brought on behalf of the assignee in the name of the original party insured (*b*).

In Ontario, however, the 35 Vic. c. 12, provides that every debt and chose in action arising out of contract shall be assignable at law by any form of writing and the assignee thereof shall sue thereon in his own name in such action. By virtue of this statute it would seem that the action might be brought in the name of the assignee.

On an assignment of the policy it is necessary that some interest in the property should be vested in the assignee, for a mere naked assignment of a policy without any interest in the subject of insurance being thereby or otherwise vested in the assignee, will not either at law or in equity give the assignee any remedy against the insurers, whatever rights he may have against his assignor (*c*).

It will thus be seen that the interest in the property and in the policy must concur in the same person. The person with whom the contract is made cannot recover unless he has an insurable interest and the latter alone without a title to the policy, will not suffice as hereafter explained. In some policies the condition as to assignment is "Policies of insurance subscribed by this company, etc., shall not be assignable without consent, etc. In other policies the condition is "The interest of the insured in the policy," etc. shall not be assignable etc. It seems immaterial which form of expression is used. The object of the condition is to secure notice

(*a*) *Davis v. Home Ins. Co.* 24 U. C. Q. B. 364.

(*b*) *Richards v. Liverpool & L. F. Co.* 25 U. C. Q. B. 400; *Beemer v. Anchor Ins. Co.* 16 U. C. Q. B. 485; *Davis v. Home Ins. Co.* 24 U. C. Q. B. 364; S. C. 19 U. C. Q. B. 373; *Demill v. Hartford Ins. Co.* 4 Allen 341; *Park v. Phœnix Ins. Co.* 19 U. C. Q. B. 110.

(*c*) *Miall v. Western Ins. Co.* 19 U. C. C. P. 270.

of any transfer of the policy. The insurers are sufficiently protected by the common law against assignments of policies where no interest in the property passes, for if the policy is vested in one person, and the property in another, neither can recover. In practice policies are sometimes assigned as collaterial security without the interest in the property passing. In such cases it is usual for the company if they wish to continue the policy in force, to undertake that the amount of insurance shall be payable in case of loss to the assignee. This means payable to the assignee as agent for the original insured. The title of the assignee in such case could not be supported on any other ground.

Where the policy is assigned in good faith as collateral security, or on an alienation of the property, it is usual for the company to assent thereto according to their conditions. The consent of the company to the transfer of the policy is always required, because the character of the insured for honesty and carefulness is an important consideration with insurers, and it is reasonable, therefore, that they should have a voice in the transfer of the policy (*a*).

In case of death, however, the policy and interest therein is, by operation of law, vested in the representatives of the insured, and in such case the consent of the company is unnecessary (*b*).

The conditions of some policies, as already explained, require that the executor or administrator should procure his interest to be endorsed on the policy.

The effect of the company's consent to an assignment is, to create an equitable, if not a legal, contract of insurance in favor of the assignee. The assignee thenceforward becomes, in equity if not at law, the assured (*c*).

When the underwriters consent to an assignment of the

(*a*) *Burton v. Gore D. M. F. Ins. Co.*, 12 Grant, 161; *Crozier v. Phœnix Ins. Co.* 2 Hannay 206.

(*b*) *Lynch v. Dalzell*, 4 Brown P. C. 431.

(*c*) *Burton v. Gore D. M. F. Ins. Co.*, Supra.

policy, they may reserve all their rights under the contract. The form usually adopted for this purpose and printed on the policy, is as follows: "The . . . . . company hereby consent that the interest of . . . . . of . . . . . in the within policy, be assigned to . . . . . of . . . . . subject nevertheless, to all the conditions therein contained."

Where there is no special provision made by law to the contrary the contract created between the company and the assignee by the former's consent to the assignment can only, as already explained, be enforced by suing in the name of the insured. Where the plaintiff, in an action on a policy of insurance, averred that at the time of effecting the policy he was interested in the property insured, that his interest was, before the loss, assigned by him to one B, which assignment was accepted by the defendants, and that until the loss B continued interested, and the plaintiff as trustee for him, the plaintiff was held entitled to succeed on proving the averments in his declaration (*a*).

The notice should be given to the company and their consent to the assignment obtained before the loss for where a policy has been assigned but no notice thereof given to the insurers till after the loss, they are not liable to an action on the policy at the suit of the assignee in the absence of an express contract to pay the insurance money to the assignee (*b*).

An action may, however, be maintained by the assignee in his own name, if it is founded on a new promise, express or implied, made by the company to the assignee supported by a valid consideration.

An undertaking by the assignee at the request of the insurers to perform all things in the policy and conditions thereto annexed on the part of the orignal insured in pursurance of a consent to assign endorsed on the policy to be

(*a*) *Park v. Phœnix Ins. Co.*, 19 U. C. Q. B., 110.

(*b*) *London Assce. Co. v. Montefiore*, 9 L.T. N.S.; 688.

performed will not a be sufficient consideration for such a promise, where the assignee does not undertake to do anything which if left undone, would subject him to an action. Nor would the assignment of the insured property from the insured to the assignee, the assignment being before the contract between the insurers and the assignee be a sufficient consideration, unless it appeared that the assignee accepted the assignment at the request of the insurers, or upon their undertaking that in case he did become assignee of the property they would give him the benefit of the premium paid by the original insured; for the assignment being prior to the promise is an executed consideration, and would not avail unless founded on a previous request, express or implied. Nor would the assignment of the policy be sufficient where the insurance ceases before the promise, nor would the payment of the premium before the promise be sufficient unless at the time of the promise the assignee was entitled to a rateable proportion of the premium for a part of the term unexpired. But if the insurer, with the knowledge of the assignment of the property, and after consent to the assignment of the policy to the assignee, receive from the latter a premium renewing the insurance to the assignee, this will be a sufficient consideration, and will entitle the assignee to sue in his own name (*a*).

Such a promise made by the insurers to the assignee will be binding while he retains an interest in the estate, and the exemption of the underwriter from any further liability to the original insured, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the underwriter and assignee (*b*).

In general, a contract of insurance is a personal contract with the insured, and not an insurance of the subject named in the policy (*c*).

(*a*) *Demill v. Hartford Ins. Co.*, 4 Allen, 341.
(*b*) *Wilson v. Hill*, 3 Met. (Mass) 66.
(*c*) *Simeral v. Dubuque M. F. Ins. Co.*, 18 Iowa 319.

And the purchase of property insured does not by mere operation of law transfer to the purchaser the interest in policies of insurance subsisting thereon. On the 19th September, 1866, the plaintiffs bought from the insured certain (the insured) property for the sum of $15,000. On the 3rd of November, 1866, a memorandum in writing was made betweeen the plaintiffs and the insured, acknowledging the payment of the first instalment of purchase money, and containing the following clauses, namely :—" The deeds and transfers of insurances shall be completed at the first demand of the insured." " The *pro rata* rate of the premium on the insurances now on the property to be repaid by the plaintiffs to the insured from this date." On the 9th of January, 1867, a fire occurred by which the property was destroyed. The property was not actually conveyed to the plaintiffs until the 9th of January 1868. Under deed of that date the receipt of the *pro rata* premium of insurance was acknowledged, and a formal transfer was made of the policies. On the 16th of March, 1867, the plaintiffs notified the defendants not to pay the insured more than the balance remaining due on the sale, and required the defendants to pay the remainder of the insurance money to them. On the 28th March, 1867, the insured claimed from the defendants the balance remaining due on the sale, making no claim, however, for the remainder of the amount for which the property was insured. On the 6th May, 1867, the defendants paid the insured $11,833 11, in discharge of their claims, and received a discharge therefor. The deed of conveyance of the 9th of January, 1868, expressly reserved all rights of the plaintiffs against the insured by reason of their claim against the defendants, and the discharge of the latter. The defendants pleaded to the effect that their agreement to insure was with the insured alone for the amount of their insurable interest, namely, $11,833 11 which had been duly paid to the insured on the 6th of May, 1867, and then discharged,

and that long previous to the 9th of January, 1868, the insured had ceased to have any legal rights under the policy, and that by the transfer of that date, the plaintiffs did not acquire any right to the sum mentioned in the policy or any part thereof. The court found that there was no agreement or promise to assign, or an assignment by the insured to the plaintiffs of the balance of the insurance money, namely, $8,166 89, and that there were no conditions or terms in the policy which would prevent the insured from assigning it. *Held*, therefore, that the contract of insurance was not personal to the insured, or limited, and restricted to them, and that the insured had a right to assign subject to the conditions in the policy, but that such assignment could only be with the consent and privity of the insurers, and that the purchase of the property did not by mere operation of law, transfer the policies as an accessory of the purchase, without any assignment of the policy (*a*).

Any defence which would have been available on the contract as against the assignor of the policy, or without an alienation of the property, will be equally so against the assignee, and therefore it does not appear to be essential to guard, by stringent provisions, against a transfer merely of the policy (*b*).

As we have already seen, all rights of the insurers against the insured by virtue of the conditions, are usually reserved on an assignment.

Where the conditions provide, that notice of an assignment must be given to the company, and approved of and endorsed on the policy by the secretary or other officer, an approval of and consent to an assignment, written and signed by the president, on a separate piece of paper, and attached to the policy by a wafer, is sufficient (*c*).

(*a*) *Forgie v. Royal Ins. Co.*, 13 L. C. J. 9 ; see, also, *Poole v. Adams*, 12 W. R. 683.

(*b*) *Angell on Ins.*, 247.

(*c*) *Pennsylvania Ins. Co. v. Bowman*, 44 Penn. St. 89.

A party to whom a bankrupt had assigned a policy, sent an agent to the insurance office, to pay the premium, who, in the course of conversation with a clerk of the office, told him of the assignment of the policy. *Held*, not sufficient notice to the insurance office of the assignment (*a*).

Various cases in the United States have shewn, that a condition prohibiting an assignment of the policy will not prevent an assignment after a loss has been incurred (*b*).

After a loss, the only interest which passes by the assignment, is the claim or debt created and become due by the loss, and the right to assign this debt is not affected by a condition prohibiting the assignment of the policy (*c*); and it has been held, that a condition prohibiting the assignment of such claim, is illegal and void (*d*).

The usual condition prohibits an assignment of the *policy* merely. It is clear, therefore, that this condition will not prevent the insured from assigning his claim to the insurance money after a loss has occurred; and, whether the insured could by express stipulation be prevented from assigning this claim, depends upon the right of the insurers to impose such a condition, as not being contrary to law (*e*).

Where a policy had this endorsement on the back: "If this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof," and the insured assigned the policy to the plaintiff one month after the fire; *held*, that such assignment was not within the meaning of the clause, which had reference only to an assignment before the loss happened (*f*).

(*a*) *Ex parte Carbis in re Croggon*, 4 Dea. & Ch. 354.

(*b*) *Mellen v. Hamilton F. Ins. Co.*, 5 Duer. (N.Y.) 101; affirmed 17 N. Y., 609; *Courtney v. New York City Ins. Co.*, 28 Barb. (N.Y.) 116; *Walters v. Washington Ins. Co.*, 1 Iowa, 404.

(*c*) *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 284; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N.Y.) 402, 40 Barb. (N.Y.) 292.

(*d*) *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St., 209.

(*e*) See also *Rice v. Prov. Ins. Co.*, 7 U. C. C. P. 548.

(*f*) *Sadler's Co. v. Badcock*, 2 Atk. 554.

The clause in a policy, which prohibits an assignment of the policy, without the consent of the insurance company in writing does not apply to a deposit of the policy by way of pledge with a creditor of the insured (*a*).

It would seem that the instrument assigning the policy must be of equal solemnity with the policy itself. Thus if the policy is under seal the assignment must be under seal. So the rules governing other contracts apply to the assignment and the assent of both parties is necessary. Thus where a condition in a policy under seal provided that it might be transferred by endorsement made with the consent of the agent but not otherwise, and the insured, with the consent of the agent, had the following endorsement made in writing not under seal on the policy: "I hereby assign the within policy to of having sold the property insured to him, retaining however, in case of loss, a lien for any balance of the purchase money due me on the amount secured by the said policy." The assignment was also at the request of the insured, entered by the agent in the books of the company. The assignor still held the policy and never parted with the possession of it. There was no agreement between the assignor and assignee for such assignment, the indorsement so signed was never communicated to the assignee, nor did the latter in any way assent thereto nor had he any notice or knowledge of it whatever. *Held* that the assent or participation of the assignee was essential to a valid contract of assignment, and this not being shewn that the assignment was ineffectual (*b*). *Held* also that the policy being under seal could not be altered or varied by a mere memorandum in writing(*c*).

If a policy is issued in the name of A B, the insured, and

(*a*) *Ellis v. Kreutginger* 27 Mo. 311.

(*b*) *Crozier v. Phœnix Ins. Co.* 2 Hannay 200.

(*c*) See also *Rogers v. Payne* 2 Wils. 376; *West v. Blackaway* 3 M. & G. 750.

is afterwards, at the instance of the latter, made payable in case of loss to a mortgagee of the property, by an endorsement on the policy signed by the agent of the insurers, and is also delivered to the mortgagee, who is in possession of it at the time of the fire, this will at least constitute an equitable assignment in favor of the mortgagee. Though at the common law the mortgagee would in such case be compelled to sue in the name of his assignor; yet if the insured after the fire becomes insolvent and the insurance money is paid into court on an interpleader issue between the assignee in insolvency of the insured and the mortgagee the latter may recover, though the action is brought in his own name; for a court of law under such circumstances may consider the equitable rights of the parties (*a*).

In an action on a fire-policy by A, the person insured, the declaration alleged an assignment to B and C, notified to the defendants and endorsed on the policy, and an agreement by them that it should stand for the benefit of B and C. The policy contained no condition as to assignment. The sale and transfer by A to B and C of the goods insured was proved. An assignment was endorsed on the policy, purporting to be made by A to B and C, but signed by D, the agent of A, in his own name, and witnessed by M, defendants' local agent. It was proved that M entered the transaction in a book kept by him, and communicated with the head office in Montreal, that the secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited, and that afterwards B and C paid an additional premium to M, to cover an increase of risk. It was held that this evidence was sufficient to prove the assignment, and that the declarations of B, one of the parties for whose benefit the suit was brought, were admissible as evidence for the defendants (*b*).

(*a*) *Manning v. Bowman*, Sup. Ct. (N.S.), T.T., 1872; *Rusden v. Pope*, L. R. 3 Ex., 277.

(*b*) *Ross v. Coml. Union Assce. Co.*, 26 U. C. Q. B. 559.

After an assignment of a policy of insurance, with the consent of the insurance company, a non compliance with the terms of the policy by the assignor in matters material to the interests of the company will avoid it as against the assignee (*a*).

Where in such case the policy has been assigned to a mortgagee of the premises insured, in case of loss, the assignee can only recover where his assignor could have done so, had no assignment been made. Such assignment does not convert the policy into a contract of indemnity to the mortgagee ; it is the interest of the mortgagor alone that is covered by it (*b*).

And where the assignee is also the mortgagee of the property, he takes the policy subject to the conditions made with the insured, and if the insured being the mortgagor violates the conditions after assignment, by additional insurance in excess of the amount permitted by the policy, the assignee cannot recover (*c*).

It has been held in Canada where after the making of a policy the insured mortgaged the property to secure a debt less in amount than the sum insured, and afterwards effected a second insurance without notice or consent contrary to the ordinary condition that this avoided the policy in an action by the mortgagee, although notice of the mortgage was given to the company and they assented thereto and ratified and confirmed an assignment of the policy to him pursuant to the Con. Stats. U. C. c. 52, s. 30 (*d*).

If the insured mortgages the property and after giving notice of the mortgage to the company assigns the policy to the mortgagee with the assent of the company, this will not make the stipulation as to giving notice of second in-

(*a*) *Pupke v. Resolute F. Ins. Co.*, 17 Wis. 378.

(*b*) *State M. Ins. Co. v. Roberts*, 31 Penn. st. 438.

(*c*) *Buffalo S. E. W. v. Sun M. Ins. Co.*, 17 N. Y. 401.

(*d*) *Burton v. Gore D. M. F. Ins. Co.* 14 U. C. Q. B. 342; See however, S. C. 12 Grant 156.

surances divisible, so that a second insurance afterwards by the mortgagor not being the holder of the policy will not avoid it (*a*).

Where A mortgaged the property to B and covenanted to insure, made an application for insurance in his own name, but the premium was afterwards paid and the interim receipt obtained by B, after which the policy issued in the name of A. The policy contained these words *in writing*: "In the event of loss under this policy, the amount the insured may be entitled to receive shall be payable to B, mortgagee." It appeared that the insurers were aware of the fact, that the relation of mortgagor and mortgagee existed between the parties, and that their invariable practice in such case, was to insure only the mortgagor. *Held*, that A, the mortgagor, was the party insured, that a second insurance effected by him, contrary to a condition of the policy, avoided it as against B; recognising the rule, that in order to avoid the policy, the second insurance must be made by the insured (*b*).

It seems if a mortgagee, instead of taking an assignment of the mortgagor's policy, effected a new policy in his own name, he would not be affected by a subsequent insurance by the mortgagor (*c*).

Where the condition of a policy provides that any alteration or addition to the buildings insured, or the erection or alteration of any building within the limits described in the application, will vitiate the policy unless notice be given to the secretary and the consent of the board obtained etc. An erection or alteration within the meaning of the condition will in the absence of the proper notice and consent avoid the policy as against a mortgagee of the property, to whom the policy has been assigned, although the latter is

(*a*) *Burton v. Gore D. M. F. Ins. Co.*, 14 U. C. Q. B. 342.

(*b*) *Livingstone v. Western Assce. Co.*, 16 Grant, 9; reversing S. C. 14 Grant, 461.

(*c*) *Burton v. Gore D. M. F. Ins. Co.*, 12 Grant, 156, S.C. 14 U.C.Q.B. 342.

not in possession of the property, and is not shown to be a party to the alterations or cognizant thereof, and this although the policy has been confirmed to the assignee by the company pursuant to the Con. Stats. U. C., c. 52, s. 30 (*a*).

Where the mortgagor took out the policy in his own name "made payable in case of loss to mortgagee," and afterwards sold all his interest in the property; it was held, that the contract was with the mortgagor and not with the mortgagee, and that the sale of the property divested the mortgagor of all insurable interest, and mortgagee could not recover (*b*). So, if an alienation by sale or otherwise is prohibited, and the insured, after mortgaging the property and assigning the policy, with the consent of the insurers, alienate the property without the consent of the insurers, the policy thereuodn becomes void (*c*).

An assignment of a policy by the insured to a mortgagee is not necessary where the company write across its face, "Loss, if any, payable to A, mortgagee," (*d*) for these words constitute an assignment in legal effect (*e*).

The assignment of a part of a mortgage debt prior to the insurance to a third person, for whom no claim is made under the policy, does not affect the right of the mortgagee to recover for the remainder (*f*).

When the insured mortgages the property and the policy is afterwards assigned to the mortgagee, and the insurers consent thereto, the effect of the transaction is that the company assent to the assignment of the benefit of the contract to the mortgagee, subject to all the incidents as to

(*a*) *Kreutz v. Niagara Dis. M. F. Ins. Co.* 16 U. C. C. P. 573.

(*b*) *Grosvenor v. Atlantic Ins. Co.* 17 *N. Y.*, 391; see also *Edes v. Hamilton M. Ins. Co.*, 4 Allen (Mass.) 362.

(*c*) *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387.

(*d*) *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523.

(*e*) *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Brown v. Hartford Ins. Co.*, *Ib.* 394.

(*f*) *Rex. v. Insurance Co.*, 2 Philadelphia Pa., 357.

forfeiture to which the policy was subject in the hands of mortgagor (*a*)

If a forfeiture has occurred against the original insured, as for instance, by non payment of his premium note, yet, his assignee taking without notice or knowledge of the forfeiture, will be protected when the company knowing the forfeiture accept the assignment and ratify and confirm the policy to the assignee (*b*).

Where in such case the insured assigns the property with the policy to the assignee, and the company afterwards ratify and confirm the insurance to the assignee under the Con. Stats. U. C., c. 52, s. 30, the company cannot afterwards set up the forfeiture in answer to an action by the assignee, although the cause of the forfeiture existed at the time of the assignment. Thus where the defendants pleaded a change in the occupancy of the premises which avoided the policy within the meaning of one of their conditions, and the plaintiff replied on equitable grounds that the alleged change in the occupancy took place before sale of premises and assignment of policy to plaintiff, and before ratification thereof to plaintiff, that defendants were, but plaintiff was not before and at the time of such sale and assignment aware of said change in occupancy, that after said sale, assignment and ratification, and before the loss plaintiff was intending to visit the premises to ascertain whether or not all conditions of the policy had been complied with and would have so done but defendants by their agent knowing plaintiff's said intention, in order to dissuade him therefrom, represented to him that all conditions of the policy had been complied with, and plaintiff thereupon acted upon such representations as defendants well knew and refrained from ascertaining the alleged facts in the plea contained, and was afterwards and before the

(*a*) *Chishom v. Prov. Ins. Co.*, 20 U. C. C. P. 13.

(*b*) *Storms v. Canada F. M. Ins. Co.*, 22 U. C. C. P. 81-2 ; *Kreutz v. Niagara D. M. Ins. Co.*, 16 U. C. C. P. 131.

loss induced by defendants to pay further premiums in respect of such insurance, which defendants with full knowledge of all the aforesaid facts, accepted from plaintiff, who was then, and continued to be, ignorant thereof, until after the fire occurred; was held a good answer to the plea (*a*).

But it seems that notice to or knowledge by the assignee or want of notice to or knowledge by the company would not make a difference in every case for there may be instances where the acts of the prior party could not be visited upon the assignee, whose policy has been ratified and confirmed to him, unless he can be individually charged with fraud or misrepresentation in procuring the confirmation. In some cases the original infirmity of claim or title may be continued against the assignee, as, if a property be originally insured as a fee simple and free from incumbrances, when it is not a fee simple nor free from incumbrances, and it is still in the same condition when the transfer is made to the assignee. The same rule also would most likely apply if the original insurance were upon a building described as of stone when it was of wood, or as covered with tin when it was covered with wood, or as used as a dwelling house when it was a flax factory, and the building continued in all such respects in the same condition at the time when it was alienated (*b*).

When the assignee of the policy gives notice of the assignment and applies to have the policy ratified and confirmed to him by the insurers he need not disclose to the latter the nature of his interest in the property, for the rule which requires an applicant for insurance to set forth his interest in the property to be insured does not extend to assignments of policies while in force (*c*).

(*a*) *Kreutz v. Niagara M. F. Ins. Co.* 16 U. C. C. P. 131.
(*b*) *Ib.* 136.
(*c*) *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St., 368; *Ib.*, 374.

CHAPTER VIII.

THE PROOFS OF LOSS, ETC.

A usual condition of the policy is, that all persons insured by the company and sustaining loss or damage by fire, are forthwith to give notice thereof to the company or its agent, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hand, and verified by their oath or affirmation. They shall also declare on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufacture, merchandise or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the assured or sufferers), that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statements, and knows or verily believes that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers; and shall also, if required, submit to an examination under oath, by the agent or attorney of the company, and shall answer all questions touching his, her, or their knowledge of anything relating to such loss or damage or to their claim thereupon, and subscribe such exami-

nation, the same being reduced to writing; and until such proofs, declarations or certificates are produced, and examination had, the loss shall not be deemed payable.

The notice of loss can only properly be given by the party whose interest is originally insured, for the words "insured" and "assured" apply to him only, and not to a lessee under him, nor to a party to whom in case of loss the policy is made payable (*a*).

It has been held that a notice of loss given by the assignee of the policy was sufficient when the assignment was made with the consent of the insurers (*b*).

To avoid the effect of this decision some of the policies now provide that in the event of an assignment, the proof of loss must be furnished by the assignor. Some of the conditions provide that the assignor shall prove the loss where there is no actual, complete or absolute sale or transfer of the property insured. Others provide that if the policy be assigned in trust or as collateral security, the assignor shall prove the loss.

It has been held that the assignee of a policy may recover without furnishing any proof of loss whatever, where the property consists principally of machinery, of which a detailed description is not necessary, and this though it is required by the conditions and the objection is raised (*c*).

Though the words of the condition are that "all persons insured shall give notice," etc., the notice may, nevertheless, be given by one of several joint owners if given on behalf of all, for the expression means only that it is a general condition incumbent upon all persons insured (*d*).

The conditions of all fire policies require that the notice shall be given either forthwith, or immediately, or within some specified number of days after the occurrence of the

(*a*) *Sandford v. Mechanics M. F. Ins. Co.*, 12 Cush. (Mass) 541.

(*b*) *Cornell v. LeRoy*, 9 Wend, (N. Y.) 163.

(*c*) *Wilson v. State F. Ins. Co.*, 7 L. C. J. 223.

(*d*) *Mann v. Western Assce. Co.*, 17 U. C. Q. B. 190.

fire. When the policy requires notice of the loss to be given "forthwith" this means immediately, without delay, directly and a notice given thirty-eight days after the fire, is neither a literal nor a substantial compliance with the condition (*a*).

The condition is to be construed as meaning with due diligence and without unnecessary delay under all the circumstances of the case, and whether such due diligence has been used, is a question to be determined by the jury (*b*).

The president and secretary of an insurance company are the proper officers to whom the preliminary proofs of loss are to be presented (*c*).

A policy which had been effected through L, the local agent of the defendants, was subject, amongst others, to a condition that "in case of loss or damage an immediate notice must be given to the manager or some known agent of the company." After the making of the policy and before the loss the defendants had transferred this branch of their business to another company. The plaintiff, not being aware of this transfer, gave notice of the damage to L, who made his report thereon to the latter company. *Held* that the notice to L was a sufficient notice within the above condition (*d*).

If the company on notice of the loss, refer the insured to their resident agent for settlement, and instruct the agent to procure a statement of the loss, he is thereby invested with full authority to receive such a statement and to extend the time for furnishing it, and if given within the time required by the agent the condition in the policy, requiring it to be made within a less time is not broken (*e*).

In the absence of any specific stipulation in the policy as

(*a*) *Inman v. Western F. Ins. Co.* 12 Wend. N. Y. 452; See also *McEvers v. Lawrence* 1 Hoffman (N. Y.) 171.

(*b*) *Edwards v. Baltimore Ins. Co.* 3 Gill Md. 176; *St. Louis Ins. Co. v. Kyle* 11 Mo. 278; *Peoria Ins. Co. v. Lewis* 18 Ill. 553.

(*c*) *Trustees etc. v. Brooklyn F. Ins. Co.* 18 Barb (N. Y.) 69.

(*d*) *Marsden v. City & C. Assce. Co.*, L.R., 1 C.P., 232.

(*e*) *Lycoming Co. M. Ins. Co. v. Schollenberger* 44 Penn. St. 259.

to whom notice shall be given, notice to the agent who effected the insurance, if he still remain the agent of the company, will be sufficient; for notice to any authorized agent of the company by the insured or his agent is held to be notice to the company.

Policies of insurance effected by a broker declared that preliminary proof and evidence of the loss were to be given to the broker, and payment of losses to be made within sixty days thereafter. The practice of the broker was to receive the premiums in money or notes crediting the underwriters with the amount, whether actually paid or not, the assured being liable to him alone for the premium. Proofs of losses were furnished to the broker from time to time, and on being satisfied of their correctness he paid the amounts and the policies were cancelled. Half-yearly accounts were furnished by the broker to the underwriter containing full particulars of all the risks, premiums, losses and charges, to which he made no objection until the account was rendered, showing the balance claimed in this action. *Held*, in an action against the underwriter to recover the amount paid by the broker for losses, that the jury were warranted in inferring that the defendant had authorized the broker to decide upon the proof of loss in each case, and had assented to his decision, and that it was not necessary to show that the proof was such as to render the defendant liable to pay under the terms of the respective policies. *Held* also that the plaintiff could recover from the defendant the amount of premium of re-insurance effected for him without proof of actual payment to the underwriter (*a*).

Losses by fire are more open to the inspection of the insurers than marine disasters, so that the same particuliarity is not required in the former as in the latter case, and a general notice will be sufficient to enable the underwriters

(*a*) *Ranney v. Gregory*, 1 Hannay, 152.

seasonably to acquire a more minute knowledge of the loss, if such knowledge be desirable (*a*).

It is not necessary that the nature of the insurable interest should be particularily stated in the notice of the loss but it is a condition precedent that the amount of the loss should be stated (*b*).

The ordinary condition now requires the insured to set forth his interest in the property.

If the condition requires notice of the loss to be given in writing to the secretary or one of the directors, notice by parol to an agent will be of no effect (*c*).

So where such a condition specifies the time within which the notice must be given, an oral notice to the local agent within the limited time, and written notice to the secretary after the expiry of such time, is not a substantial compliance with the condition (*d*).

Although the decision in these cases is rested principally on the ground that the notice was not given to the proper officer, or within the proper time, there can be no doubt that where the condition requires the notice to be in *writing*, a verbal notice will not suffice, though in other respects it is sufficient. The condition as to a written notice will, however, be sufficiently complied with if written notice is given to the secretary, by the local agent, upon information conveyed to him by the insured (*e*).

Thus, if after the fire the insured inform the local agent of the loss, and the latter notify the head office by letter, and the resident secretary receive the agent's letter of

(*a*) *Huff v. Marine Ins. Co.*, 4 Johns (N. Y.) 132; *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 64.

(*b*) *Scott v. Phœnix Ins. Co.*, Stuart's L. C. Appeals. 354 ; *Dawes v. North Riv. Ins. Co.*, 7 Cow. (N. Y.) 452 ; *Gilbert v. North Am. Ins. Co.*, 23 Wend. (N. Y.) 43.

(*c*) *Patrick v. Farmers Ins. Co.*, 43 N. H. 621.

(*d*) *Cornell v. Milwaukee M. F. Ins. Co.*, 18 Wis. 387.

(*e*) *West Branch Ins. Co. v. Helfenstein.* 40 Penn. st. 289.

notification, and acknowledge it in writing, this will be a sufficient "notice in writing" within the condition (*a*).

It seems, if the condition does not require a written notice a verbal notice will suffice. If the knowledge is fully communicated, the courts are not very particular as to the form in which it is done; and where it appeared in evidence that the president and one of the directors of the company went to the place where the fire was, for the purpose of examining into the matter, it was held, that the insured might well be excused from giving any further notice to the company, as he could not make it more certain (*b*).

A compliance with the condition as to notice and particulars of loss in the terms required by the contract is a condition precedent to the right to recover (*c*).

Thus if the notice is required to be given within any particular time, the condition must be complied with as to time (*d*).

But under the ordinary condition providing that the particular account of the loss shall be given "as soon after as possible," it is only to be given within a reasonable time after giving the notice of the loss, and this reasonable time is a question of fact for the jury, depending on the circumstances of the particular case. Where there are no circumstances accounting for the delay, and where the delay has been great it may be a proper question for the court (*e*).

Where a condition requires that the insured shall "give immediate notice of any loss or damage by fire within fourteen days, to the agent of the company, and as soon after

(*a*) *Lafarge v. Liverpool, L. & G. Ins. Co.*, 3 Revue Critique, 59.

(*b*) *Roumage v. Mechanics' F. Ins. Co.* 1 Green, N. J. 110.

(*c*) *McFaul v. Montreal I. Ins. Co.* 2 U. C. Q. B. 59; *Mason v. Harvey* 8 Ex. 819; *Roper v. Lendon* 5 Jur. N. S. 491; *Elliott v. Royal Ex. Assce. Co.* L. R. 2 Ex. 244-5.

(*d*) *Roper v. Lendon*, Supra.

(*e*) *Mann v. Western Assce. Co.* 19 U. C. Q. B. 314; affirmed on appeal ib. 329; See also *Attwood v. Emery* 1 C. B. N. S. 110.

as possible are to deliver in a particular account of such loss and damage," etc.; the notice of the loss must be given within the fourteen days, but the particular account, etc., as soon as it reasonably and conveniently can be delivered considering all the circumstances (*a*).

Where by the conditions of the policy the insured was required to make affidavit as to the particulars of his loss, within fifteen days after the fire, and it was declared, that until such affidavit were made, the loss should not be payable; and, another condition of the policy provided, that no money should be payable until sixty days after the adjustment of the loss; it was held, that as no money was payable until the lapse of these sixty days, the penalty for non-compliance with the condition as to particulars of loss, viz.: that the loss should not be payable, could only operate after the lapse of the sixty days, consequently, the stipulation requiring the particular account to be furnished within fifteen days, was nugatory, and that the plaintiff was entitled to succeed, though his affidavit was made after the expiration of sixty days (*b*).

Where a condition provides that the insured shall forthwith give notice of the loss to the company, and within fourteen days thereafter, deliver in an account, etc.; the word thereafter, refers to the last antecedent, and an account of the loss delivered within fourteen days after knowledge thereof, and the giving of notice is sufficient, though more than fourteen days has elapsed since the fire (*c*).

The delay fixed by the regulations of an insurance company for giving notice of the fire, and the circumstances connected with it is not in all cases so fatal as to deprive a party who has not complied literally with the regulations from all recourse (*d*).

(*a*) *Mann v. Western Assce. Co.*, 17 U. C. Q. B. 190.

(*b*) *Lafarge v. Liverpool, L. & Globe Ins. Co.*, 3 Revue Critique, 59.

(*c*) *Smith v. Queen Ins. Co.*, 1 Hannay, 311.

(*d*) *Dill v. Quebec Assce. Co.*, Rob. Dig. 209.

Where a policy of insurance contains a proviso that the loss is to be paid within sixty days after proof of loss, and adjustment and proof of interest in the property, the furnishing of such preliminary proof is a condition precedent to the plaintiffs right to recover unless there is an averment that it has been waived (*a*).

So compliance with the condition as to particulars of loss is a condition precedent to the right to recover (*b*).

The affidavits proving the loss must comply with the conditions of the policy, and where a declaration averred that affidavits were made by three persons named, it was held that proof that the affidavits were made by these particular persons was necessary, and that they should also contain statements that these persons were present at the fire, and contain the statements of the nature and extent of the loss required by the policy (*c*).

Where the document sent in did not purport on the face of it to have been a statement made on oath, and had no jurat, and was not in the form of an affidavit, the condition requiring the account of the loss to be verified by affidavit. *Held* that this was not a compliance with the condition, and that the plaintiff could not recover. *Held* also that the case was not altered by proof being given *viva voce* at the trial; that in fact the plaintiff did take his oath before a magistrate to the truth of this statement (*d*).

Where the affidavit contains a proper *jurat* the signature of a justice of the peace thereto is always admitted as genuine in the absence of proof to the contrary. Such signature is complete proof in itself without any other evidence, nor is it necessary in such case to shew that the deponents were duly sworn (*e*).

(*a*) *Robertson v. New Brunswick M. Assce. Co.*, 3 Allen 333; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507.

(*b*) *McFaul. v. Montreal Ins. Co.*, 2 U. C. Q. B. 61-2.

(*c*) *Alderman v. West of S. Ins. Co.*, 5 U. C. Q. B., O. S. 37.

(*d*) *Shaw v. St. Lawrence C. M, Ins. Co.*, 11 U.C. Q.B., 73.

(*e*) *Lafarge v. Liverpool, L. & G. Ins. Co.*, 3 Revue Critique, 59.

Where the condition requires that the affidavit of the claimant proving the loss should give a copy of the written portion of the policy, the furnishing of such copy is a condition precedent without the performance of which, if not waived by the company, no recovery can be had on the policy, and the inability of the insured to give such copy on account of the loss of the policy is no defence (*a*).

But it has been held in Canada were a condition in a policy provided that any loss or damage should be paid within three months after due notice and proof thereof made by the insured in conformity to the by-laws and conditions annexed to the policy; and that such proof should further contain a certified copy of the written portion of the policy, that it was not absolutely necessary that the notice and proof of loss should also contain a certified copy of the written portion of the policy, for the latter was not a condition precedent to the plaintiff's recovery (*b*).

The affidavit proving the loss must be made by the assured even although he has before the loss assigned the policy to another. The plaintiff owning property, insured it with a mutual insurance company on the 1st of December, 1864, for three years. He afterwards mortgaged it to one N on the 13th May, 1865, and on the 29th November, 1865, as signed the policy to N. The latter paid up all arrears of assessments, but gave no note or security for the amount unpaid. The defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N alone. His mortgage was paid off on the 22nd January, 1868 and in March following the plaintiff sued upon the policy. One of the conditions endorsed was, that all persons insured and sustaining loss should forthwith give notice and within thirty days deliver a particular account of such loss signed by them and veri-

(*a*) *Blakeley v. Phœnix Ins. Co.*, 20 Wis., 205.
(*b*) *Richardson v. Canada W. F. M. & S. Ins. Co.* 16 U. C. C. P. 430.

fied by their oath. Held that the action could not be maintained by plaintiff he having failed to comply with the condition.—*per Morrison, J.*—N was not the person insured and therefore could not give the notice of loss. *per Wilson, J.* He was insured and could have sued in his own name, but the contract of insurance having been absolutely transferred to him the plaintiff could not sue (*a*).

The conditions of a policy must be strictly complied with in reference to the preliminary proof. Thus, where the policy contained the ordinary condition, and it appeared that the plaintiffs insured as assignees in insolvency of one D, and that the business was continued under the supervision of D, who was really the only person who knew all about the loss, the plaintiffs, personally, taking no part in the management of the business, and that an affidavit as required by the condition, was in fact made by D. *Held*, nevertheless, that an affidavit should be made by plaintiffs as persons insured, and failing to make such affidavit, they could not recover (*b*).

Where a policy is effected in the names of all the partners, the affidavit verifying the particulars of the loss, need not be in the names of all. One of the partners may, in his own name, furnish statements and proofs to the company regarding the loss, where these statements and proofs sufficiently point to the precise property lost, as well as if all the partners joined in it. Where A & B being partners, had bought the property insured, and gave a bond for the balance of the purchase money, but before the loss had dissolved partnership; and in the deed of dissolution, B merely consented that A should have, possess, and enjoy the property, without making any formal grant; it was held, that an affidavit by A alone, describing himself, as being at the time of the fire, solely interested in the property, was suffi-

(*a*) *Fitzgerald v. Gore Dis. M. Ins. Co.* 30 U. C. Q. B. 97.

(*b*) *Cameron v. Monarch Assce. Co.*, 7 U. C. C. P. 212.

cient, and that it was also sufficient for the magistrate's certificate to state the loss as that of A alone (*a*).

The affidavits, notices, etc., must contain the various requisites prescribed by the condition. The affidavit should contain all the legal requisites of an affidavit, should show that the parties made the statement therein contained on oath and be properly sworn to. The affidavit may, however, be administered by a justice of the peace, and the fact of his residing contiguous to the fire may be proved *aliunde* (*b*).

The condition must in all cases be strictly complied with. The making of an affidavit stating in general terms the value of the different kinds of goods destroyed, but without in any way mentioning his loss on the buildings insured, the mere statement as to them being that they had been totally destroyed, and without verifying the deposition by the books of account or other proper vouchers, is clearly no compliance with the condition (*c*).

The proof of the amount of the loss means not only the delivery of a statement or particulars of the claim but the exhibition of such legal evidence to support it as the circumstances of the case will admit of (*d*).

Under the ordinary condition not only must the "particular account" be delivered in, but it must also be verified by affidavit, and by the production of the books of account and other vouchers as required by the contract (*e*).

The reasonable construction of the condition is that the insured shall produce to the company something which will

(*a*) *Mann v Western Assce. Co.*, 19 U. C. Q. B. 314; affirmed in appeal, *ib.*, 329.

(*b*) *Mann v. Western Assce. Co.*, 17 U.C. Q.B.. 190.

(*c*) *Carter v. Niagara Dis. M. Ins. Co.*, 19 U.C. C.P., 143; *Greaves v. Niagara Dis. M. Ins. Co.*, 25 U.C. Q.B., 127.

(*d*) *Goulstone v. Royal Ins. Co.*, 1 F. & F., 276.

(*e*) *Greaves v. Niagara Dis. M. F. Ins. Co.* 25 U. C. Q. B. 127; *Cinqumars v. Equitable Ins. Co.*, 15 U. C. Q. B. 143; *Mulvey v. Gore Dis. M. F. Ins. Co.*, 25 U. C. Q. B. 424.

enable them to form a judgment whether the loss or damage claimed for was actually sustained. (*a*).

And the intention of the condition is to give the insurers the means of satisfying themselves as fully as they can whether the claim for loss is just as to the amount, without the expense and trouble of litigation (*b*).

In this case the insured was required by the company to produce invoices of goods insured, and having failed to do so it was held that he could not recover.

Where a condition requires the insured to produce their invoices and books of account and all other vouchers which may be reasonably required, they must be produced if a proper *bona fide* demand is made for them, but not otherwise (*c*).

In this case the agent of the defendants and the plaintiff were quarrelling, and the former demanded the proofs in such a manner as in all probability to induce the plaintiff to suppose it was made for the mere purpose of annoyance; no letter was written nor any request in writing made. It was held that the demand was not sufficient.

After a loss, the insured gave to the secretary of the company a list of the names from whom he had purchased his goods, and subsequently the secretary requested the insured to sign a paper calling upon the purchasers to duplicate the bills he had bought of them, but insured refused to sign it. *Held* that his refusal to do so did not prevent recovery (*d*).

The breach of a condition which is to work a forfeiture must construed strictly (*e*).

Therefore where a condition related only to notice and proof of loss and provided that if any untrue statement should be made, the policy should be void, it was held that

(*a*) *Banting v. Niagara D. M. F. Ins. Co.*, 25 U. C. Q. B. 431.
(*b*) *Cinqumars v. Equitable Ins. Co.*, 15 U. C. Q. B. 143; *Ib.* 246.
(*c*) *Cameron v. Times & B. F. Ins. Co.*, 7 U. C. C. P, 234.
(*d*) *Franklin Ins. Co. v. Culver.* 6 Ind. 137.
(*e*) *Park v. Phœnix Ins. Oo.* 19 U. C. Q. B. 121.

a statement in an affidavit made in proof of loss, as to the plaintiff's title did not avoid the policy (*a*).

The plaintiff's affidavit in compliance with a condition requiring him to deliver in as particular an account of the loss as the nature and circumstances of the case would admit of stated that he was in the county of Sunbury at the time of the fire and was unable to ascertain in what manner it originated. In his evidence on the trial, the plaintiff stated that he left St. John about 7 o'clock p. m. on his way to the county of Sunbury, where he arrived the following morning. The fire broke out about 9 o'clock, at which time the plaintiff would have been in the county of Kings on his way to Sunbury, and only a few miles from St. John. The house was locked when the fire was discovered and on being broken open it was found to be in a room in which there was neither fire-place nor stove and no appearance of any clothing or bedding which was the subject of insurance, and in fact no appearance of anything being consumed. A candlestick was found in a barrel in this room containing straw partly consumed. *Held*, that the defendants were entitled to a strictly accurate account of the plaintiff's personal connection with the premises and his whereabouts at the time of the fire, and the circumstances connected with his leaving and the statements in the affidavit were calculated to disarm suspicion and were false within the meaning of the ordinary condition (*b*).

It seems that under that part of the condition requiring the insured to "deliver in" a particular account, etc., the insured would be bound to deliver at the office a written statement of the loss, and he would not comply with the condition by sending such statement by post.

Where a condition of a policy provided that persons desirous of making insurance were to deliver into the office or its agent the following particulars, etc., and that the

(*a*) *Ross v. Coml. Union Assce. Co.* 26 U. C. Q. B. 552.
(*b*) *Smith v. Queen Ins. Co.*, 1 Hannay 311.

insurance should be subject to such conditions as were contained in the printed proposals. *Held* that the words "deliver into" imported a delivery by or in writing, the same expression being in another place used in the conditions, which, from the words "signed with his hand," clearly imported a writing (*a*).

By the conditions and stipulations attached to a policy of insurance, and subject to which it was issued and received, the insured upon sustaining damage by fire was forthwith to give notice to the company, and within forty days to "deliver in a particular account" of such loss or damage. The policy contained a further clause that "all communications and notices to the company must be post-paid and directed to the secretary at C." The statement of loss was made out, sworn to, and deposited in the post office, inclosed in a sealed envelope, postage paid, and addressed to the secretary of the company at C, but was never received by the company. *Held*, that the condition requiring the insured to "deliver in" the statement of loss within forty days was a positive requirement of the policy on that particular subject, which could not be deemed superseded or nullified by the general direction to forward communications and notices by mail; and that in sending such statements by mail the insured had not complied with the conditions of the policy (*b*).

Where the assured, from loss of books and vouchers, could not furnish the "particular account" required by the conditions of the policy, a statement of the gross amount lost and the circumstances of the loss, under oath was held sufficient (*c*).

One of the conditions of a policy of insurance required, that all persons sustaining loss should give notice to the agent through whom insured, and within one month after

(*a*) *Davis v. Scottish P. Ins Co.*, 16 U. C. C. P, 176.

(*b*) *Hodgkins v. Montgomery Co'y. M. Ins. Co.*, 34 Barb., N.Y., 213.

(*c*) *Norton v. Ransselaer& Saratoga Ins. Co.*, 7 Cow., N. Y., 645; *Bumstead v. Dividend M. Ins. Co.*, 2 Kern, N. Y., 81.

loss, deliver in as particular an account thereof as the nature of the case would admit, and if *required*, make proof of the same by their oath or affirmation, and by the production of their books of account, etc., and should, if *required*, procure a certificate under the hands of three of the nearest householders, etc. The plaintiff having sustained a loss, furnished an affidavit and certificate in the terms of the condition, without being required to do so. In an action on the policy, one of the notices of defence was, that the proof and certificate required by the condition, were not given by the plaintiff after the alleged loss, but the defence on the trial was, concealment at the time of effecting the policy. *Held*, that the affidavit and certificate were admissible as part of the preliminary proof, but if not strictly admissible it was immaterial evidence, and therefore, no ground for a new trial (*a*).

Where goods in a shop were insured, but no goods were actually destroyed by the fire in question, the fire having only extended over the edges of two ends of shelves, representing only a small portion of one side of the shop, and the damage to these goods was chiefly caused by water; and amounted only to about £32. The insured furnished a statement, which consisted merely in an extract from his books, showing his stock-in-trade in May, 1857, his purchases up to February, 1858 (the date of the fire), and deducting from those sums the amount of his sales, less his profit, and the amount remaining after the fire, showing a balance, which was entitled "Balance which insured is entitled to claim from the insurance company," giving no detail of any goods whatever, it was held that the statement was not a statement of loss by fire, and that there was, consequently, no preliminary proof (*b*).

It is not necessary that the insured should, in his preliminary proofs, negative the occurrence of the loss from

(*a*) *Perkins v. Equitable Ins. Co.*, 4 Allen 562.

(*b*) *Thomas v. Times & B. F. Ins. Co.*, 3 L. C. J., 162.

any of the excepted causes stated in the policy, such as invasion, insurrection, riot or civil commotion, etc. (*a*)

The insured need not in the proof describe the manner in which the loss occurred, or the cause thereof, for the "particular account of loss and damage" required by the condition refers to the articles lost and damaged, and not to the manner or cause of the loss (*b*).

Under that part of the condition requiring the insured to "declare on oath whether any and what other insurance or incumbrance has been made on the property," the insured must show that he has given a notice not only of any incumbrance whether made before or after the date of the policy, if one has been made, but must also show that he has given a notice, even if no encumbrance has been made, stating the fact that no encumbrance has been made. In other words, in any case of loss the notice must refer to the subject of incumbrance, and whether there is any such or not on the premises and must state how the fact is (*c*).

But under this part of the condition all that is incumbent on the plaintiff is to make the declaratian on oath. He need not inform the defendants whether there is any other insurance on the premises or not, nor is he required to deliver the declaration or inform the defendants of the fact if its being made. It is the defendants duty to inform themselves of what has been done, if they do not choose to do so having the declaration before them it is their own fault (*d*).

But the declaration must be made on oath before the commencement of the suit.

That part of the condition requiring the insured to submit to an examination under oath is complied with if he

(*a*) *Catlin v. Springfield Ins. Co.* 1 Sumner, C. C. U .S., 434; *Lounsbury v. Protection Ins. Co.* 8 Conn., 459.

(*b*) *Ib.*

(*c*) *Markle v. Niagara Dis. M. F. Ins. Co.*, 28 U. C. Q. B. 525.

(*d*) *Williamson v. Niagara Dis. M. F. Ins. Co.* 14 U. C. C. P. 15.

submit to one examination, although he refuses to answer under oath questions asked subsequently (*a*).

If without excuse or justification the insured refuses to comply with such a condition he cannot recover, but his refusal is to some extent a question of fact and intention. If it was to gain time and lessen the chances of detecting fraud it would be fatal, but if it was to save the insured or his family from an epedemic it would not (*b*).

So if the condition requires the insured to subscribe, the examination after it is reduced to writing, if he refuse to do so he cannot recover (*c*).

When the conditions stipulate for such evidence as shall be satisfactory to the directors of the company, this does not mean such evidence as caprice may require, but satisfactory means sufficient, or such as would satisfy reasonable men (*d*).

Where a condition, besides requiring a particular account of the loss and damage, provides, that the insured "shall produce such other evidence as the directors may reasonably require," it is within the province of the court to decide as to what particular evidence may be required under this condition, and it is for the jury to say whether what is furnished is sufficient as a compliance with a requisition therefor under the condition. In the absence of special circumstances, the question of reasonable time for requiring such evidence cannot arise. It seems this condition would authorise the company in requiring from the insured, a builder's certificate as to the value of the buildings destroyed, they being, by another condition, empowered to re-build instead of paying the sum insured. If such a certificate can be reasonably required, and it is demanded before

(*a*) *Moore v. Protection Ins. Co.*, 29 Me. 97.

(*b*) *Philips v. Protection Ins. Co.* 14 Mo. 220.

(*c*) *Bonner v. Home Ins. Co.*, 13 Wis. 677.

(*d*) *Strong v. Harvey*, 3 Bing. 304; *Braunston v. Accidental Death Assce. Co.*, 2 B. & S. 523; *Bunyon on F. Ins.*, 91.

action, the furnishing of it before action is a condition precedent to the right to recover, and the plaintiff, failing to produce it, must submit to a non-suit (*a*).

It seems, that a demand under the condition, may be made by an inspector, whose duty it is to visit agencies and adjust losses, at all events, if the directors adopt the act.

The conditions must also be complied with in every particular as to the magistrate's certificate, and where the condititon requires that the certificate shall be under his hand and seal it must be so made. So if the condition requires the magistrate to certify the amount of loss he must do so (*b*).

So when a condition requires that the certificate should set forth the loss or damage "on the subject insured," a certificate stating the amount of loss, but not stating it to be on the subject assured is bad (*c*).

The certificate must also state that the *insured* (according to the knowledge and belief of the magistrate), really by misfortune, and without fraud or evil practice, sustained the loss or damage, etc., and if after the occurrence of the loss the insured becomes insolvent, a certificate alleging that the *assignee*, without fraud, etc., sustained the loss will be insufficient. An assignee in insolvency standing in the place of the insured cannot recover until the condition is complied with (*d*).

A coroner, whose name is not in the commission of the the peace, is such a magistrate as may give the certificate.

A strict compliance with this part of the condition is necessary. Thus where the condition requires the certificate of a magistrate "most contiguous" to the place of the

(*a*) *Fawcett v. Liverpool, L. & G. Ins. Co.*, 27 U. C. Q. B. 225; *Toms v Wilson*, 4 B. & S. 442.

(*b*) *Mann v. Western Assce. Co.*, 17 U. C. Q. B., 190; *Scott v. Phœnix Assce. Co.*, Stuart's L. C. Appeals, 354.

(*c*) *Langel v. Mutual Ins. Co.*, Prescott, 17 U. C. Q. B., 524; *Kerr v. British Am. Assce. Co.*, 22 U. C. C. P., 569.

(*d*) *Kerr v. British Am. Assce. Co.*, 22 U. C. C. P., 569.

fire, it will not be sufficient to produce the certificate of a magistrate living at the distance of twelve miles from the place where the fire occurred when there are others living nearer; and in such case without the certificate of the *nearest* magistrate the insured cannot maintain an action (*a*).

Although the conditions must be strictly complied with, it seems the court will not enter into a nice calculation touching a discrepancy of a few feet in the distances of the residences of the different magistrates. Where it appeared that a notary lived a few feet nearer than the certifying magistrate, but whether his office was nearer did not appear, it was held that the office might be regarded in ascertaining the magistrate most contiguous (*b*).

There would seem, however, to be no doubt on principle as well as by authority, that *any*, even the least difference in point of distance from the place where the fire occurred, between the residences of the justices will be material, and if the certifying magistrate is not in point of fact "most contiguous" to the place of the fire the condition will not be complied with (*c*).

If the difference in distance is clearly shown to the court it is apprehended they would be bound to regard it no matter how trifling, except in so far as the maxim *de minimis non curat lex* may apply.

It seems, however, that the court will in a proper case gladly evade the rigor of the rule, and will refrain from entering into a nice calculation of the distances. Thus where it was proven that several magistrates or notaries had their places of business nearer to the fire than the place of business of the magistrate whose certificate had been furnished, but there was no evidence that their places of residences were nearer to the fire than the one who gave the certificate

(*a*) *Moody v. Ætna Ins. Co.*, 2 Thomson; 173; *Lampkin v. Western Assce. Co.*, 13 U. C. Q. B., 237.

(*b*) *Turley v. North Am. Ins. Co.* 25 Wend. N. Y. 374.

(*c*) See *Protection Ins. Co. v. Pherson* 5 Port (Ind.) 417.

It was held that the certificate was sufficient, and that the distances would not be nicely calculated when the magistrate signing was near by and acquainted with all the circumstances (*a*).

And where the residence of the certifying magistrate was most contiguous to the place of the fire, but the office of another magistrate was nearer than the residence of the former, it was held that the condition was substantially complied with (*b*).

If the certificate of the nearest magistrate is not in compliance with the condition, it will not be sufficient to obtain the certificates of two other magistrates residing at a greater distance though the two last named certificates are in other respects in conformity with the policy (*c*).

So if two of the nearest magistrates refuse the certificate, and that of the next nearest is obtained it will not be sufficient (*d*).

A party to whom the company consent to pay the loss, by endorsement in writing on the policy, is not constituted the assured, so as to require proof that the magistrate was not related to him, if it is not shewn that he is in any way interested in the policy (*e*).

By the course of judicial decisions, both in England and the United States, the production of the certificate is a *condition* precedent to the payment of any loss, so that its being wrongfully witheld will make no difference; nor, is the insured entitled to vary the terms of the contract, as to the production of the certificate, by substituting other terms or conditions in lieu of those which all the parties to the contract have originally made (*f*).

(*a*) *Longhurst v. Conway F. Ins. Co.* U. S. D. Ct. Iowa.
(*b*) *Peoria M. & F. Ins. Co. v. Whitehill* 25 Ill. 466.
(*c*) *Noonan v. Hartford F. Ins. Co.* 21 Mo. 81.
(*d*) *Leadbetter v. Ætna Ins. Co.* 13 Me. 265.
(*e*) *Ketchum v. Protection Ins. Co.*, 1 Allen, 136.
(*f*) See *West v. Lockyer*, 2 H. Bl 574; 6 T. R. 710; *Oldman v. Bewicke*, 2 H. Bl. 577 n.; *Routledge v. Burrell*, 1 H. Bl. 254; *Columbian Ins. Co. v. Lawrence*, 10 Peters (U.S.), 507; see also *Moody v. Ætna Ins. Co.*, 2 Thomson, 173; *Racine v. Equitable Ins. Co.*, 6 L. C. J. 89.

Where the insured, by the conditions of the policy undertakes for the act of a stranger, he must fulfil his undertaking, even although the party applied to should wrongfully refuse to comply with his request. Thus where the insured was required by the policy to procure the certificate of the minister and churchwardens as to their belief in the *bona fides* of the claim. It was held that the condition was not unreasonable, that the insured had no right to substitute any other kind of proof, and that compliance with the stipulation was a condition precedent to his right to recover though he averred in his declaration that the minister and churchwardens had wrongfully refused to certify (*a*).

The production of a certificate in strict compliance with the condition may, in certain cases, be dispensed with. Thus, where the defendants pleaded that no magistrate's certificate was furnished, as required by a condition of their policy, and the plaintiff replied on equitable grounds that one H. J. was jointly interested with the plaintiff in the profits of the property, though the plaintiff was the legal owner thereof; that plaintiff resided at Toronto (the property being situate in the Province of Quebec) and was not at the time of the fire acquainted with any magistrate, etc., contiguous to the place of the fire, and therefore could not *then* produce the certificate. That this was represented to defendants, who, by their president and managing director, exonerated plaintiff from producing such certificate; but a certificate was prepared under the instructions of such managing director and was afterwards signed by two magistrates, upon production whereof the president and managing director accepted the same as sufficient. The replication was held a good answer to the plea (*b*).

It was proved that the insured had sent a cirtificate in fulfilment of the condition, but that the general agent of the insurers who had received it, returned it for some

(*a*) *Worsley v. Wood*, 6 T.R., 710.

(*b*) *Rice v. Prov. Ins. Co.*, 7 U. C. C. P., 548.

alleged insufficiency. The certificate was not produced at trial by the insured, nor was he called on to produce it, nor was any evidence given of its contents. *Held*, that a *prima facie* compliance with the conditions was shown on the part of the insured, and that the burden of proving the insufficiency of the certificate justifying their rejection of it rested on the insurers (*a*).

The condition generally goes on to provide that if there appear any fraud or false swearing in the proofs, declarations or certificates the insured shall forfeit all claim under the policy. Such a condition as this is fully in accordance with legal principles and sound policy (*b*).

And a false and fradulent statement as to the loss and damage will avoid the policy under the condition (*c*).

In general if the claim for loss is unjust and fraudulent it cannot be maintained (*d*).

So a grossly fraudulent over charge will deprive the assured of all remedy under the policy (*e*).

It seems, that "false swearing," within the meaning of the condition, signifies swearing wilfully and fraudulently false. Thus, where, after the loss by fire, the plaintiff made a statement under oath, that he was the *absolute* owner of the property, when in fact he was not the owner, but a tenant in common with his wife, of the property insured, it was held, that this was not "false swearing," for it was merely an untrue statement, which did not appear to have been wilfully or fraudulently made (*f*).

The only fraud or attempt at fraud, or false swearing, which will vitiate a policy within the meaning of the condition, is such as has reference to the claim of the plaintiff,

(*a*) *Platt v. Gore Dis. M. F. Ins. Co.*, 9 U. C. C. P. 405.
(*b*) *Britton v. Royal Ins. Co.*, 4 F. & F. 905.
(*c*) *Seghetti v. Queen Ins. Co.*, 10 L. C. J. 243.
(*d*) *Grenier v. Monarch F. & L. Assce Co.*, 3 L. C. J. 100.
(*e*) *Thomas v. Times & B. F. Assce. Co.*, 3 L. C. J. 162.
(*f*) *Mason v. Agricultural M. Assce. Co.*, 18 U. C. C. P. 19; S. C. 16 U. C. C. P. 493, reversed.

and bears on the proof of his loss, and not on any immaterial or collateral subject (*a*).

False swearing, therefore, as to payment of premiums, or assessments on a mutual policy, will not be within the condition (*b*).

In order that the false swearing may avoid the policy, it must appear that the oath is intentionally false, and taken with intent to deceive the insurers as to some material point (*c*).

But it seems, that if the claim made is wilfully false in any substantial respect, the insured cannot recover (*d*).

The plaintiff effected a policy of insurance against fire with a condition that the plaintiff should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim made. In the plaintiff's affidavit proving the loss he claimed for goods damaged to the extent of £1085. The jury on the trial only found a verdict for the plaintiff with £500 damages. The court granted a new trial considering that the verdict of the jury established that there was false swearing in the claim made (*e*).

One of the conditions of a fire policy required that persons insured should within fourteen days give in writing an account of their loss or damage, such account of loss to have reference to the value of the property destroyed or damaged immediately before the fire and should verify the same by their accounts and by affidavit and such vouchers as in the judgment of the company might tend to prove such account and value, and should produce such further evidence and give such explanations as might be reasonably required, and if their should appear any fraud or false state-

(*a*) *Crowley v. Agricultural M. Assce. Co.*, 21 U. C. C. P. 567; *Ross v. Coml. Union Assce. Co.*, 23 U. C. Q. B. 552.

(*b*) *Ib.*

(*c*) *Marion v. Great Republic Ins. Co.*, 35 Mo. 148; *Franklin F. Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Franklin Ins. Co. v. Culver*, 6 Ind. 137.

(*d*) *Goulstone v. Royal Ins. Co.*, 1 F. & F. 229.

(*e*) *Levy v. Baillie* 7 Bing. 349.

ment in such account of loss or damage, or in any of such accounts evidence or explanations or if such affidavit should contain any untrue statement the policy should be void. The statement complained of was that the plaintiff in his affidavit proving the loss, stated that he was absolute owner of the building insured, which was unincumbered, whereas he had not yet paid for the land. *Held* that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account and that an untrue statement in the affidavit as to the plaintiff's title would not avoid the policy (*a*).

Nor would it make any difference if the affidavit stated only the title to goods and not to lands (*b*)

The plaintiff had lived with his father for about 37 years on land belonging to the crown. A barn had been built on it resting on abutments of loose stones, which the plaintiff in October, 1867, insured with defendants. In December, 1867, a patent issued to one F, and in June, 1869, T claiming through the patentee recovered judgment in ejectment against the plaintiff and his father and placed a *Hab. fac. pos* in the sheriff's hands. A few days after, and before it had been executed the barn was burned. Proceedings in chancery were then pending by the plaintiff contesting the claim of T. The policy required that the plaintiff, in his account of the loss, should shew the true nature of his title at the time of the fire, and the plaintiff in such account stated that he was *bona fide* owner, and that his title was by possession for thirty years by himself and his father. *Held* that the account did not give a true statement of the plaintiff's title; that the barn was part of the freehold, and that he could not recover. *Wilson* J. dissenting on the ground that the plaintiff being in possession, and prosecuting his claim in equity had an insurable interest; that as against an adverse claimant he might treat the barn as a chattel

(*a*) *Ross v. Coml. Union Assce. Co.*, 26 U. C. Q. B. 552.

(*b*) *S. C. Ib.* 564.

which he could remove, and in this view his statement of title was correct (*a*).

The notice of loss and the particulars of it may be waived by the insurers expressly, or by their conduct in dealing with the assured. Where the fire occurred on the 13th June, and the notice of loss and particulars were furnished on the 11th of July, and the insurers did not then object that they were not in time, but entered into a correspondence with the insured as to furnishing better particulars which the latter did. On being again applied to the insurers declined to pay on the ground that the circumstances attending the fire were suspicious, but after action brought paid the amount due on another policy to which the notice of loss and particulars equally applied, it was held that the preliminary proof was waived by the conduct of the insurers (*b*).

The plaintiff had effected an insurance on a cargo of wheat on board a vessel which was afterwards lost. The premium had been paid, but no formal policy was executed before the loss. Before the trial the attorney for the defendant gave a written admission to the plaintiff's attorney, by which he agreed : " That no objection should be taken at the trial to the want of a policy of insurance on the wheat, and that the question to be tried should be confined to the cause and manner only of the loss, and that all proceedings should be had in the same manner, and to the same effect as if a policy had been duly and properly issued, and were produced at the trial." *Held* that the defendants were precluded from objecting to the want of notice and proof of loss usually required by the conditions of their policies, and that such proof was waived by the agreement of the defendants' attorney (*c*).

An insurance company cannot object to the preliminary

(*a*) *Sherboneau v. Beaver M. Ins. Co.*, 30 U. C. Q. B., 472.

(*b*) *Lampkin v. Ontario M. & F. Ins. Co.*, 12 U. C. Q. B. 578 ; see, also, *Pim v. Reid*, 6 M. & G. 1.

(*c*) *Walker v. Western Assce. Co.*, 18 U. C. Q. B. 19.

proofs when all are furnished which have been demanded, and no objection is made to their sufficiency before the commencement of the suit (*a*).

If the underwriter intends to insist upon defects in the proof, he must notify the insured of that intention in time to afford him an opportunity to correct them. Conditions precedent are waived by such conduct on the part of the party entitled to insist upon them, as is inconsistent with the purpose to require the performance of them. And contracts of insurance constitute no exception to the rule (*b*).

The payment by the insurers, to the insured, of a part of the sum agreed to be paid by the policy, is a waiver of the usual preliminary proofs (*c*).

When the insurers make no objection to a deficiency in the preliminary proof, or to the notice given of the loss, but rest their denial of liability on other grounds, this amounts to a waiver of the objection of a defective notice (*d*).

An offer of compromise of a claim on a policy for a loss, made by the insurers, after the preliminary proofs of loss had been received and examined without making any objections to the proofs, is a waiver of any defects in such proofs (*e*).

While mere silence will not amount to a waiver of defects in proofs of loss, an objection to the proofs upon one specific ground, and silence as to another, in which was the real defect, operates as a waiver of such defect (*f*).

Formal defects in the preliminary proofs may be regarded

(*a*) *Canada L. C. Co. v. Canada A. Ins. Co.*, 17 Grant 418.

(*b*) *Post v. Ætna Ins. Co.*, 43 Barb. N. Y. 351.

(*c*) *Westlake v. St. Lawrence Coy. M. Ins. Co.*, 14 Barb. N. Y. 206.

(*d*) *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404; *Bodle v. Chenango Co. M. Ins. Co.*, 2 Comst. (N.Y.) 53.

(*e*) *VanDeusen v. Charter Oak M. & F. Ins. Co.*, 1 Robert (N.Y.) 55.

(*f*) *Ayres v. Hartford F. Ins. Co.*, 17 Iowa, 176.

as waived the insurers by placing their refusal to pay on other grounds (*a*).

So if certificate is not that of the nearest magistrate, and the company refuse to pay on other grounds, they thereby waive the objection (*b*).

The plaintiff's attorney testified that he met defendant's agent in the street, and said he had all the preliminary proofs ready except a certificate, which he feared he could not get in the time required by the policy; that defendant's agent said it made no difference, but to get the proofs as soon as he could. This was held evidence of waiver to go to the jury (*c*).

The pendency of negotiations for arbitration as to the value of the buildings destroyed between the assured and the secretary of the company is no waiver of a condition requiring the proof of loss to be furnished within thirty days, if no submission to arbitration in fact takes place and the secretary does not assent to waive the condition (*d*).

The fact of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, if required, by the books of account and other vouchers, of the insured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called on (*e*).

In an action on a policy of fire insurance for $1000, defendants pleaded fraud and false statement, which, under a condition of the policy, would avoid plaintiffs' claim; and also, that the plaintiff did not forthwith give notice of his

(*a*) *St. Louis Ins. Co. v. Kyle*, 11 Mo., 278; *Tayloe v. Merchants Ins. Co.*, 9 How., U. S., 390; *Phillips v. Protection Ins. Co.*, 14 Mo., 220; *Hartford P. Ins. Co. v. Harmer*, 2 Ohio St., (22 Ohio) 452; *Franklin F. Ins. Co. v. Coates*, 14 Md., 285; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill., 466; *Blake v. Exchange M. Ins. Co.*, 12 Gray, Mass., 265; *Great Western Ins Co. c. Staaden*, 26 Ill., 360; *Lewis v. Monmouth M. F.Ins. Co.* 52 Me., 492.

(*b*) *O'Neil v. Buffalo F. Ins. Co.*, 3 Comst., N. Y., 122.

(*c*) *Crozier v. Phœnix Ins. Co.*, 2 Hannay, 200.

(*d*) *Niagara Dis. M. Ins. Co. v. Lewis* 12 U. C. C. P. 123.

(*e*) *Wightman v. Western Marine & Fire Ins. Co.* 8 Rob. La. 442.

loss, and deliver in as particular an account of such loss as the nature of the case would admit of, and make proof of the same by declaration or affirmation, and by his books of account, or such other reasonable evidence as the defendants or their agent required. The jury found that there was no fraud or false statements, and fixed the plaintiffs' loss at $900; but in answer to the following question: Did plaintiff forthwith, and within the delay required by the said policy, to wit, the 12th day of December, 1866, at Montreal, give notice to defendants, and deliver in an account giving particulars of his loss under oath, and offer all information to defendants, and make claim to the payment of the sum of $1000 currency, of and from the defendants. They answered, "We consider the claim made, *but not in due form.*" The condition of the policy contained no provision as to the *form* of the claim, nor was the form objected to or enquired of. *Held*, that the words "but not in due form," were in no way pertinent to the issue submitted to the jury, and should therefore be considered as mere surplusage, and of no legal force or effect whatever, and that the plaintiff was entitled to judgment on the verdict for $900, with interest and costs (*a*).

(*a*) *Wiggins v. Queen Ins. Co., of L. & L.*, 13 L. C. J. 141.

CHAPTER IX.

ADJUSTMENT, RE-BUILDING, ETC.

The basis of an adjustment is the contract of insurance, with its representations and warranties together with all written and printed conditions of the policy as they may be modified or controlled by subsequent indorsements. In all cases the adjustment should be made up in accordance with the terms of the policy: as given in the written portion thereof, without reference to any alleged verbal or other agreement between the insured and the agent, not included in or endorsed upon the policy before the occurrence of the fire. The policy as written, and the policy only, must control the adjustment in every instance. The adjuster should not only be familiar with the terms and conditions of the policy, but also with the whole law of insurance. Reference may be made to other portions of this work for an elucidation of the rights and liabilities of the insurer and insured in all cases. The chapter on "The extent and nature of the risk" will be found to be of practical importance to the adjuster, and, indeed, many points are inserted in that chapter which might with equal propriety be inserted in this.

The amount to be recovered under a policy of insurance is unliquidated, and dependent upon the amount of damage actually sustained. But the amount may become liquidated by an adjustment, which, though not in all cases conclusive, is so unless something the contrary can be shown (*a*).

When the amount due is adjusted and paid and accepted in full without objection the claim is satisfied. A plea, therefore, alleging that the amount which the plaintiff was entitled to receive was settled and adjusted at $3,500 between plaintiff and defendant, and that the defendant

(*a*) *Luckie v. Bushby*, 13 C. B., 871.

afterwards paid and satisfied in full to the plaintiff the said sum of $3,500 for the loss and damage, is good on motion for judgment *non abstante veredicto,* although the plea does not allege that no more was due (*a*).

In its strict sense, adjustment of fire losses, is ascertaining and fixing the amount of loss under the insurance, without reference to the companies interested. Apportionment is the act of determining, and apportioning the contributive liability of each co-insuring company upon the ascertained general loss. Contribution to fire losses is the payment of its rateable proportion of such ascertained general loss by each co-insuring company.

These several subjects will be treated of in this chapter.

In ascertaining the extent of the loss and damage, reference should be made to the circumstances as they existed at the date of the policy, for the indemnity to the insured must be adjusted on the principle of replacing him as near as may be in the situation he was in at the commencement of the risk (*b*).

The first step of the adjuster is to ascertain, as accurately as possible, the amount of actual loss and damage sustained on the property insured. In effect, the insurer is by the loss made the purchaser of the property destroyed, and he has a right to know that what he is called upon to pay, is not in excess of the true value of the property. The adjuster has not only to guard against an over valuation of the amount of loss and damage, but also against claims for loss of profits on the business carried on in the insured premises, loss of time, inconvenience, etc. Profits are not in any instance recoverable, unless insured as such, and claims for loss of time, inconvenience or annoyance, are of a purely sentimental character, and do not enter into the spirit or letter of the contract. Though claims which cannot be supported are often made by the insured, even when

(*a*) *McLean v. Phœnix Ins. Co.*, 2 Hannay, 179.
(*b*) *Marchesseau v. Merchants Ins. Co.*, 1 Rob. La. 438.

there is no attempt at fraud, yet, on the other hand, it must be admitted, that adjusters are not always free from blame in endeavouring to cut down claims, and thereby arrive at what is termed a "good settlement for the company."

Simple justice to both parties to the contract requires that the adjustment should only be for what is actually lost not exceeding the sum insured; any other result would inflict a wrong on either the insurer or insured, as the object and effect of the contract is merely to secure an indemnity against the consequences of a loss on the subject insured. It is worthy of consideration how far the system of "jumping" the amount of loss after a fire with the view of publishing a card of thanks for prompt settlement, has contributed to the difficulties met with by the adjuster. The alleged evil resulting from this system is that the claimant as a rule makes up his claim for such sum as will give a margin, to be yielded to the adjuster, when the latter makes his offer of settlement.

The adoption of a concise form of policy giving full protection to the companies against fraud, avoiding impracticable and vexatious conditions, and adopting such only as can be clearly understood, would, it is believed, tend materially to destroy the evil complained of, and at the same time give a greater protection to both the insurer and the insured than at present exists. When the great protection that insurance affords and the important interests it involves are considered, it is strange that it is dealt with in the majority of cases, by commercial men particularly, in such an indifferent and careless manner. There are few, if any, who make themselves conversant with the conditions or any of the terms of their policy, except, perhaps, the written portion thereof. The policy is simply a contract between the insurers and the insured, and its terms are contained in its conditions, and in the body of the policy. In effect the insurer undertakes that if the insured complies

with certain conditions he will be entitled to indemnity on the occurrence of a particular peril to the subject insured. The insured should therefore make himself thoroughly familiar with the conditions of his policy, otherwise, he may be at the mercy of the company if they elect, to take advantage of a breach of the conditions in the event of a loss. The same neglect or lack of careful attention is evident in the choice of insurers. It is, of course, to the advantage of the insured that the company with which he insures should be perfectly solvent, and that the conditions of their policy should be reasonable, and such as in the ordinary course of business may be complied with. But irrespective of these considerations it is often found that the company effecting insurance at the cheapest rate, commands the most extensive patronage, and this from a class of men who would consider very carefully the expediency of investing in any other commodity merely because it was cheap. If greater care were exercised by the companies in the selection of risks, if the character of the party, and the value, nature, and situation of the property were made the basis of the contract, perhaps, many of the difficulties which arises in this connection would be avoided. The companies should remember that by insuring honest men, they may as effectually prevent fraud as by imposing numerous and complicated conditions.

The unsatisfactory state of insurance law in Canada has lately been referred to by an eminent judge of the court of Queen's Bench for the Province of Ontario, and it has been suggested that the Legislature should interfere and restrict the companies to such conditions as the courts shall determine to be reasonable. It is claimed that if this were done the companies would be more careful in the selection of their risks, and thereby fraud and false or exaggerated claims would be avoided.

A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the

company shall be liable to pay the assured two thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole than the aggregate of the amount insured, and to no more on *any* of the different properties than two-thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject of insurance, and therefore the company is liable only for two-thirds of the loss on each subject, notwithstanding, that on some of the subjects the loss is less than the amount for which those subjects are insured, and, notwithstanding, that the whole loss is less than the aggregate amount insured (*a*).

In this case by express stipulation the insured could not recover more than two-thirds on *any* of the subjects insured. Independent of such express stipulation when a separate insurance is effected on separate properties, and the two-thirds value applies, the insured can recover only two-thirds on the properties injured or destroyed, and not two-thirds of the total insurance.

For instance, a house is insured for $1,000 and the furniture for $2,000, and the house is sworn to be worth $3,000, and it is totally destroyed by fire, but none of the furniture, which is worth $3,000, is injured. The plaintiff cannot recover the two-thirds of the value of the whole property covered by the policy up to the sum insured; for that would give him the whole $3,000 upon his house which is its full and not its two-thirds value, and yet there is only an indemnity of $1,000 on it which the company was to make good in any event.

The two-thirds clause is to make the insured interested in the property to some extent himself, and in order to give it full effect he should be interested in saving every part of the property when separate risks are taken on separate

(*a*) *King v. Prince Edward C. M. Ins. Co.*, 19 U. C. C. P. 134.

parts of it. If the rule were otherwise, frauds might be committed or negligence encouraged (*a*).

Plaintiffs' insured with defendants $3,400, of which $1,000 was on his tannery and $500 on the machinery in it on an application valuing the tannery and fixtures at $1,000 which was said to be the two-thirds of the actual value, but agreeing that in case of loss defendants should only be liable as if they had insured two-thirds of the actual cash value anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damage not exceeding the said sum of $3,400, the said losses or damage to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury found the total cash value of the former to be $1,050 and the latter $750. *Held*, that the plaintiff was bound by the agreement in his application to take two-thirds of the actual cash value and could therefore only recover this sum (*b*).

Though the rule is otherwise in marine insurance, yet in fire insurance where a person insures his house or goods for a part only of their value and suffers a loss equal to the full amount insured, this sum in the absence of a special provision in the policy to the contrary must be paid by the insurers and not merely such a proportion of the sum as would correspond with the proportion between the sum insured and the whole value of the property on which the insurance is effected. In other words where a man insures to an amount not equal to the value of the property, this does not prevent his recovering the full sum insured if he has sustained damage to that amount (*c*).

Although the general rule is as already mentioned, yet,

(*a*) *McCulloch v. Gore Dis. M. & F. Ins. Co.*, 22 U. C. C. P. 110.

(*b*) *Williamson v. Gore Dis. M. Fire Ins. Co.*, 26 U. C. Q. B. 145.

(*c*) *Thompson v. Montreal Ins. Co.*, 6 U. C. Q. B. 319; *Peddie v. Quebec F. Ins. Co.* Stuarts L. C. appeals 174.

if the policy contains conditions of average, the insured can only recover such proportion of the loss as the sum insured bears to the whole value of the property immediately before the fire.

The insurers also, are not liable to loss owing to the assortment being broken. Therefore, if out of whole packages or bales of manufactured goods, only a few articles are damaged, the insured is not entitled to have the sound and damaged goods sold together, for the insurers are not liable for loss to the sound portion, being accountable only for the actual injury done to the things insured, by the direct operation of the peril insured against (*a*).

The conditions of some companies provide that no profit of any kind shall be included in the claim of the insured, and when the insurance is against loss or damage by fire on a building simply, and it is injured or destroyed by fire the insured cannot recover for his loss occasioned by the interruption or destruction of his *business* carried on in such building, nor for any *gains* or *profits* which were morally certain to enure to him if it had remained uninjured to the expiration of the policy, for although profits of trade or business are an insurable interest, yet they must be insured as such (*b*).

Where the insurance was for £1,000 on an "inn and offices," and the premises being injured by fire, the insurer reinstated them pursuant to the policy, it was held that the insured could not recover for rent paid in the meantime, the hire of other houses while the "inn" was being repaired, and the loss or damage sustained by reason of various persons declining to go to the inn while it was undergoing repairs (*c*).

Underwriters undertake to indemnify only for damage arising from external accidents, not from that occasioned

(*a*) *Arnould on Ins.*, 836.

(*b*) *Niblo v. North Am. Ins. Co.*, 1 Sand. (N. Y.), 551; *Re Wright & Poole*, 2. N. & M., 819, 1 A. & E., 621.

(*c*) *Re Wright & Poole*, Supra.

by the inherent qualities or natural defects of the thing insured, hence, as a general principle, insurers are not liable for the loss of a thing which is consumed by reason of its own qualities, such as spontaneous combustion without external causes, unless those qualities or tendencies are excited to action and made destructive by a peril insured against. In most policies an express clause is inserted protecting the insurers from such losses as the above.

In estimating the amount of damage sustained, the intrinsic value of the property is to be considered, without reference to any extraneous circumstances whereby its value may be increased or diminished. Thus, where the insured had built the house insured on land of which he was only lessee for years, and at the time of the fire the lease had only fifteen days to run, and it appeared that the building was worth $1,000, as it stood, but if removed at the end of the term it would only be worth $200. It was held that the value of the building as it stood was the criterion of the damage, although by removal at the end of the term it might be reduced to a much less sum (*a*).

Where a policy provides that the loss or damage shall be estimated according to the true and actual cash value of the property at the time the loss shall happen, the money value in the existing market is the only rule and guide to carry out the stipulation of the contract (*b*).

The actual value of the goods may be recovered without any reference to the cost price. Thus where a policy covered the stock-in-trade of a block-maker, it was held that he was entitled to recover the actual value of the stock at the time of the loss by fire, and that the insurers could not fulfil their contract by paying the cost price of the articles, or the sum which it cost to manufacture them, and this notwithstanding that the insurance was not upon the profits of the subject insured (*c*).

(*a*) *Lawrent v. Chatham F. Ins. Co.*, 1 Hall, (N. Y.) 41.
(*b*) *Grant v. Ætna Ins. Co.*, 11 L. C. R. 128.
(*c*) *Equitable F. Ins. Co. and Quinn*, 11 L. C. R., 170.

When goods are so much damaged as not to be saleable in the ordinary mode a fair sale at auction may be made by the insured, after reasonable notice to the underwriters or with their knowledge, and the price at which it is sold is a proper criterion by which to estimate the damage to the insured. But if sold without the knowledge of or notice to the underwriters such price is not sufficient evidence of the value of the goods in their damaged condition.

A survey of goods alleged to be damaged made without notice to the underwriter, followed by a sale (after advertisement in two newspapers,) at nine o'clock in the morning of the second day after the survey, at which sale the claimant bought in the goods, is irregular, and such proceedings afford no criterion of the extent of damage the goods have sustained (*a*).

When the owner is insufficiently insured upon an ordinary policy, and the insurance money, together with the value of the salvage, does not make up more than the value of the property immediately before the fire, the salvage or residue of the property remaining after the fire will always belong to the owner. But when the owner is insured up to the full value and the claim is admitted as a total loss, any salvage belongs to the insurers (*b*).

The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest upon the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim (*c*).

After the cause of action accrues under a policy *i.e.* after the fire, and due proof of the loss and compliance with the conditions entitling the plaintiff to sue, if he accept a bill of exchange in full satisfaction and discharge of the *cause of action*, this will be a good bar to an action to recover

(*a*) *Sun M. Ins. Co. v. Masson*, 4 L. C. J., 23.

(*b*) *Da Costa v. Firth*, 4 Burr, 1966; *Bunyon on F. Ins.*, 102.

(*c*) *Toronto S. B. v. Canada L. Assce. Co.*, 14 Grant, 509.

the sum insured, although the bill of exchange is never paid (*a*).

This proceeds on the ground that after the loss by fire the policy gives a claim for damages to the extent of the loss, and, not merely a right to recover the sum insured in the policy. And in the above case the bill was given and accepted in satisfaction of the *cause of action* in the declaration mentioned. The acceptance of a bill by the plaintiff could not be legally pleaded as a satisfaction of the covenant *before breach*, because that would be to set up a dispensation from the covenant in consideration of giving an undertaking by simple contract (*b*).

An insurance company may be compelled to pay the entire loss on a policy, within the amount insured, unless limited by its conditions; but will be entitled to sue for and recover proportionate amounts of other companies insuring against the same loss (*c*).

The right to contribution between insurers is based upon the concurrence of the policies, and it is a necessary incident of its existence, that the several insurers should be bound with equal certainty, and in the same sense for the same loss (*d*).

A condition is usually inserted in the policy, that in the event of several insurances, the company shall be liable only for such rateable proportion of the loss or damage happening to the subject insured, as the amount insured by the company shall bear to the whole amount insured thereon. Where several policies on the same subject each contain this clause, and in the event of loss, one of the companies pays more than the others, the former is not entitled to any contribution from the latter. But, if only one contains the clause, the others, on paying more than their share, will be

(*a*) *Brown v. Erie & Ont. Ins. Co.*, 21 U. C. Q. B. 425.

(*b*) *Ib.*

(*c*) *Peoria Marine & F. Ins. Co. v. Lewis*, 18 Ill 553.

(*d*) *Baltimore F. Ins. Co. v. Loney*, 20 Ind. 20.

entitled to contribution from the company whose policy contains the clause (*a*).

If, however, the other policies are void, the company whose policy is valid will, it seems, be liable for the whole loss (*b*).

And, though the policy sued on contains this stipulation, yet, if a second policy effected on the property, has by subsequent events become avoided, and is void at the time of the loss, the full amount insured may be recovered under the policy sued on, without reference to the *pro rata* clause (*c*). But where property is insured in several companies, and each company contains the *pro rata* clause, the liability of any one of the companies to pay the insured its rateable share of the loss, is not affected by the fact that some of the other companies have paid more than their share, so that the amount already received by the insured is equal to his whole loss (*d*).

In all cases where the loss is equal to or greater than the amount insured by the several policies there can be no *pro rata* contribution, and the several underwriters are liable for the several sums insured. The clause in question is intended to prevent circuity of action and is only applicable where double insurance exceeds the loss of the insured. Where there is double insurance without this clause, the insured can proceed against any one of the underwriters if the insurance is sufficient, and recover the whole loss, and the defendant then would have his action against the others for contribution. To avoid this the clause in question is very generally introduced in policies, and in case of double insurance prevents a recovery of more than a *pro rata* share of the loss. It substitutes proportional abate-

(*a*) *Lucas v. Jefferson Ins. Co.*, 6 Cowen, (N.Y.) 635.

(*b*) *Hygum v. Ætna Ins. Co.*, 11 Iowa, 21.

(*c*) *Forbush v. Western M. Ins. Co.*, 4 Gray, Mass. 337.

(*d*) *Fitzsimmons v. City F. Ins. Co.*, 18 Wis. 234.

ment for contribution in all cases in which the latter would otherwise have been required by the common law (*a*).

Where there are several insurances on the same property, each subject to the *pro rata* clause if one company pays more than its just share, its remedy is not against the other companies for contribution, but against the insured (*b*).

In case of a double insurance, the policies are considered as one ; and the insurers are liable *pro rata*, and are entitled to contribution to equalize payments made on account of losses (*c*).

Where property covered by several policies of insurance is destroyed, the proportion of its value to be paid by one underwriter is that which the amount of his policy bears to the amount of all the insurance thereon, although some of the policies cover other property in addition to that destroyed (*d*).

The *pro rata* clause is generally expressed to apply without reference to the dates of the different policies. In marine insurance it was the practice that the first underwriter in point of time bore the whole loss to the extent of his liability. This custom was also extended to fire insurance, hence the proviso above referred to was inserted to distribute the liability equally among the different co-insurers.

The non-concurrency of policies is the greatest source of vexation to adjusters, and not unfrequently entails serious loss to the insured, as scarcely any two adjusters will agree on a rule, by which a specific and general policy covering the same subjects should be adjusted. The following case will serve to illustrate the difference of opinion existing in the minds of eminent English experts on this point :

(*a*) *Richmondville Un. Sem. v. Hamilton Ins. Co.*, 14 Gray (Mass) 459 *Lucas v. Jefferson Ins. Co.*, 6 Cowen (N. Y.) 635.

(*b*) *Ib.*

(*c*) *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14.

(*d*) *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass). 265.

The example is as follows (reduced to currency for ease of calculation), viz. :—

Office A, covers on dwelling	$100 00
Office B, covers on warehouse	100 00
Office C, covers on dwelling and warehouse	200 00
Total	$400 00
Loss on dwelling	250 00
Loss on warehouse	100 00
Total	$350 00

The solution (and argument), of Mr. Bunyon, who styles it "a very difficult case," is as follows :—

Now if the assured claimed, in the first instance, for loss on the warehouse, which would be $100, and the $100 were divided in the proportions of two-thirds and one-third between offices B and C, he would have remaining $133.33 insured by office C, and $100 by office A, applicable to loss of $250 on the dwelling house, which would be insufficient to satisfy it. Hence, he would have a right to have his larger policy applied to the larger loss ; and, claiming two-thirds of $250, or $166.67 of office C, and $83.33 of office A, there would remain an insurance on the part of office C of $33.34, and of office B of $100, and the liabilities would be as follows :—

Office A, on dwelling	$83 32
Office B, on warehouse	75 00
Office C, on dwelling, $166.67, and warehouse $125	191 67
Total loss	$350 00

The late Mr. Ritcher, of the Phœnix Office, to whom the case was submitted, as quoted by Mr. Atkins, solved the problem under the rule of *pro rata* apportionment, requiring

contribution in the full amount upon each subject as follows:

	DWELLING.	WAREHOUSE.	TOTAL.
Office A	$100	...	$100
Office B	...	$50	50
Office C	150	50	200
Total	$250	$100	$350

These results illustrate the operation of the Albany rule as between co-insuring companies; the specific making a salvage at the expense of the general policy.

Mr. Hore, who holds that the amount of loss upon a given subject is the amount of insurance thereon within the sum named, without reference to the amount of the policy, thus—policy for $1000, loss, $900; the insurance is $900, not $1000—gives the following solution:

Office A pays on dwelling		$100 00
" B " warehouse		64 00
" C " "	$36 00	
" C " dwelling	143 00	
		179 00
The insured, deficiency		7 00
Total payment		$350 00

Thus compelling the insured to contribute to his own loss, with unexhausted insurance under a specific policy, which is in direct conflict with the English rule.

Under the rule that insurance under compound policies become specific in the ratios of the loss upon the several items, Company C, in this instance, would become specific insurance in the proportions of $250 on dwelling, and $100 on warehouse, or as 5 is to 2, that is 5-7 of $200=$143 on dwelling, and 2-7 of $200=$57 on warehouse (in round numbers), and would pro-rate with its co-insurers in these sums respectively, which would give the following as the

FIRST APPORTIONMENT OF INSURANCE.

COMPANY.	DWELLING.	WAREHOUSE.	TOTAL.
A	$100 00	.....	$100 00
B	.....	$100 00	100 00
C*	143 00	57 00	200 00
Total insurance	$243 00	$157 00	$400 00
Loss	$250 00	100 00	350 00

From this apportionment it results, that the amount of insurance upon *dwelling* falls short just $7 of full indemnity —evidently the same $7 which Mr. Hore, in his adjustment, assessed to the insured. But, inasmuch as there remain $50 of unexhausted specific insurance, and as "the claim must be so conducted as to give the insured the greatest benefit," this deficiency must be made good by the unexhausted policy B.

But, as policy B, does not cover dwelling *directly*, it cannot be assessed *directly*; it can, however, be reached through its co-insurer C, which, fortunately, *does cover dwelling*, and and must contribute this delinquent $7 out of its contribution to warehouse, leaving its amount thereon $7 less, or $50, and adding it to dwelling, now $143, will make its contribution then $150; which re-adjustment will present the following as the

SECOND APPORTIONMENT OF INSURANCE.

COMPANY.	DWELLING.	WAREHOUSE.	TOTAL.
A	$100 00	.....	$100 00
B	.....	$100 00	100 00
C	150 00	50 00	200 00
Total insurance	$250 00	$150 00	$400 00
To pay loss	250 00	100 00	350 00

from which we get the following :—

FINAL CONTRIBUTION.

COMPANY.	DWELLING.	WAREHOUSE.	TOTAL.	SALVAGE.
A	$100 00	.....	$100 00	.....
B	.....	$66 67	66 67	$33 33
C	150 00	33 33	183 33	16 67
Total payment	$250 00	$100 00	$350 00	$50 00

*The exact figures of Co. C are $142.86 on dwelling, and $57.14 on warehouse.

This operation fully illustrates the differance between *pro rata* and *rateable* proportions as applied to contributive liability. Under the policy, C's *pro rata* of insurance was relatively $57 and $143, but its *rateable* proportion was $50 and $150 respectively ; thus changing the respective amounts, but not increasing the aggregate.

Company A makes no salvage here, because, with the *pro rata* contribution liability of Company C, its co-insurer, the total insurance upon *dwelling* is short of indemnity ; hence there can be no salvage on this item. Company C makes its salvage on *warehouse*, where the insurance, even after C had contributed to the deficit on *dwelling*, was in excess of the loss.

The following ruling of our courts, if universally and rigidly applied, might be found in some cases to be oppressive :

Plaintiffs insured with defendants $2,000 on a building and $2,000 on the furniture, and with another company $2,000 on the building and furniture together, and a loss occurred of $1,050 on the building and $878 on the furniture. The defendant's policy provided that in case of loss the assured should recover from them only such portion thereof as the amount insured by them should bear to the whole amount insured on the property, and under this they contended that the other insurance must be treated as one for $2,000 on the building and $2,000 on the furniture, so that they would be liable only for one-half of the loss on each. *Held*, that as the whole amount insured was $6,000, of which defendants had taken $4,000, they were liable for two-thirds of the loss, although the other company would be liable for $2,000 on either the building or furniture (*a*).

The more equitable adjustment of this claim would be to treat the other company's general policy in the adjustment of the loss as a specific insurance on the first item of building, and this loss being $1,050, each company should therefore pay one-half.

(*a*) *Trustees, etc., v. Western Assce. Co.*, 26 U. C. Q. B., 175.

"Western" paying	$525 00
Other company	525 00
Total loss on building	$1050 00

The other comyany's general policy having paid $525, should now only be called on to pay its *pro rata* proportion of the loss on furniture ($878) as the sum, it has been reduced to $1,475, bears to the total amount now covered, including the specific policy of the "Western" $2,000, in all $3,475 which would make,

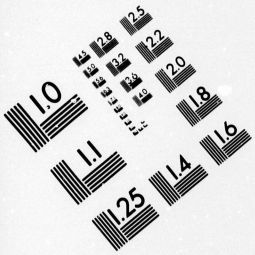
"Western" pay	$505
Other company	373
Total loss on furniture	$878

By this adjustment, the Western would be called on to pay only $1,030 instead of $1,284, as it was by the foregoing ruling. Suppose the loss on the furniture or building to have been $4,000, and the "other company" settles on the basis of the above ruling, and gets a discharge from the claimant, by paying one-third, $1,334, how is he to get the balance of his claim, $2,666, when the "Western" policy being specific, covers only $2,000 on either item. Such an adjustment would be :—

"Western" exhausts its specific amount by paying	$2,000
Other company having been discharged by paying	1,334
Claimant would lose	666
Amount of total loss	$4,000

It might be held by the court, that inasmuch as this unexhausted sum remains, the claimant would have recourse against the other company for this amount, $666, which would cover his loss. The case is supposed, merely, to show, how serious complications might arise out of such a general ruling. Similar adjustments to the above have been made, resulting in loss to claimants, and leaving unexhausted policies.

Now suppose the loss to have been $2,500 on building,



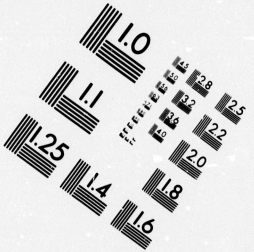
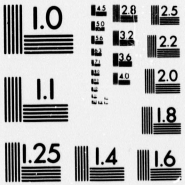
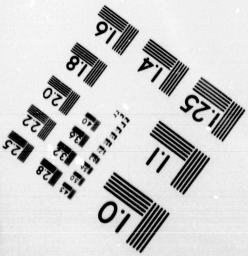
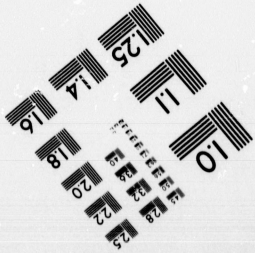


IMAGE EVALUATION
TEST TARGET (MT-3)







and $2,500 on furniture, and the specific insurance to have the following condition copied from a policy, viz.: "Any "general policy on different properties to be treated as a "specific policy on each property for the whole amount "thereby insured."

What would be the adjustment of the loss?

Western could only be called on to pay, on building	$1,250
" " " " on furniture	1,250
Other company, total amount of its policy	2,000
Claimant would lose	500
Total amount of loss.....	$5,000

And this loss of $500 he would have to bear, notwithstanding that there was still unexhausted of the specific policy $1,500, as by the above condition, the contract of indemnity he had accepted would be fully carried out. Numberless illustrations might be added to the above, but the object of this chapter is rather to point out the manner in which difficulties similar to the foregoing may be obviated in the event of a loss, than to give instructions and lay down rules relative to extrication from them when they occur.

The adjuster must make the adjustment in accordance with the conditions of the policy, and the contract entered into, and as it is in the power of the assured alone, when effecting the insurance to have all details clearly defined, he alone, is also to blame for any complications that occur in the settlement after a loss. The following simple precautions would avoid many of the difficulties of which the insured complains.

1. Examine your policy carefully, and decline all that have conditions which cannot be clearly, and under all circumstances, complied with.

2. See that all policies covering the *same* subjects are concurrent, each using precisely the same words in describing the subjects insured.

3. Pay an adequate rate of premium for the risk and apply the same rule to cheap indemnity against loss by fire that is applied to any other matter.

4. When a loss occurs make out an honest and clear statement of the amount thereof, and compromise for nothing less.

If these simple precautions are taken claimants will have no reason to fear any adjuster, or that the latter will be able to apply the "Finn," "Albany," "Reading," or any other rule to his damage or loss. It may be that the practice of hawking about risks from office to office to beat down the rate to a non-remunerative figure, has begotten a desire on the part of the companies to apply the same principle in the settling of claims. There can be no doubt, however, that both these courses are to be deprecated.

The sworn returns made to Government, prove that the business of fire insurance in Canada has for several years past been unremunerative and has been done at a loss to the companies engaged in it, hence, the recent advance in rates which is by some very unjustly found fault with, for on an adequate receipt of premium by the companies for the hazards assumed, depends the very indemnity which it is claimed the policy gives, and that this fact may be fully realized, it may be here stated that the nineteen companies which make returns of the amount they have at risk in the Dominion alone, adds up to the large sum of $251,725,940 36. Any reflective person must see how small in comparison to these figures must be the total capital of the companies. This capital should, therefore, be protected by remunerative rates to avoid disaster not only to the companies, but also to the insured.

Legislation for a uniform policy may be objected to, but there can be no sound objection raised to compelling all companies, licensed to do business in Canada, to use the same form of policy and conditions as are used at the parent office. The inviduous distinction drawn in framing

for this Dominion a policy with special conditions different from what is in general use is certainly not very creditable to us as a people, if it is considered a necessity.

The 14 Geo. 3 c. 78. passed with a view to deter ill-minded persons from wilfully setting their houses on fire with a view of gaining for themselves the insurance money is in force here (*a*). Section 83 provides that it shall be lawful for the directors of an insurance office, upon the request of any person interested in or entitled to any house or building which may be burnt or damaged, to cause the insurance money to be laid out and expended so far as the same will go in rebuilding, re-instating and repairing the premises, unless the insured shall within sixty days after the adjustment of his claim give sufficient security to them that the money shall be laid out in this manner, or unless it shall be at that time settled and disposed of amongst all the contending parties to the satisfaction of the insurers (*b*).

Under this statute it is not absolutely necessary that the request should be in writing, but there must be a distinct request made by the persons interested, to have the insurance moneys laid out in rebuilding and repairing the premises, and if the party interested does not make the request before the insured is settled with he cannot make it afterwards.

If a tenant from year to year has insured the premises demised to him, he has a right to have the money laid out in rebuilding pursuant to the statute; so, also, has his landlord or the owner of the premises. But the party interested has not a right to rebuild himself, and then charge the insurers with the expense. The proper course is to apply for a *mandamus* to compel the insurers to lay out the insurance moneys according to the provisions of the statute (*c*).

(*a*) *Stinson v. Pennock*, 14 Grant, 604.

(*b*) As to an accidental fire within the meaning of this statute see *Gaston v. Wald* 19 U. C. Q. B., 586.

(*c*) *Simpson v. Scottish M. F. & L. Ins. Co.*, 9 Jur. N. S. 711; 1. H. & M. 618.

Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure, and a loss by fire occurs, whereby the insurance money becomes payable, the mortgagee is entitled nnder the statute to have the insurance money laid out in rebuilding, although the mortgage is not then due (*a*).

The insurers have no right to reinstate or rebuild, except through an express stipulation in the policy to that effect, but the policy usually contains a condition, that it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and equal goodness, and to rebuild or repair the buildings within a reasonable time, giving notice of their intention to do so within thirty days after the preliminary proofs shall have been received at the office of the company (*b*).

If the company, in pursuance of the condition, exercise the option to rebuild, the contract becomes substantially a building contract, and an action upon the policy to recover the loss cannot be sustained if the company properly carry out the election to rebuild (*c*).

But where the insurers having the option to rebuild, elect to do so, they must proceed to reinstate the insured without unnecessary delay, in premises as good and substantially the same as those destroyed, and if the insurers do not faithfully carry out the election to rebuild, the insured is not barred of his action on the policy. If the insurers had proceeded with a part of the building, but had not for some reason completed it, they could not be forced either to finish the house or take it down and build another, and such partial restoration of the premises would be no bar to an action for the full amount insured (*d*).

Where the insurers elect to rebuild and partially perform

(*a*) *Stinson v. Pennock*, 14 Grant 604.

(*b*) *Wallace v. Insurance Co.*, 4 La. 289.

(*c*) *Beals v. Home Ins. Co.*, 36 N. Y. 522.

(*d*) *Home D. M. Ins. Co. v. Thomson*, 1 E. & A. Reps. 260.

the contract, but desist therefrom before fully completing it, the rule of damage in an action brought by the insured for the non performance of the building contract, is the amount it would take to complete the building by making it substantially like the one destroyed, independent of what had already been expended thereon (*a*).

Where the condition of a policy of a mutual insurance company provides that it shall be optional with the company to pay the loss or damage either in money or by rebuilding such real property, or by repairing, the performance of the stipulation as to rebuilding is optional with the company, and cannot be enforced against them, for indemnifying the assured in this way is at variance with the principle and provisions of the act as to mutual insurance companies, Con. Stat. U. C. c. 52. It seems that independent of the statute the Court of Chancery would not in an ordinary case enforce specific performance of such a stipulation for the proper remedy for non payment of the loss is an action at law (*b*).

When the by-laws of a company provide, that no insurance shall be effected for more than two-thirds of the value of the property, a condition as to rebuilding would be inconsistent with this by-law, for how could the insurers reinstate the premises, and thereby restore them in their full value, when they could only by the terms of their contract be liable to the insured for two-thirds of the value. In case of a mutual company, the statutes regulating such corporations provide means for ascertaining the amount of actual loss sustained in each case, and point out the mode in which it may be recovered; and it is doubtful whether the premium notes of the insured can be made use of for procuring funds for satisfying a collateral contract, which the statutes give the company no power to enter into (*c*).

(*a*) *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429.
(*b*) *Home D. M. Ins. Co. v. Thompson*, 1 E. & E. Reps. 247.
(*c*) *Home D. M. Ins. Co. v. Thompson*, 1 E. & A. Reps. 255-6.

Where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do. Where, therefore, the policy provides that the insurer instead of paying the amount of the loss may reinstate the premises and they elect to do so, they are bound to reinstate the premises according to their election, although reinstatement becomes impossible by reason of the act of a third party, provided the reinstatement is lawful at the time it is undertaken, and continues lawful to the time of action brought (*a*).

In the above case, the erection of the building was prohibited by the municipal authorities. To meet such a case as the above, a condition is sometimes inserted, that the insurers, when prohibited from reinstating, may pay such sum as would be requisite to reinstate if no prohibition had intervened.

When a fire occurs the insurers, it would seem, have a right to enter upon the premises for the purpose of ascertaining the damage and when it is necessary to retain possession of them for a reasonable time; but if they retain possession for an unreasonable time they will be liable in damages to the insured (*b*).

In some cases the right to enter on the premises is given by an express condition of the policy, and when such is the case the condition will of course govern the rights and liabilities of the parties.

The insurers, on paying the amount of the loss, have a right to an assignment from the insured of any right of action which the latter may have against a third person for his wrongful act in causing the loss. The insurers in such case are entitled to be subrogated in the rights and actions of the insured, and the fact that the amount insured is less than the total damage will not disentitle the insurers to

(*a*) *Brown v. Royal Ins. Co.*, 1 E. & E. 853.

(*b*) *Bunyon on F. Ins.*, 45; *Oldfield v. Price*, 2 F. & F., 81.

recover the amount they have paid in an action against the wrong doer (*a*).

In some cases the right of subrogation is given by an express condition of the policy.

But where the interest of a mortgagee in possession has been insured *eo nomine*, at his own expense, the insurers, in case of a loss by fire before the mortgage debt is paid, cannot upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them, and to be subrogated to the rights and remedies of the insured under the mortgage (*b*).

Where a mortgage interest is insured and on a loss occurring the insurers pay the amount to the mortgagee they will be entitled to an assignment of the mortgage (*c*).

If, after insurance, the insured sell the property to another party, he can only recover to the amount of the purchase money unpaid at the time of the fire, and upon payment of his claim by the underwriters, the latter will be entitled to all the securities held by the assured as against the vendee (*d*).

Where explosions by gas are protected by the policy, and a loss occurs from the negligence of the gas company, the insurers will be responsible, but the primary liability is that of the gas company, and, if the insured enforces his claim against the insurers, they will be entitled to stand in his place and recover in his name compensation from the gas company (*e*).

An insurance company having paid a loss on a dwelling house, caused by sparks from a locomotive, and for which loss a railroad company was liable. *Held*, that the assured might

(*a*) *Quebec F. Ins. Co. v. Molson*, 1 L. C. R., 222.

(*b*) *Suffolk F. Ins. Co. v. Boyden*, 9 Allen, Mass., 123.

(*c*) *Burton v. Gore D. M. F. Ins. Co.*, 12 Grant, 170; see also *Crawford v. St. Lawrence Ins. Co.*, 8 U. C. Q. B., 135.

(*d*) *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385.

(*e*) *Mose v. Hastings Gas Co.*, 4 F. & F. 324; *Bunyon on F. Ins.* 40.

in the first place apply to either the railroad company or the insurance company ; that if he first applied to the railroad company, his claim on the insurance company would be diminished by the amount received from the former ; that if he first obtained indemnity for his loss from the insurance company, the latter was subrogated to his rights as against the railroad company, and might bring an action at law in his name against it, and he could not, by the execution of any release, discharge the railroad company from their liability (*a*)

Where the owner of realty insures and then sells the property on condition, that the vendee insures the property for the benefit of the vendor, and to secure the unpaid purchase money ; if the vendee insures pursuant to the agreement, and the insurers, on a loss happening, pay the amount to the vendor, the unpaid purchase money will be reduced by the amount paid (*b*).

Reinsurance is a valid contract at the common law, and there is no difference in principle between reinsurance against fire and reinsurance against loss by perils of the sea (*c*).

Reinsurance was formerly prohibited in England, by the Statute 19 Geo. II., c. 37 (*d*). This statute is now repealed, and reinsurance is extensively practised there. In Canada, the charters of most mutual companies expressly allow reinsurance to be made (*e*) ; and in this country, reinsurance is practised *ad libitum* by proprietary as well as mutual companies.

The clause as to double or other insurance is in operative in a policy of re-insurance, unless the re-insured has made other re-insurances, for the clause is held to refer

(*a*) *Hart v. Western R. R.*, 13 Met. (Mass) 99.

(*b*) *Leclaire v. Crasper*, 5 L. C. R. 487.

(*c*) *New York B. F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend, (N.Y.) 359.

(*d*) See *Andree v. Fletcher*, 2 T. R. 161 ; 3 T. R. 266.

(*e*) See 27 & 28 Vic. c. 38, s. 8 ; (Ont.) 31 Vic. c. 32 s. 4 ; See also (Dom.) 34 Vic. c. 9 s. 4, as to life companies.

entirely to double re-insurances on the same interests, and if there be no other re-insurances the re-insurer is liable for the amount of loss within the policy.

When the policy of the original insured contains provisions for *contribution* between the several insurers, and there is more than one policy on the subject of insurance the re-insured can nevertheless recover from the re-insurers any loss he has to pay within the amount of his policy.

In the contract of re-insurance the condition of the policy requiring notice and preliminary proofs in case of loss is complied with when the first underwriter transmits to the re-insurer such notice, and the proofs made by the original insured.

It has been held that a total loss under a reinsurance policy providing for the estimation of damage according to the cash value of the property is the whole amount reinsured, not exceeding the whole value of the reinsured, subject in the policy of reinsurance, and not the proportion, which the amount reinsured bears to that originally insured. The party reinsured can, therefore, recover the whole amount reinsured, unless a *pro rata* clause is inserted in the contract of reinsurance.

The claim of the reinsured rests upon their *liability* to pay the loss to the original insured, and not upon their greater or less ability to pay it in full, and, therefore, the re-insured can collect of the reinsurer before payment to the original insured ; and though the company reinsured becomes insolvent, the reinsurer is not released from payment in full, by reason thereof (*a*).

Reinsurers may make every defence the reinsured could then make, when loss remains unadjusted between reinsured and party originally insured, on the terms and conditions of the policy, and where the reinsured is not liable on the

(*a*) *Eagle Ins. Co. v. Lafayette, Ins. Co.*, 9 Ind. 443 ; *Home v. Mut. Safety Ins. Co.*, 1 Sandf. (N. Y.) 137.

original policy, a recovery cannot be add against the reinsured (*a*).

The plaintiffs premises were insured in the London & Liverpool Company, from the 2nd October 1865 to 2nd October 1866. Before the term expired, he received notice from W. the agent at Newcastle, that this company would renew the policy on the same terms, and accordingly he paid W. the premium money, and got his receipt. A, the general agent at St. John, declined to renew the policy, and paid the premium to defendants, who issued a policy (taking the description of the premises from the London & Liverpool's book), dated the 16th October, 1866, but in the body of it, insuring from the 2nd October, 1866, to the 2nd October, 1867. The premises were destroyed by fire on the 13th October, 1866, before the policy issued; but the plaintiff did not know that he was insured by defendants, until he received the policy from W, who also acted for them. It was held, that this amounted to a reinsurance and there being no fraud, the plaintiff was entitled to recover; it was held also, that the policy related back to the 2nd, though dated on the 16th October, after the loss occurred (*b*).

(*a*) *Eagle Ins. Co. v. Lafayette Ins Co.*, 9 Ind. 443.

(*b*) *Giffard v. Queen Ins. Co.*, 1 Hannay 432.

CHAPTER X.

THE PROCEEDINGS AT LAW UPON POLICIES.

The possession of an insurable interest will not alone give a right to recover; there must also be a contract of insurance between the person having such interest, or his assignor or trustee, and the company. Thus, where a marine policy is made in this form: The . . . Insurance Co. of, etc., on account of A B, loss, if any, payable to C D, do make insurance, etc., it is held that the contract is made with A B, and that making the loss payable to C D does not constitute him the party insured, and therefore he cannot recover upon the policy in his own name. But the insertion, after the name of A B in the policy, of the words "for or in the name of all persons interested," etc., or "for whom it may concern" would enable C D or any other person, whether named in the policy or not, to recover on shewing an insurable interest, and that he was the person on whose account the insurance was *bona fide* intended to be made. So, if the words "as broker," or "as agent," were inserted after A B's name, parol evidence would be admissible to shew the right and interest of an undisclosed principal who could sue upon the policy. But if A B described himself as the agent of a particular person the policy, by its necessary construction would enure only to protect an interest of the party thus named as principal (*a*).

The policy must shew in whose favor or for whose benefit and use it is made, either by expressly naming the parties, or by implication, as in policies, "for whom it may concern," as no one but the party thus specifically named or intended by the general words has any rights under the policy.

(*a*) *McCollum v. Ætna Ins. Co.* 20 U. C. C. P., 289; see also *Richardson v. Home Ins. Co.*, 21 U. C. C. P., 292.

When there is an express contract of insurance with a particular person named in the policy, the action must be brought in the name of such person, although the loss is by the terms of the policy made payable to another (*a*).

In this case the policy did not contain the words "for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all."

Without such a clause as the latter no one can take advantage of the policy except the party expressly named in it (*b*).

Under the plea of non-assumpsit the plaintiff must establish a contract by the insurers with himself, and to do this he must show that he is the person named in and by the policy insured, or the person benefically interested in the insurance in a way that entitles him to sue upon the policy. Where the name of C D only is mentioned as the assured, though by the policy the loss is payable to A B; that only means payable to A B as agent or on behalf of the party on whose account the policy is made (*c*).

An endorsement in writing on a fire policy, signed by the company, expressing their consent that the loss, if any, is to be payable to the order of A B who is no party to, nor is his name mentioned in the contract, does not entitle A B to recover on the policy in his own name, and he could maintain no action except as assignee, and in the absence of any order by A. B. the loss would under the contract be payable to the party named in the body of the policy as the assured. It would, therefore, be sufficient for a declaration on such a policy to allege that the loss was not paid to the insured, nor to A B, and as the endorsement gives A B no legal interest in the property, it does not prevent the

(*a*) *Every v. Prov. Ins. Co.*, 10 U. C. C. P. 20.

(*b*) *Ib.* 23.

(*c*) *Orchard v. Ætna Ins. Co*, 5 U. C. C. P. 445; *McCoullm v. Ætna Ins. Co.*, 20 U. C. C. P. 289; *Every v. Pro. Ins. Co.*, Supra.

assured from maintaining an action in his own name, nor is it necessary to aver any order from A B in favor of the insured (*a*)

Where property was insured in the name of O, but the policy contained the following clause: "Loss, if any, payable to the order of B, if claimed within sixty days after proof, his interest therein being as mortgagee;" it was held, that B must be treated as the party insured, and that he could maintain an action on the policy in his own name. It was held also, no objection to B's recovery, that the preliminary proofs were furnished by him, and not by O (*b*).

The ground of the decision in this case was, that B was mortgagee, and by the terms of the mortgage, insurance was to be made for his benefit, and that the premium was in fact paid by him.

If a mortgagor procure insurance in his own name, but with a stipulation that the amount of loss, if any, shall be paid to the mortgagee, a suit on the policy may be maintained in the name of the mortgagee.

If the property is alienated by way of mortgage after the date of the policy, and the policy is ratified and confirmed to the mortgagee, under the Con. Stats. U. C. c. 52, s. 30, the latter may maintain an action thereon in his own name (*c*).

Where, after the making of the policy, the insured mortgages the property to one person, but the mortgage is not ratified and confirmed to the mortgagee, as required by the Con. Stats. U. C. c. 52 s. 30, so that the policy becomes void, a subsequent mortgage by the insured to another person not claiming under the first mortgagee, will not set up the policy, though it is assigned to the second mortgagee and ratified and confirmed to him pursuant to the statute (*d*).

(*a*) *Ketchum v. Protection Ins. Co.*, 1 Allen 136.

(*b*) *Brush v. Ætna Ins. Co.*, 1 Oldright, 459; see also *Manning v. Bowman*, Sup. Ct. (N.S.) T. T. 1872.

(*c*) *Kreutz v. Niagara Dis. M. F. Ins. Co.*, 16 U. C. C. P. 573; *Burton v. Gore Dis. M. Ins. Co.*, 14 U. C. Q. B. 342.

(*d*) *Burton v. Gore D. M. F. Ins. Co.*, 14 U. C. Q. B. 342.

Where a policy is issued to two persons jointly, both should join in bringing an action for a breach of the contract, and the omission to join them is a good defence. If the one partner has assigned all his interest in the policy to the other, still he must proceed in the name of the original parties, unless he can show notice of the assignment to the company, and of their assent thereto (*a*).

If one partner insures the partnership property in his own name, for the benefit of the firm, he may sue alone in his own name on the joint account of himself and his co-partner (*b*).

Where the plaintiff, acting as agent for a third party, procures an assurance on a vessel belonging to the latter, and by the terms of the policy the loss is to be paid to the plaintiff, he may maintain an action thereon in his own name for the benefit of his principal, the latter being interested in the vessel (*c*).

Where an insurance is made in the name of the agent for the benefit of the principal under a prior authority or subsequent adoption by the latter, the agent cannot recover in his own name and for his own benefit on the policy (*d*).

An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns (*e*).

But when the policy is ratified and confirmed to the assignee under the Con. Stats. U. C. c. 52 s. 30, he may sue thereon in his own name (*f*).

Where a renewal receipt has been issued to the assignee of a policy, and he has paid the premium, an action of assumpsit, will lie by him as on an express agreement and

(*a*) *Tate v. Citizens M. F. Ins. Co.*, 13 Gray, Mass., 79.
(*b*) *Dunlop v. Ætna Ins. Co.*, 2 U. C. C. P. 252.
(*c*) *Dimock v. New Brunswick M. Assce. Co.*, 1 Allen, 398.
(*d*) *Cusack v. M. Ins. Co.*, 6 L. C. J., 97.
(*e*) *Beemer v. Anchor Ins. Co.*, 16 U. C. Q. B., 485. See ante p. 197.
(*f*) *Kreutz. v. Niagara Dis. M. F. Ins. Co.*, 16 U. C. C. P., 131; *Storms v. Canada F. M. Ins. Co.*, 22 U. C. C. P., 79.

promise of the insurance company to pay him for any loss which may occur (*a*).

Where property insured has been maliciously and wilfully burnt by a third person; no action can be sustained by the insurance company, which had paid the loss, against such third person, in its own name; and the statute inflicting against the incendiary a penalty of three times the loss in favor of the party injured will not give such right of action (*b*).

In such case as the foregoing the suit must be brought in the name of the owner of the property for the use of the insurer. The different rule applied in cases of marine insurance rests upon the doctrine of abandonment and subrogation of the insurer to the rights and title of the insured, a doctrine which has no existence in cases of fire insurance (*c*).

The Statute of Canada 29 Vic., c. 28. s. 7., enacts that the person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall on loss or damage by fire happening, have the same advantage from any then subsisting insurance, relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor, in respect of his interest under the lease, or in the property, or by any person claiming under him, but not effected in conformity with the covenant as he would have from an insurance effected in conformity with the covenant. Although B has a covenant from A, the original insurer, to insure the property against loss or damage by fire, this section will not authorize A to sue for his own benefit, and the benefit of B. if neither A nor B had any interest in the insured property at the time of the fire (*d*).

(*a*) *Peoria M. & F. Ins. Co. v. Hervey*, 34 Ill., 46.
(*b*) *Rockingham M. F. Ins. Co. v. Bosher*, 39 Me., 253.
(*c*) *Peoria Marine F. Ins. Co. v. Frost*, 37 Ill., 333.
(*d*) *Smith v. Prov. Ins. Co.*, 18 U. C. C. P. 223.

A contract of insurance being a mere personal contract, in no way attached to, or running with the realty, does not pass either to the heir-at-law, or the grantee of the property insured. The executor or administrator is the only person who can take the contract, and enforce it. No other person except the insured can have any interest in or right to sue upon the policy without a valid assignment thereof to him (*a*).

In general the contract is by its express terms limited to the personal representatives, the operative words of the contract in the body of the policy usually being "to make good unto the insured his executors, administrators or assigns" all such loss or damage by fire, etc.

Where, by the terms of a life policy the insurance money is not payable until surrender by the executor of the assured, but the latter in his lifetime has pledged it with another person to secure certain claims, and the pledgee at the time of the death is the legal holder of the policy, and cannot be compelled to transfer it except on payment of his claim; the executor cannot recover against the company, except by a surrender to the company of the policy, in the usual way (*b*).

A condition is inserted in all policies to the effect, that no suit or action against the company for the recovery of any claim under or by virtue of the policy, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in case any suit or action shall be commenced against the company after the expiration of the said twelve months, the lapse of time shall be deemed and taken as conclusive evidence against the validity of the claim. A failure to comply with this condition constitutes a complete bar to the action (*c*).

(*a*) *Wyman v. Prosser*, 36 Barb. (N. Y.) 368; see, however, *Wyman v. Wyman*, 26 (N. Y.) 117.

(*b*) *Conway v. Britannia L. Assce. Co.*, 8 L. C. J. 162.

(*c*) *Cornell v. Liverpool & L. Ins. Co.*, 14 L. C. J. 256.

Various cases have established that a condition of this character is reasonable and valid (*a*).

When a policy contains such a condition, the general statute law of the country as to limitations has no application, and the action must be commenced within the period limited by the condition (*b*).

Generally the Act of the Legislature incorporating a mutual company contains a clause limiting the time within which all actions must be brought (*c*).

It seems that where the limitation rests only on a condition of a policy it operates as a contract only, and that the limitation fixed by it must, upon the principles governing contracts, be more flexible in its nature than one fixed by statute and liable to be defeated or extended by any act of the insurers, which prevents the action being brought within the prescribed period (*d*). And it seems the condition will not be enforced when so necessarily inconsistent with the nature of the interest insured as to render a recovery unattainable by the exercise of due diligence (*e*).

This condition will not apply, if after payment of the premium, the granting of an interim receipt and acceptance of the risk, the policy is wrongfully withheld by the company (*f*).

But, the fact that the policy is not in the possession of the plaintiff, is not in all cases an answer to the defence founded on the condition.

To an equitable replication setting up, that when the loss occurred, the defendant had not issued a policy to the plaintiff, although he had previously effected an insurance with them, and that, although requested, they refused to execute

(*a*) See *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Roach v. New York & Erie Ins. Co.*, 30 N. Y., 546; *Woodbury, S. B. v. Charter Oak Ins. Co.*, 31 Conn., 518; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill., 466.

(*b*) See *Brown v. Roger Williams Ins. Co.*, 7 R. I., 301.

(*c*) See 29 Vic., c. 37.

(*d*) *Peoria M. Ins. Co. v. Hall*, 12 Mich., 202.

(*e*) *Longhurst v. Star Ins. Co.*, 19 Iowa, 364.

(*f*) *Penley v. Beacon Assce. Co.*, 7 Grant, 130, 5 U. C. L. J. 213.

the policy until after the commencement of the action, and that in consequence of such delay, he was prevented from suing within six months, as required by the conditions of the policy; it is a good answer to shew, that prior to the plaintiff first effecting the insurance mentioned, he had held a large number of policies from defendant's office on the property, which policies all contained the condition as to actions being brought within six months from the time of the loss, that it was one of the usual conditions with defendants, as plaintiff well knew, that the insurance was effected on the same terms and conditions as all the others, that before the expiration of the six months the policy was executed and ready to be delivered to plaintiff, of which plaintiff had knowledge, and that the defendants never refused to execute the policy, and did not withhold it to prevent the plaintiff bringing his action (*a*).

Where an action at law was brought on a policy within the period of limitation fixed by such policy, which it was found could not be sustained by reason of a mistake in the form of the policy, and a bill in equity was brought while that suit was pending, and after the period of limitation had expired, for the correction of the policy and for an injunction against the defence set up in the action at law.

Held, that the suit in equity was not barred by the expiration of the time limited (*b*).

If the insured regularly commences his action before the expiry of the time limited, and is non-suited, a subsequent action commenced after the expiry of the time, will be too late (*c*).

The clause as to limitations is a condition subsequent, and the right of action having once fairly vested can only be devested under this condition by subsequent lapse of time, and therefore becomes a matter of defence—the subject of a

(*a*) *Hickey v. Anchor Assce. Co.*, 18 U. C. Q. B. 433.

(*b*) *Woodbury Savings Bk. v. Charter Oak Ins. Co.*, 31 Conn. 518.

(*c*) *Wilson v. Ætna Ins. Co.*, 27 Vt., 99.

plea; and it need not it the first instance be shown in the declaration that the condition was complied with (*a*).

Under such a condition time does not begin to run until the cause of action accrues and where the condition requires the action to be brought within twelve months "next after the cause of action shall accrue," this expression refers to the period at which the plaintiff is entitled to commence his action, and if, by the terms of the policy, the loss is not payable until the expiry of a specified number of days, or until compliance with certain conditions, the cause of action does not accrue until the loss is payable, although the loss has occurred before. Where, therefore, the policy provided that payment of losses should be made in sixty days after the loss should have been ascertained and proved, and the defendants pleaded that the *fire took place* more than twelve months before the commencement of the suit; the plea was held bad on demurrer (*b*).

Where a condition provides that loss shall not be paid until sixty days after the loss has been ascertained and proved, the sixty days do not begin to run until *all* proofs, declarations, and certificates are given in, and no action can be maintained until the sixty days have expired, although the defendants have previously declared their intention to resist payment (*c*).

It is held in the United States when the policy provides that "payment will be made in sixty days after loss, proof, and adjustment thereof," that an action will lie within the sixty days if the insurers refuse to adjust the loss (*d*).

In the case of re-insurance, if the policy by which the

(*a*) *Ketchum v. Protection Ins. Co.*, 1 Allen, 136; *Brady v. Western Ins. Co.*, 17 U. C. C. P., 597.

(*b*) *Lampkin v. Western Assce. Co.*, 13 U. C. Q. B., 361.

(*c*) *Hatton v. Prov. Ins. Co.*, 7 U. C. C. P., 555; see *Hochster v. De La Tour*, 2 E. & B., 678; *Frost v. Knight*, L. R. 5. Ex., 322.

(*d*) *Phillips v. Protection Ins. Co.*, 14 Mo., 220; *Indiana Ins. Co. v. Rutledge*, 7 Ind., 25.

re-insurance is effected provides that no action shall be brought unless commenced within twelve months after the loss or damage, this latter expression signifies the loss or damage to the subject insured and not the loss or damage to the party re-insuring, by reason of his having to pay the loss. The action must therefore be brought within twelve months after the loss of the subject insured, irrespective of the time of payment by the party re-insured (*a*).

The Statute of Canada, 29 Vic. c. 37, s. 3, provides, that no action shall be brought against a mutual insurance company, except within one year after the happening of the loss or damage, in respect of which such suit is brought, saving in all cases the rights of parties under legal disability.

An imprisonment for a misdemeanor will not create a "legal disability" within the statute, so that it will not run against the insured, as provided in this clause, for, notwithstanding the imprisonment, the party might maintain an action. It seems, however, an imprisonment for treason or felony would create such a disability, for in such cases the party could not sue (*b*).

The clause as to limitation may, in some cases be waived by the acts of the company or their agent. Thus, where a fire policy not under seal contained a six months limitation, and within this time, and before breach of the condition, plaintiff presented his claim for loss, when it was agreed by parol between him and one D, acting for defendants, that if plaintiff would not prosecute his claim until S returned from England, defendants would pay the same and take no advantage of the limitation clause above referred to. The insurance had been effected by and through D, and the premiums paid to him or to S, who was associated with him in the management of the company, and the policy signed by D as "manager for the said Co. in Ontario,"

(*a*) *Prov. Ins. Co.* v. *Ætna Ins. Co.*, 16 U. C. Q. B., 135.

(*b*) *Tallman v. Mutual F. Ins. Co.*, 27 U. C. Q. B. 100; see *Bullock v. Dodds*, 2 B. & Ald., 258.

under an express authority from the directors, two of whom subscribed their names to the same, opposite a seal with the name of the company upon it. The secretary also signed his name to the authority. It also appeared, that after the expiration of the six months there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff. *Held*, that D had power to bind the company as their agent, and that what had taken place between him and plaintiff, amounted to a waiver in law of the six months condition, and that the plaintiff was, therefore, entitled to recover (*a*).

The condition although assented to by the parties, operates as a forfeiture of the right of action. It should, therefore, be construed strictly and slight evidence of waiver will, as in other cases of forfeiture be sufficient to defeat its application (*b*).

Where insurers, by holding out to assured hopes of an amicable adjustment, have themselves caused the delay, they cannot take advantage of a stipulation in the policy, that the suit shall be brought within twelve months next after a loss and damage, or claim shall be barred (*c*).

Where a company is incorporated by Statute of Ontario, and has its chief place of business in that Province, if an action is brought on a policy issued there, service of process on an agent of the defendants in Quebec, will not be sufficient if such agent is only an agent for specific purposes, and has not charge of an office belonging to the company for the transaction of its business generally, and without limitation (*d*).

In this case the defendants act of incorporation prescribed a mode of service on foreign corporations which had not been followed. As to service on the company the 31 Vic. c. 48 s. 10, requires all companies to which the provisions of the act

(*a*) *Brady v. Western Ins. Co.*, 17 U. C. C. P. 597.
(*b*) *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552.
(*c*) *Grant v. Lexington Ins. Co.*, 5 Ind. 23.
(*d*) *Macpherson v. St. Lawrence I. M. Ins. Co.*, 5 L. C. R. 403.

apply to file in the office of either of the Superior Courts of law or equity in that one of the Provinces in which it has its chief agency, a power of attorney from the company to its agent in Canada, authorizing him to receive service of process, and service as provided for by the act is declared to be sufficient.

A suit on a fire policy may be tried by a jury (*a*).

In declaring on a policy of insurance it is necessary to allege the interest of the party or parties on whose behalf the insurance is effected, at the time of the insurance and of the loss. When, therefore, an action was brought by A, and the declaration contained statements purporting that B was also a party insured, and that the action was brought on his behalf, the declaration was held bad for want of a distinct averment that B was interested in the property at the time of insurance and at the time of the loss. If A had been solely interested in the policy nothing should have been alleged as to B, and if B had been equally or jointly interested it should have been distinctly so stated and his interest should have been averred (*b*).

Though the existence of the interest at the time of the loss must be alleged, it need not be particularly specified (*c*).

On this point the rules of court provide that in actions on policies of insurance the interest of the assured may be averred thus: That A, B, C, and D, or some or one of them, were or was interested," etc., and it may also be averred that the insurance was made for the use and benefit and on the account of the person or persons so interested.

When the plaintiff, in his declaration, alleges that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured, and the defendant, in his plea, alleges that he was

(*a*) *McGillivray v. Montreal Assce. Co.*, 5 L. C. R. 406.

(*b*) *Dunlop v. Ætna Ins. Co.*, 2 U. C. C. P., 252; see also *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P., 515.

(*c*) See *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P., 515; *Bell v. Janson*, 1 M. & S. 201; *Routh v. Thompson*, 11 Ea., 428.

not at *the time of the loss* interested as alleged, the plaintiff must, nevertheless, prove his interest to the full extent insured at the date of the policy, for such interest is not admitted by the omission to traverse it; and in the absence of any proof of the extent of his interest he would be entitled only to nominal damages. The test as to the extent to which an admission of an averment by not traversing it, goes, is: assume that the averment was precisely traversed, what would the plaintiff have to prove to entitle him to succeed on the issue? The admission goes to the extent of producing the same result as a failure of evidence on a precise traverse (*a*).

In pleading non-compliance with a condition precedent in a policy of insurance the plaintiff must shew that the defendant either prevented the performance or rendered it impossible or unnecessary by his own act or neglect. Where, therefore, the policy sued on guaranteeing to the extent of $20,000 the honesty and care of one W while in the plaintiff's employment as cashier, contained a condition that it should be void on the neglect of the plaintiffs to make known to the directors of the society in Canada any act or omission of W discovered by them giving a claim under it. In declaring on this policy the plaintiffs alleged that while in their employment a sum exceeding $20,000 was entrusted to W to be safely kept in the safe at their head office, of which $10,000 was lost owing to his negligence in regard to its custody, and they alleged, as an excuse for not giving the notice, that defendants had ceased to have or to appoint directors in Canada. Defendants pleaded that before the alleged neglect of W they had ceased to carry on business or have directors in Canada, and had appointed one R to act for them for the purpose of paying policies already granted and receiving all notices required, of which the plaintiffs had notice, but that they gave no

(*a*) *Clark v. Western Assce. Co.*, 25 U. C. Q. B., 209; *King v. Walker*, 2 H. & C., 384.

notice to R or to the directors of the company in any way. *Held*, on demurrer, that the plea was bad, for the defendants had by their own act deprived themselves of the benefit of the condition, and rendered compliance with it impossible, and they could not insist upon notice to R. *Held* also, that the averment of W's neglect in the declaration was not too general, and that the excuse for non-compliance with the condition was sufficiently stated (*a*).

By the Common Law Procedure Act, the performance of conditions precedent may now be averred generally. Where, after the passing of this act, a policy of insurance was, in the old form, containing specific averments of the performance of conditions precedent, it was referred to the master to strike out the superfluous matter (*b*).

Where the plaintiff in his declaration avers, that he has performed a condition precedent, he is bound to prove it, though the performance has been dispensed with. If he means to insist on the latter fact, he should allege it specially (*c*.

Although it is a general rule, that where the language of a pleading is ambiguous, it shall be taken most strongly against the pleader, yet, where the court sees from the whole allegations, that the pleader must have meant his language in a sense not against him, it shall not be taken in a sense against him, and the test of the sense in which it is intended by the pleader, is its making or not making the suit erroneous; that, when taking it in one sense would make the suit erroneous, and taking it in another sense would make it not erroneous, it shall be taken in the latter sense. Thus, where there was no allegation in the bill of the performance of conditions precedent, but it did not appear from the scope and intent of the pleadings that there were any conditions precedent, it was held, that the

(*a*) *Royal C. Bank v. European Ins. Co.*, 29 U. C. Q. B.. 579.

(*b*) *Patterson v. Prov. Ins. Co.*, 2 U. C. P. R. 164.

(*c*) *McFaul v. Montreal I. Ins. Co.*, 2 U. C. Q. B. 61

bill was good (*a*). In this case, the allegation was: "The company thereupon became liable to pay to the said (the assured), the full amount of the said policy, under the terms and conditions thereof;" and it was held, that this was not a sufficient allegation of the performance of conditions precedent, and if any such were shewn on the face of the bill, a specific allegation of their performance was necessary, otherwise there would be no distinct averment, of all the facts necessary to constitute a title to relief (*b*).

It is a fundamental rule of pleading that facts and not conclusions of law to be drawn from those facts are to be pleaded, and it is for the court to draw conclusions upon the facts as stated to them. On this principle a plea setting up a forfeiture should explicitly show all the facts by the act or law necessary to work the forfeiture. Thus in the case of a mutual policy, a plea alleging that the policy is void for non-payment of an assessment on a premium note, must show that the assessment was made strictly in conformity with the statutes in that behalf; and it is not sufficient to allege merely that the assessment is lawfully made and levied (*c*).

A condition forming a defence to an action on a policy, but having no necessary or immediate connection with, nor forming a part of the contract to pay the insurance money, should not, in the first place, be set out and negatived in the declaration. Thus, if a condition provided that all actions should be brought within six months, the bringing of the action within six months is not such a condition precedent to the plaintiff's right of action, as to necessitate its averment in the declaration, and it seems, notwithstanding this averment that the defendant would have to set up by plea the non accrual of the cause of action within the limited time (*d*).

(*a*) *Workman v. Royal Ins. Co.*, 16 Grant 185.
(*b*) See *Houghton v. Reynolds*, 2 Hare, 264; *Walburn v. Ingilby*, 1 M. & K. 61.
(*c*). *Crowley v. Agricultural M. Assce. Co.*, 21 U. C. C. P. 567.
(*d*) *Brady v. Western Ins. Co.*, 17 U. C. C. P. 597.

The Con. Stat. U. C. c. 22 s. 79, enacts that a party pleading in answer to any pleading, in which any document is mentioned or referred to, may set out the whole or any part thereof, which is material, and the matter so set out shall be taken to be part of the pleading in which it is set out.

Under this statute, if defendant in his plea refers to the condition of a policy, the plaintiff may in his replication set out the condition, but after having set out the condition he cannot demur to the plea on account of the inconsistency between that plea and the policy, because the instrument is not upon the record as part of the plea (*a*).

In the case of an incorporated insurance company, it need not be alleged in pleading that the policy is under their corporate seal for an allegation that a policy of insurance was made by a corporate body imports *ex vi termini* that it was sealed with its corporate seal, inasmuch as it is the ordinary mode in which such a corporate body enters into formal contracts (*b*).

It will be a departure, fatal on general demurrer, for the plaintiff first to sue upon a specialty, and then in a subsequent pleading to allege that there was no such specialty in existence when he sued. Thus, if the plaintiff declares upon a policy as duly sealed and executed by the defendants, a replication on equitable grounds, alleging, that when the loss occurred the defendants had not issued a policy to the plaintiff, although he had previously effected the insurance with them, and that the defendants refused to execute the policy until after the commencement of the action, although frequently requested by the plaintiff, is bad, as a departure from the declaration (*c*).

Where the declaration alleged, that the plaintiff sued as

(*a*) *Noad v. Prov. Ins. Co.*, 18 U. C. Q. B., 586 ; *Sim v. Edmonds*, 15 C. B. 240.

(*b*) *Workman v. Royal Ins. Co.*, 16 Grant 185 ; see, also, *Young v. Austin*, L. R. 4 C. P. 553.

(*c*) *Hickey v. Anchor Assce. Co.*, 18 U. C. Q. B. 433.

well for the benefit and on behalf of A B (who, as mortgagee of the plaintiff, was entitled to the benefit of a covenant from the latter, to insure the property), as on his, the plaintiff's own behalf; and the replication alleged, in answer to a plea setting up a sale and conveyance of the insured property, that the conveyance was only by way of mortgage, and that plaintiff was entitled to a reconveyance upon paying the moneys secured by the mortgage. *Held*, that the replication did not shew that the plaintiff did not bring the action on his own behalf, and that the averment in the declaration connected with section 7 of the 29 Vic. c. 28, did not shew that the action was brought on behalf of the party entitled to the benefit of the covenant to insure, and that, therefore, the replication was no departure from the declaration (*a*).

Where a plea framed under the Con. Stats. U. C. c. 52, s. 27, alleged that the property insured was incumbered by a mortgage, and the plaintiff did not truly state his title to the land in his application, whereby the policy became void and the plaintiff traversed only the allegation as to the incumbrance, leaving that as to the statement of title unanswered. It was held that the replication was an answer to the plea; that the latter part of the plea might be read as qualifying the former, and not as a distinct statement that the plaintiff did not truly state his title, for by the statute the title need not be shewn when the plaintiff has a fee simple unincumbered, and the declaration did not shew that he ever made any statement of title, nor did it disclose an estate in the plaintiff which made it obligatory upon him by the statute to state his title respecting it. The plea, therefore, read as above, was in effect an assertion that the plaintiff's title was incumbered by the mortgage, and being so incumbered he did not state this fact truly in his application according to the statute. The traverse of the incumbrance was, therefore a sufficient answer to the plea (*b*).

(*a*) *Smith v. Prov. Ins. Co.*, 18 U. C. C. P. 223.
(*b*) *Williamson v. Niagara Dis. M. F. Ins. Co.*, 14 U. C. C. P., 15.

Where the condition of a policy requires that the plaintiff "shall declare on oath whether any and what other insurance or incumbrance has been made on the same property," the proper method of pleading the violation of this condition is to traverse the making of the declaration on oath. Where, therefore, a plea alleged that the plaintiff neglected to inform the defendants as to whether there was any further or other insurance on the premises, the plea was held bad, for all the plaintiff was required to do was to make the declaration on oath and not to inform the defendants of its contents or of its being made (*a*).

To an action on a policy of insurance on a steamer against fire, defendants pleaded in their sixth plea that by the policy the plaintiffs warranted that the total amount of said insurance on said steamer should not exceed three-fourths of her declared value, otherwise, the policy should be void, and that the insurance on her far exceeded three-fourths of said value. The plaintiffs replied that the warranty referred to was to the effect that the total amount of insurance *against fire* should not exceed three-fourths of the declared value, and that such insurance did not exceed said value. *Held* on demurrer a good replication, and that the defendants might have rejoined, reaffirming the condition to be as they had alleged, and denying that it was such as the plaintiffs asserted (*b*).

If the defendant plead to one count of a declaration founded on a policy, and the plaintiffs demur to that plea, the defendants cannot except to a count in the declaration to which the plea demurred to does not apply, for such count is not in the line of pleadings affected by the demurrer (*c*).

Where the declaration alleges that the vessel in consequence of injury by tempest was obliged to put into port to repair damage, and a plea in answer denies that she put

(*a*) *Williamson v. Niagara Dis. M. F. Ins. Co.*, 14 U. C. C. P., 15.

(*b*) *Noad v. Prov. Ins. Co.*, 18 U. C. Q. B. 584.

(*c*) *Date v. Gore Dis. M. F. Ins. Co.*, 14 U. C. C. P. 548.

into port for the purpose of repairing damage, but to seek another market for her cargo, and then states voyages to other ports in search of a market, the plea will be bad for duplicity. But if the plaintiff instead of demurring for duplicity answers the plea, he is bound to answer every material allegation, and a replication, alleging that the vessel put into port for repairs, and not for the purpose mentioned in the plea would be bad (*a*).

So if the declaration is framed for a constructive total loss and abandonment of the cargo, and the plea alleges that after the vessel arrived at Barbadoes (where, according to the declaration she had put in to repair damage) she sailed again without any examination into the state of her cargo, in search of a market to Trinidad, and thence to St. Thomas, where the cargo was sold by the master, who as super cargo was the plaintiff's agent, a replication asserting that the master in the exercise of a wise discretion, abandoned the voyage at Barbadoes, and that the authority entrusted to him by the plaintiff was there ended, will be bad for it does not answer the allegations in the plea that after the arrival of the vessel at Barbadoes, the voyage and the authority over the cargo were resumed (*b*).

An averment in a declaration that at the time of the loss a mortgagee of the plaintiff was entitled to the benefit of a covenant in a mortgage made by plaintiff before the making of the policy to insure the property, and that the plaintiff sued as well for the benefit and on behalf of the mortgagee as on the plaintiff's own behalf, will not vitiate the declaration (*c*).

As both the mortgagor and mortgagee have an insurable interest it is no objection to a declaration that it shews on the face of it that the plaintiff, as mortgagor, is bringing

(*a*) *Fairbanks v. Union M. Ins. Co.*, 1 James 271.

(*b*) *Ib.*

(*c*) *Smith v. Prov. Ins. Co.*, 18 U. C. C. P., 223.

the action on account of the mortgagee, to whom the policy has been assigned (*a*).

In regard to pleading a double insurance, if the plea merely allege that the property is insured in another office it will be bad, as being to general and vague. The particulars of the other insurance should be stated by shewing the date of the second insurance and with whom effected, and on what property and to what amount, and alleging the absence of notice and other circumstances bringing the case within the condition. It would be no answer to the objection that the plea is a simple denial of the alleged observance by the plaintiff of the particular condition (*b*).

Where the declaration alleges a loss to the full amount insured, the defendants in pleading an additional insurance without notice, may assume the loss to be as alleged, although the plaintiff under the allegation might recover for a partial loss; and, if it is in fact only partial, so that the notice may be given after it, the plaintiff should reply this (*c*).

Under a simple traverse of a plea setting up the violation of a condition on which the policy was to subsist, in this; that the plaintiff insured in another company and gave no notice of it, and had not the other insurance noted on the policy, it is not competent for the plaintiff to shew that he had a reasonable time within which to give the notice (*d*).

Under a plea alleging that sixty days had not elapsed between the notice and proof of loss and the commencement of the suit (as required by a condition of the policy), the defendant cannot object to the sufficiency of the proofs, but can only shew that sixty days have not elapsed after all the proofs are given (*e*).

(*a*) *Richards v. Liverpool & L. F. Ins. Co.*, 25 U. C. Q. B., 400.
(*b*) *Ramsay W. C. Co. v. Mutual F. Ins. Co.* 11 U. C. Q. B., 516.
(*c*) *Butler v. Waterloo M. F. Ins. Co.*, 29 U. C. Q. B. 553.
(*d*) *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250.
(*e*) *Rice v. Prov. Ins. Co.*, 7 U. C. C. P. 548.

The sufficiency of the proofs should be objected to by a special plea (*a*).

If a plea allege an increase of the risk, by certain means avoiding the policy within the meaning of a condition, that any increase of risk unless notified, etc., shall avoid the policy, the means alleged must be proved as laid and cannot be rejected as surplusage (*b*).

A replication is bad if on the whole matter being set out in the declaration, the latter would be bad (*c*).

The test for allowing or disallowing a replication on equitable grounds is, would the statement in the plaintiff's declaration of what he relies upon in answer to the defendant's plea, have shown that he was not entitled to recover in a court of law? (*d*).

It was held in Ontario, before the passing of the statute allowing the defendant to plead as many pleas as he might think proper, that in an action on a policy the defendants will not be allowed to plead together an equitable plea that the policy had been assigned by the plaintiff to secure a mortgage debt, and that the amount of it had been paid to to the mortgagee, and a legal plea that the plaintiff had effected a subsequent insurance without notice, contrary to a condition of the policy (*e*).

The the court will not favor an amendment of a plea for the purpose of enabling the company to set up an unjust defence (*f*).

By the 23 Vic. c. 24, it is provided, that in any suit brought in Canada on a foreign judgment, any defence set up, or that might have been set up to the original suit, may

(*a*) *Rice v. Prov. Ins. Co.*, 7 U. C. C. P. 548.

(*b*) *Ottawa F. Ins. Co. v. Liverpool L. & G. Ins. Co.*, 28 U. C. Q. B. 518; *Harris v. Mantle* 3 T. R. 307; *Martin v. Gilham*, 7 A. & E. 540.

(*c*) *Miall v. Western Assce. Co.*, 19 U. C. C. P. 274.

(*d*) *Jacobs v. Equitable Ins. Co.*, 18 U. C. Q. B. 17; S. C. 17 U. C. Q. B. 43; *Ries v. Equitable Assce. Co.*, 2 H. & N. 19.

(*e*) *Ott v. Liverpool, L. & G. Ins. Co.*, 5 U. C. P. R., 156.

(*f*) *McKenzie v. Times & B. Ins. Co.*, 17 U. C. Q. B., 226.

be pleaded to the suit on the judgment. Where a company by its act of incorporation is authorised to issue policies in foreign countries, which are to have the same force and effect, and to be suable on in the same manner as if issued in Canada; if an action is brought here on a judgment obtained against the company in the foreign country, in the absence of any allegations in the pleadings that the policy was made here, the court cannot assume that it was so made. The law, therefore, of the foreign country, will be assumed to govern the interpretation of the policy, and if by such law the assignee of the policy can sue there in his own name, he may also do so in the action on the judgment in this country. The statute allows all objections on the merits to be urged, but not such as this, affecting only the *status* of the plaintiff, and his right to assume that position. But, any defence which was set up, or which could be set up in the foreign country, can be pleaded to the action on the judgment here. Thus, non-compliance with a condition of the policy, which could have been pleaded in the original action in the foreign country, may also be set up here; and if certain facts were relied on in the foreign country, as shewing a waiver of the condition, it would be a matter of evidence whether such facts shewed a waiver by our law. The question of waiver or not would be one of procedure to be decided by our law, and if the condition was violated, the insurers would be entitled to succeed, unless a sufficient waiver was proved according to our law (*a*).

A person having an equitable and insurable interest in land of which he is in possession under a contract of purchase may prove such interest by verbal evidence.

On the dissolution of a partnership A bought from B a certain property, of which the legal title was in the latter, giving his notes for the purchase money. No deed was given by B to A, but a letter from B was produced, in which he wrote: "The whole transaction was with both

(*a*) *Waydell v. Prov. Ins. Co.*, 21 U. C. Q. B. 612.

companies in good faith, and I trust they will not be allowed to take an unprincipled advantage of any flaw that may exist or oversight that may have occurred in the transfer of the property," etc. A was in possession of the property and produced the notes and proved the purchase so far as verbal testimony could prove it. *Held* that the evidence was sufficient (*a*).

After an insurance is effected the statement or admission of an agent of the company in regard thereto will not bind the latter or have any greater effect than the evidence of an ordinary witness; for, as a general rule, the admission of the agent, in order to be binding, must be made in the course of the transaction, or at the time of making the contract (*b*).

What the agent does or says afterwards is not admissible to affect the principal. Thus, letters written by the agent of the insurers to the latter after the occurrence of the loss, cannot be used against the insurers, and such evidence would not be admissible in any case in contradiction of the express terms of the policy for parol or extrinsic evidence, is not admissible to vary or control written contracts (*c*).

The burden of proof is on the person dealing with an agent to show that an agency exists, and that the agent has the authority assumed or otherwise which estops the principal (*d*).

Where the defendants plead an alteration or addition to the premises, and allege that no notice was given thereof, whereby the policy became void under a condition contained therein, the burden of proving these facts lies on the defendants (*e*).

Opinions are only admissible where the nature of the

(*a*) *Whyte v. Home Ins. Co.* 14 L. C. J., 301.
(*b*) *Redpath v. Sun Mutual Ins. Co.*, 14 L. C. J., 90.
(*c*) *Grant v. Ætna Ins.* Co., 11 L. C. R. 128.
(*d*) *Pole v. Leask*, 8 L. T. Reps., N. S. 645; *Myles v. Thompson*, 23 U. C. Q. B. 553; *Smith v. Roe*, 1 U. C. L. J., N. S. 154.
(*e*) *Barrett v. Jermy*, 3 Ex. 535.

inquiry involves a question of science or art, or of professional or mechanical skill, and then only from witnesses skilled in the particular business to which the question relates (*a*).

Underwriters will not be permitted to express their opinions as to the nature of a risk, whether it is more or less hazardous; like other witnesses, they can only testify to facts. They do not come within the rule, that experts may testify in particular cases, and that permits men of professional science to give their opinion upon subjects connected with the arts (*b*).

The opinions of experienced underwriters as to whether the erection of a boiler-house adjacent to a building insured would increase the risk, are not competent testimony. It is not a matter of science or skill; and the jury must judge for themselves, from the circumstances in evidence, whether the risk was increased (*c*).

Testimony of an insurance expert, as to whether the premium of insurance would be increased in consequence of the owner vacating a dwelling house is incompetent (*d*).

A witness who has been many years an officer of an insurance company, and has become acquainted with the business of fire insurance, is competent to give his opinion as to the effect produced by the erection of additions to the buildings insured (*e*).

The opinion of an insurance agent as to the materiality of facts not communicated is not admissible, and such agent cannot be asked whether he would have taken the risk if certain facts had been communicated to him (*f*).

The parol testimony of an agent of the defendants is ad-

(*a*) *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. (22 Ohio) 452.

(*b*) *Merchants & Man. Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Hand, Ohio, 408.

(*c*) *Jefferson Ins. Co. v. Cotheal*, 7 Wend., N. Y., 72.

(*d*) *Joyce v. Maine Ins. Co.*, 45 Me., 168.

(*e*) *Kern v. South St. Louis M. Ins. Co.*, 40 Mo., 19.

(*f*) *Perkins v. Equitable Ins. Co.*, 4 Allen, 562; *Campbell v. Rickards*, 5 B. & Ad. 840.

missible to shew that there is a mistake in the description of the premises, as contained in the policy, where it appears that the description was wholly prepared by the agent himself, and that no misrepresentation was made by the insured. And it is immaterial that the policy was for a year before the fire in the possession of the insured, unobjected to, with a printed notice upon it, to examine it and see if it was correct, or that the diagrams to which reference was made, both in the interim receipt and in the policy, corresponded with the description in the policy (*a*).

The evidence of a director, as to the practice of the company in giving consent to other insurance is immaterial. The practice of the company, so far as within the knowledge of such director, could not bind the assured; to be binding the knowledge must be such, and so known to the parties as to lead to the belief that the contract was made with reference to it (*b*).

If the insured is charged with a fraudulent over valuation of the premises, he cannot give evidence of his good character to rebut the proof of fraud, for such evidence for such purpose is inadmissible in a civil suit (*c*).

In an action on a fire policy, it appeared that among the questions asked by the agent of the company was one:—"Had the applicant ever had any property destroyed by fire and under what circumstances? Was it insured and in what office?" to which the agent answered that the plaintiff had never before had any property destroyed by fire that he had heard of. *Held* that the plaintiff as a witness on his own behalf might be asked in cross examination as to what passed between him and the agent on this subject, but that the plaintiff's answer would be conclusive (*d*).

Particular circumstantial evidence as to the amount of a

(*a*) *Somers v. Athenæum Ins. Co.*, 3 L. C. J. 67.

(*b*) *Goodall v. New England M. F. Ins. Co.*, 5 Fost. (N. H.) 169.

(*c*) *Fowler v. Ætna Ins. Co.*, 6 Cowen 675.

(*d*) *McCulloch v. Gore Dis. M. F. Ins Co.*, 22 U. C. C. P. 610.

loss suffered by fire will outweigh the positive testimony of witnesses, where the evidence of these witnesses is not consistent, and where the inferences from the facts proved are against its truth (*a*).

Upon an issue whether plaintiff was interested in goods destroyed by fire, if a witness called by the plaintiff state, that invoices of the goods, and letters of advice purporting to be written by him at Edinburgh, were fabricated in London, after the fire, by plaintiff's direction, it is competent for the plaintiff to call other witnesses to disprove the alleged fabrication, and show the genuineness of the documents (*b*).

In an action upon a policy of insurance for a loss of a vessel, the verbal declarations of the plaintiff, the sole registered owner, that another person a foreigner, was part owner, are not sufficient to disprove the allegation of interest in the plaintiff, if he has obtained the register on his own declaration, and acts as owner in procuring the insurance, and in the other affairs of the vessel (*c*).

To prove the ownership of a vessel insured, it will be sufficient for the plaintiff to produce his certificate of ownership from the registry, and shew that he is in possession at the time the insurance was effected as well as at the time of the fire. In fact, it seems it would be sufficient to show possession merely without the aid of any documentary proof or title deeds, unless rendered necessary by the adduction of contrary evidence (*d*).

An offer to sell, is evidence, at least, against the person offering, that the property is not worth more (*e*).

Evidence that the agent of an insurance company frequently waived the conditions of its policies requiring

(*a*) *Grenier v. Monarch F. & L. Assce. Co.*, 3 L. C. J., 100.
(*b*) *Friedlander v. London Assce. Co.*, 1 N. & M. 31 ; 4 B. & Ad. 193.
(*c*) *Watson v. Summers*, 2 Kerr 62.
(*d*) *Grant v. Ætna Ins. Co.*, 11 L. C. R. 131-2,—330 ; see *Taylor*, Evid. 126.
(*e*) *Hersey v. Merrimack Coy. M. F. Ins. Co.*, 7 Fost. (N. H.) 149.

prepayment of premiums, is not admissible to raise an inference of waiver in a particular case in the absence of other proof tending to establish such waiver (*a*).

An insurance company is not chargeable with notice of incumbrances on property, on which it issues a policy, because such incumbrances are matters of public record, so as to be estopped from setting up such incumbrances in avoidance of the policy (*b*).

Defendant was indicted for setting fire to her house, and to prove that the house was insured the books of the insurance office were produced, in which was an entry to that effect. *Held*, that the policy was the best evidence, and no evidence from the books could be admitted unless notice had been given to produce the policy (*c*).

Sworn entries in the custom house of the quantity and value of goods imported, by the party claiming under a policy of insurance for the loss of the goods by fire, a much larger amount of damages than the entries shew importations for, are evidence to go to the jury on the measure of damages (*d*).

Where there was only one plea on the record, setting up certain facts, which, being denied, it lay on the defendants to prove, and the defendants' counsel at the trial consented that the plaintiff should have a verdict for the whole amount of his insurance if the jury did not find against him on the plea; it was held, that the affirmative of the issue lay on the defendant, and he was entitled to begin, that if the plaintiff had occasion to go to the jury on the question of what amount of damages he should be allowed to recover, he would have been entitled to begin (*e*).

It does not necessarily follow that a new trial should be granted by reason of the disallowance of the right to begin,

(*a*) *Wood v. Poughkeepsie M. Ins. Co.*, 32 N. Y. 619.
(*b*) *Mut. Ins. Co. v. Deale*, 18 Ind. 26.
(*c*) *Rex v. Doran*, 1 Esp. 127.
(*d*) *Lazare v. Phœnix Ins. Co.*, 8 U. C. C. P. 136.
(*e*) *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250.

but it is at least a circumstance which should have weight in disposing of an application for a new trial (*a*).

Where an insurance company effected an insurance on a vessel, and accepted a note for the premium, and afterwards a loss occurred, it was held, that the insured had a right in equity to set off the amount of his loss against the note, the policy providing that the amount of the note given for the premium, if unpaid, should be first deducted from the loss (*b*).

If the property is wilfully and maliciously burnt by the assured, this will be a good defence to an action against the company, and, where after effecting the policy the plaintiff mortgaged the property, and the policy was afterwards assigned to the mortgagee, with the assent of the defendants, but the action was brought by plaintiff *in his own right*, and as trustee for the mortgagee ; a plea alleging arson by plaintiff was held a good answer to the action either at law or in equity (*c*).

Where arson is alleged, the fraudulent intent must be shown, but it may be shown by presumptions as well as by direct evidence (*d*).

But every legal presumption will be made in favor of the innocence of the insured, and he should not be pronounced guilty, unless that guilt is clearly established by evidence excluding or overcoming every fair and reasonable hypothesis of his innocence (*e*).

In an action against an insurance company on a fire policy, a defence that the insured or his assignee, wilfully, and maliciously set fire to the insured premises ought to be as satisfactorily established to the minds of the jury, as to

(*a*) *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250.

(*b*) *Berry v. Columbian Ins. Co.*, 12 Grant, 418.

(*c*) *Chishom v. Prov. Ins. Co.*, 20 U. C. C. P. 11.

(*d*) *Regnier v. Louisana L. M. & F. Ins. Co.*, 12 La. 336.

(*e*) *McConnell v. Delaware, Ins. Co.*, 18 Ill. 228.

justify them in convicting him of a criminal charge for the same offence (*a*).

The law is otherwise in the United States, and the rule of evidence applicable to civil actions applies (*b*).

Under a plea alleging "that the said property by the defendants insured was not nor was any part thereof burnt, consumed, or destroyed by fire, as alleged, nor did the said fire or loss happen in manner and form as alleged," the defendants cannot give evidence that the building insured has been designedly and fraudulently set fire to by the plaintiffs, and an amendment for the purpose of putting such a plea on the record has been refused (*c*).

If the jury find in favor of the insured on a charge of arson, the court will not grant a new trial, though subsequently to the trial a grand jury have found a bill against the insured and others for a conspiracy to defraud the insurers in the same matter. But on affidavits disclosing the conspiracy itself, and showing that the insurers did not obtain a knowledge of it till after the trial, so that they were taken by surprise, the court will grant a rule *nisi* for a new trial on payment of costs (*d*).

In the absence of misdirection, where a jury find in favor of a party expressly charged with a criminal offence, the court will rarely subject him a second time to the verdict of a jury (*e*).

In this case, in an action on a fire policy on a plea of arson, the defendants gave such evidence to shew that the house had been burned by one K, by the procurement of the plaintiff, as would have well warranted a finding for defen-

(*a*) *Richardson v. Canada W. F. M. Ins. Co.*, 17 U. C. C. P. 341 ; *Thurtell v. Beaumont*, 1 Bing. 339.

(*b*) *Washington Un. Ins. Co. v. Wilson*, 7 Wis. 169 ; *Schmidt v. New York Un. F. Ins. Co.*, 1 Gray (Mass.) 529 ; *Hoffman v. Western Em. Ins. Co.*, 1 La. An. 216.

(*c*) *Mann v. Western Assce. Co.*, 17 U. C. Q. B., 190.

(*d*) *Thurtell v. Beaumont*, 1 Bing., 339.

(*e*) *Gould v. British Am. Assce. Co.*, 27 U. C. Q. B. 473.

dants. K, however, had been indicted for the arson, and acquitted, and the probabilities were, that if plaintiff had been indicted he would also have been acquitted. The jury having found for the plaintiff, the court refused to interfere (*a*).

But, the rule that a new trial will not be granted when the jury find in favor of a party charged with a criminal offence, is not inflexible.

Where, in an action on a fire policy, the plaintiff in his statement of loss swore, that his damage amounted to about twelve times the amount actually proved, and for which he obtained a verdict; and the judge before whom the case was tried, was dissatisfied with the finding the court, notwithstanding the usual practice as to new trials, where the defence charges a criminal offence, granted a new trial costs to abide the event (*b*).

Generally speaking, where there is ground of challenge, but no objection is taken to a juror who might be challenged, this will not, in the absence of fraud or collusion, be ground for a new trial; for the plaintiff should exercise his right of challenge if he objects to the juror's presence. Thus the fact that one of the jurors is an insurer in a mutual company, and thereby by virtue of the Con. Stats. U. C. c. 52 a member thereof, is no ground for a new trial in case of an adverse verdict, though the counsel for the company at the trial presses upon the consideration of the jury the propriety of checking fraud in insurers, and that the safety of the whole depends on the good faith of every insurer (*c*).

In the absence of some rule of law or some established practice adopted by the courts with a view to commercial dealings the jury are left to determine not only the facts, but to draw the conclusion whether, under the circum-

(*a*) *Gould v. British Am. Assce. Co.*, 27 U. C. Q. B. 473; see also *Lampkin v. Ontario M. & F. Ins. Co.*, 12 U. C. Q. B. 578; *Mann v. Western Assce. Co.*, 19 U. C. Q. B. 319.

(*b*) *McMillan v. Gore Dis. M. F. Ins. Co.*, 21 U. C. C. P. 123.

(*c*) *Richardson v. Canada W. F. M. Ins. Co.*, 17 U. C. C. P., 341; *Williams v. G. W. R. Co.*, 3 H. & N., 869.

stances, the act required was done in a reasonable time (*a*).

The jury must decide the good faith of the applicant in answer to questions in the application (*b*).

When the jury add to their finding of facts, a finding as to the construction and effect of the policy upon the rights of the parties, the latter finding may be treated as surplusage. Thus, where the policy provided that "if more than 20 pounds weight of gunpowder shall be upon the premises at the time when any loss happens, such loss will not be made good," and the jury find that there was gunpowder on the premises in excess of the amount allowed, but add, "which the insured was not prohibited by his policy from carrying," the latter words may be rejected (*c*).

A clause is usually inserted in fire policies, providing for a reference to arbitration in the event of differences arising as to the amount of loss or damage. This clause may be so framed as to make a prior reference a condition precedent, or it may merely give the company an option to refer, and in the latter case, the only manner in which the clause can be taken advantage of is, by applying to the court or judge to stay proceedings after the commencement of the action.

The question whether the amount of loss and damage must be submitted to arbitration before the commencement of any action on the policy, depends simply on the agreement of the parties. If the clause as to arbitration is so worded as to make a prior reference a condition precedent to the bringing of the action, it must be complied with, for the condition as to arbitration is incorporated into the

(*a*) See *Mann v. Western Assce. Co.* 19 U. C. Q. B., 332; *Graham v. Van Diemansland Co.*, 11 Ex., 112; *Goodwyn v. Cheveley*, 4 H. & N., 631.

(*b*) *Hopkins v. Prov. Ins. Co.*, 18 U. C. C. P., 74.

(*c*) *Beacon F. & L. Ins. Co. v. Gibb*, 7 L. C. J. 57; 1 Moore P. C. cases, 73; 7 L. T. N. S. 574.

contract to pay, and the insured has only a right to recover the amount awarded (*a*).

If the clause as to arbitration expressly provided that the insured should not be entitled to commence or maintain any action at law, or suit in equity, until the amount of the loss should have been ascertained by arbitration, and should, then, only, have a right to sue for the amount awarded ; a prior reference would be a condition precedent.

If the contract is in such terms that a reference to a third person or a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with ; but if on the other hand, the contract is to pay for the loss, with a subsequent contract to refer the question to arbitration contained in a distinct clause, collateral to the other, then the contract for reference does not oust the jurisdiction of the courts or deprive the party of his action (*b*). Where in a policy of fire insurance entered into by the plaintiff with the defendants, the covenant for payment was made according to the exact tendor of certain articles ; one of which provided that on a loss occurring the assured should, within fifteen days, send in particulars of his loss, " which loss or damage after the same shall be adjusted, shall immediately be paid in money by the defendants with an option to them to reinstate, and a proviso that in case any difference shall arise touching any loss or damage, such difference shall be submitted 'to arbitrators,' whose award in writing shall be conclusive and binding on all parties." In an action brought on this policy, to which the defendants pleaded this article, and that the plaintiff had not submitted the matter to arbitration. *Held*, on demurrer, that the covenant was by its very terms qualified

(*a*) See *Elliott v. Royal Ex. Assce. Co.*, L. R. 2. Ex. 243 ; *Scott v. Avery*, 5 H. L. C. 811 ; 25 L. J. (Ex.) 308 ; *Braunstein v. Accidental Death Assce. Co.*, 1 B. & S. 782.

(*b*) *Elliott v. Royal Ex. Assce. Co.*, L. R. 2 (Ex.) 243 ; *Scott v. Avery*, 5 H. L. C. 811 ; 25 L. J. (Ex.) 308.

and made conditional by the subsequent words, referring to the articles which following without any interval, formed an integral and substantial part of the covenant; that the covenant, therefore, was only a covenant to pay the adjusted loss, and that this loss could only be adjusted by a reference to arbitration as pointed out in the subsequent article, and that, therefore, the plaintiff had no cause of action, the reference and adjustment by that means being a condition precedent to the right to recover (*a*).

If the agreement for a reference is collateral to the agreement to pay, and does not provide that no action shall be brought until the claim is referred to arbitration, the insured is not debarred from proceeding by action for the recovery of his loss without a reference, and the only method of enforcing the agreement would be by application to stay proceedings under the Common Law Procedure Act (*b*).

Proceedings, however, may be stayed in such case by application to a judge, as provided by the Act. Thus, where the condition of a policy of insurance provided "that in case differences arise touching any loss or damage the company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators," and the condition was accepted by the assured; it was held that this constituted an agreement for reference to arbitration under the Act Con. Stats. U. C. c. 22 s. 167, and a judge, therefore, had power under this section to stay the action on defendant's application (*c*).

Under a condition that in case any difference or dispute shall arise between the assured and the company touching any loss or damage, such difference may be submitted to arbitration," etc., the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference in the progress of the suit (*d*).

(*a*) *Ellott v. Royal Ex. Assce. Co.*, L. R. 2 (Ex.) 237.

(*b*) *Roper v. Lendon*, 1 E. & E., 825.

(*c*) *McInnes v. Western Assce. Co.*, 30 U. C. Q. B., 580; S. C. 5 U. C. P. R., 242, 6 C. L. J. N. S., 292.

(*d*) *Scott v. Phœnix Assce. Co.*, Stuart's L. C. Appeals, 152.

The leading principle of mutual insurance companies is, that every person whose property is insured becomes a member, and is consequently under obligation to observe its by-laws; and the rules and regulations being referred to in the policy, are to be taken as a part of the contract of warranty, in the same manner as if they had been introduced into the body of the policy (*a*).

The essential difference between the mutual and proprietary companies is, that in the former, as already explained, every person insured becomes a member of the company, and the several members are, as the name indicates, insurers of each other (*b*).

A person so insured in a mutual company, is bound to become informed of its rules and regulations (*c*).

The fact that a company is a mutual company will not render an assured so far a member, as to be bound by the acts of an agent of the company, pending his application for insurance (*d*).

Mutual insurance companies were until recently, empowered to issue two different kinds of policies, having different effects, the first on a premium or deposit note basis, and persons insuring on this principle are alone members of the company, and such insurances may be for any term not exceeding five years. As an incident to a policy of this class a part of the sum secured by the note is to be paid in cash to provide for the incidental expenses of the company. The second description of policy is for a cash premium. Persons thus insuring are not members of the company, and are not liable for any further charge or assessment whatever, and the policy must not be for more than three years. Under the recent Act of the Ontario Legislature as to mutual insurance companies, it is provided that

(*a*) *Riach v. Niagara Dis. M. F. Ins. Co.*, 21 U. C. C. P. 467.

(*b*) *Storms v. Canada F. M. Ins. Co.*, 22 U. C. C. P. 83.

(*c*) *Mitchell v. Lycoming M. Ins. Co.*, 51 Penn. St., 402.

(*d*) *Columbia Ins. Co. v. Cooper*, 50 Penn. St., 331.

mutual companies incorporated under the Act shall not issue policies otherwise than upon the mutual principle. The issuing of policies upon the cash principle is therefore now confined to existing companies. A note made by the insured in the mutual branch of a mutual insurance company for the sum of $3, part of the sum of $36, for which the insured has already given his deposit or premium note, such $3 representing the portion of the deposit note payable to the treasurer for incidental expenses, under Con. Stats. U. C. c. 52 s. 22 is not a note given for a cash premium of insurance within the meaning of 29 Vic. c. 37 s. 5, so as utterly to avoid the policy, if the note is not paid within thirty days after the same is made payable (*a*).

This statute provides that if any note given for a cash premium of insurance shall remain in arrear and unpaid for thirty days after the same shall be payable the policy of insurance held by the person in default shall thereupon become absolutely null and void. The 29 Vic. c. 94 s. 3 is in the same terms.

This clause does not avoid the policy generally upon non-payment of the note therein referred to in all cases, but is confined to cases where the policy is held by the person making default in payment of the note. Where, therefore, after giving a note coming within this section, the assured assigned the premises and the policy to a third party, and the directors of the company, by writing, endorsed on the policy, assented to the assignment; it was held, that the non-payment of the note given by the assured, could not be set up against the assignee, the note being current at the time of the assignment; and the assignee not being aware of its existence or non-payment, and not being required by the company to pay or secure the note, or give his own in lieu thereof. But, it would be a good defence to any claim by the original assured (*b*).

(*a*) *Ellis v. Beaver & T. M. Ins. Co.*, 21 U. C. C. P., 84.

(*b*) *Storms v. Canada F. M. Ins. Co.*, 22 U. C. C. P. 75.

Under the statutes, when the cash premium principle is adopted, a note may be taken for the whole amount of premium, but it is payable in one sum, and not by instalments, whereas, if the deposit or premium note principle is adopted, the amount of the note is payable by instalments after assessments duly made (*a*).

The 31 Vic. c. 32 s. 5. of the Province of Ontario, provides that when policies of insurance are issued, and premiums in cash collected thereon, for periods of one year, as by law provided, the persons so paying in cash shall not be liable to any further charge or assessment whatever. Although this statute only in express terms applies to policies issued for a period of one year, it should be read as applying also to any shorter term (*b*).

The Con. Stat. U. C. c. 52 s. 67 enacted that the estate of the insured shall stand pledged to the company to meet the liabilities of the insured for his proportion of any losses or expenses accruing to the company during the continuance of the policy. This lien has been abolished by the recent act of the Ontario Legislature, to consolidate and amend the laws having reference to mutual companies. Under the old act it was held that the lien of the company under this clause on the property insured would not be affected by a mortgage of the property effected after the insurance (*c*).

It was also held that to entitle the company to the benefit of this clause, it was not necessary that the policy should be registered, and under this clause all the right or estate of any party effecting an insurance with a mutual company in the property insured at the time of effecting the same was subjected to all claims against the assured under such insurance, and a purchaser taking a conveyance of the property from the assured, took subject to the charge of the company, although without notice and although such charge did not appear on the registry affecting such pro-

(*a*) See *Ellis v. Beaver & T. M. Ins. Co.*, 21 U. C. C. P. 84.
(*b*) *Ashford v. Victoria M. Assce. Co.*, 20 U. C. C. P. 437.
(*c*) *Russ v. Mutual Ins. Co.*, Clinton, 29 U. C. Q. B. 79.

perty ; the registry laws not providing for the registration of such charge (*a*).

A foreign legislature cannot make a law creating a lien on legal estate in Canada, and although a mutual company is incorporated in a foreign state, yet, if the provisions of its charter are only applicable to the state of things existing there, it cannot carry on business in this country (*b*).

Where an agent of a railway company has given his own individual notes to an insurance company, for premiums of marine insurance on iron belonging to the railway company, taking the policy of insurance in his own name, and afterwards gives the notes of his firm for the same debt, the railway company is, nevertheless, liable in a direct action for the amount of the premiums, and on an intervention by the firm, the renewal notes filed in the case will be declared inoperative as against the intervening parties, and be ordered to be delivered up to them (*c*).

(*a*) *Montgomery v. Gore D. M. Ins. Co.*, 10 Grant 501.

(*b*) *Genessee M. Ins. Co. v. Westman*, 8 U. C. Q. B. 487.

(*c*) *Montreal F. Ins. Co. v. Stanstead S. & C. Ry. Co.*, 13 L. C. R. 233.

BOOK II.

MARINE INSURANCE.

In every policy of marine insurance there is an implied warranty presumed from the very act of procuring the insurance that the vessel at the commencement of the voyage is seaworthy, that is, in a fit state as to repairs, equipment, crew, and in all other respects, to encounter the ordinary perils of the proposed voyage at the time of sailing on it (*a*).

This seaworthiness has been held to be a condition on which the fact of the attaching of the policy for loss insured in the course of the voyage depends. But the implied warranty is not violated or the policy avoided by a merely incidental temporary defect or deficiency at the commencement of the voyage, if the defect may be readily and easily remedied, and is remedied before the loss occurs (*b*).

The term seaworthiness is a relative, flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which it is about to embark; and if the insurer agrees with full knowledge of the facts, to insure a vessel, incapable from her size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty must be taken to be limited to the capacity of the vessel, and will be satisfied if she is made as seaworthy as she is capable of being made. Thus, where a vessel built in England for river navigation on the

(*a*) *Quebec Marine Ins. Co. v. Com. Bank Can.*. 13 L. C. J., 270–1, per Badgley, J.

(*b*) *Ib.*, 271, *per Badgley; Weir v. Anderson*, 2 B. & Ald., 320.

Indus, was insured for the voyage out, and the underwriters, at the time when they took the risk, were informed of the purpose for which she was built, and exacted a higher rate of premium in consequence; it was held, that the implied warranty was not infringed, the vessel being made as seaworthy, and as reasonably fit for the sea voyage as she could be made (*a*).

When the insurance is effected *at and from* a port where the vessel is lying, the risk attaches from the date of the policy, and continues during the whole time she remains in such port, in a course of preparation for her voyage, or whilst taking in cargo, and also necessarily when she sails from the port on her voyage. There is, therefore, a difference between this insurable interest when the vessel is in port, and the implied warranty of seaworthiness, the latter attaching only at the commencement of the voyage (*b*).

Therefore, in a policy in which there is no express warranty of seaworthiness defects in a vessel "before she should have started on her voyage," can have no effect whatever as unseaworthiness whilst she is lying at her home port, before her departure. So the incompetency of the officers in charge to navigate in salt water could only apply when the vessel reached salt water, and could have no effect whatever of unseaworthiness whilst she was in fresh water with competent officers in charge (*c*).

But this implied warranty is construed in reference to the intended use and service of the vessel, and differs accordingly at different times, and under different circumstances. What would satisfy the implied warranty for lying in port for temporary purposes, for short coasting voyages, for navigating a lake or river, vary from those

(*a*) *Burgess v. Wickham*, 3 B. & S. 669; *Clapham v. Langton*, 34 L. J. (Q. B.) N. S. 46; 10 L. T. Reps. N. S. 875.

(*b*) *Graham v. Barras*, 5 B. & Ald. 1011.

(*c*) *Quebec Marine Ins. Co. v. Com. Bk. Can.* 13 L. C. J. 270.

demanded for navigating the open sea, on long voyages, as to and from Europe, or the Cape of Good Hope. Indeed, as in policies at and from, if the insurance risk attaches before sailing, and the ship while in port is in a state of seaworthiness commensurate with her then risk, her subsequently sailing in a state of unseaworthiness for the voyage, will not avoid the policy *ab initio* (*a*); and in the same way if she be lost in the course of river navigation, the underwriters will be liable, provided her then state of equipment was adequate to her then risk, although it might not be such as to constitute a state of seaworthiness for a sea voyage. The governing principle is, if the vessel, crew and equipments, be originally sufficient for her then state, the assured has done all he contracted to do, and if the voyage is such as to require a different complement of men or state of equipment, in different parts of it, as if it were a voyage down a river and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it (*b*).

Where, therefore, a vessel on a voyage from Montreal to Halifax, was seaworthy at Montreal, where she took in her cargo, and took on board a sea-going engineer, and whence she sailed on her voyage; and was fit for river navigation to Quebec, where she took on board her sea-going master and crew, and was also fit for river navigation to Bic, where she first entered salt water, whence, after certain repairs were effected, she was fit for salt water navigation until her loss; it was held, that the implied warranty of seaworthiness was not infringed (*c*).

This system of successive gradations for fitness of naviga-

(*a*) 3 Taun., 299.

(*b*) *Quebec Mar. Ins. Co. v. Com. Bk. Can.*, 13 L. C. J. 270; *Dixon v. Saddler*, 5 M. & W. 414; *Biccard v. Sheppard*, 14 Moore's P. C. cases, 471; *Busk v. Royal Ins. Co.*, 2 B. & Ald. 72; *Walker v. Maitland*, 5 B. & Ald. 171; *Holdsworth v. Wise*, 7 B. & C. 794; *Ib.*, 219; *Thompson v. Hopper*, 4 E. & B. 181.

(*c*) *Quebec Marine Ins. Co. v. Com. Bk. Can.*, Supra.

tion, also, necessarily implies that repairs may be made at each, and, therefore, the rule is plainly accompanied with the obligation upon the insured to keep the vessel seaworthy if it be possible, as far as depends upon him, that is, to procure the necessary and reasonable repairs in the successive stages of the voyage, according to the means that can be had for the purpose (*a*).

It is an elementary principle that after the policy has once attached a compliance with the warranty ceases to be a condition precedent to the liability of the insurer. Therefore, a defect in the boiler of a vessel navigating from Montreal to Halifax, which was first discovered on the vessel reaching salt water, and immediately repaired, it being proved that the vessel was sound at Montreal, and thence all the way up to salt water, does not vitiate the policy (*b*).

But if the vessel had been entirely unnavigable at the time of the insurance, or if the boiler had been irremediably defective, the insurers would not be liable. So, also, if there had been a neglect to repair the boiler after the damage sustained, because a necessity of repairs must be within the contemplation of the parties, and every unavoidable delay, and deviation occasioned thereby, is therefore constructively permitted in a contract of marine insurance (*c*).

The implied warranty of seaworthiness applies to the state of the vessel at the commencement of the voyage, and if seaworthy then the insurer is responsible for all the ordinary incidents arising in the course of the voyage. Thus, if a vessel, insured on a voyage from Montreal to Halifax, is fit for fresh-water navigation until she reaches the ocean, and is then fitted for salt water navigation the warranty will not be infringed by reason only that the state of the boiler was such as to render repairs to it necessary

(*a*) *Quebec Marine Ins. Co. v. Com. Bk. Can.*, 13L. C. J. 272 5; Burr. 280-2.
(*b*) *Ib*, Douglas 708-55; 1 Dow. P. C. 344.
(*c*) *Ib*, 276.

on reaching the ocean to fit it for such navigation, the boiler being sound on starting and fitted for river navigation all the course of the voyage down the St. Lawrence. So the fact that the chief engineer in charge of the vessel from Montreal to the ocean had never been to sea, and was ignorant of the management of the vessel in salt water would not affect the warranty, if an engineer accustomed to salt water is taken on board when the vessel reaches the ocean (*a*).

Where a policy in addition to expressly excepting losses arising from unseaworthiness, provides that the vessel shall at all times during the continuance of the policy be sound and seaworthy, and be well manned and found in all things and means necessary, and proper for the safe navigation thereof; it seems the stipulations must be considered with reference to the navigation in which the vessel is at the moment of the loss engaged, and if she is seaworthy in regard to such navigation the insured may recover; though as to another part of the navigation the stipulations, construed in the same manner, may have been violated. Thus, if a vessel insured between Toronto and Quebec were lost by stranding in the river St. Lawrence, the question for the jury would be not was she well found and seaworthy for the navigation of the open Lake Ontario but was she well found and seaworthy for the navigation of the river St. Lawrence, and if in the opinion of the jury she was at the time of the loss suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated unless so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation, without reference to the particular navigation in which the loss should occur an absolute cause of forfeiture (*b*).

Even under the above form of policy it would be no

(*a*) *Quebec Marine Ins. Co. v. Com. Bk. Can.*, 13 L. C. J., 267.

(*b*) *Gillespie v. British Am. F. & L. Ins. Co.*, 7 U. C. Q. B. 108; see, also, *Ross v. Bradshaw*, 1 B. & C. 312.

defence that the vessel was seaworthy at the commencement of the voyage if she was unseaworthy when the loss occurred (*a*).

When there is no express stipulation as to seaworthiness, the implied warranty extends only to the commencement of the risk, but it is quite competent for the parties to stipulate expressly that the vessel shall be seaworthy during the whole voyage, and that the insured shall not be liable for losses arising from certain specified causes (*b*).

In such cases the covenant must be adhered to during the whole course of the voyage, although the vessel was seaworthy at its commencement; and a declaration alleging merely that she was seaworthy at the commencement of the voyage would be insufficient (*c*).

In the absence of an express stipulation as to seaworthiness, there is no implied warranty on the part of the insured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew, during the whole course of the voyage (*d*).

A vessel insured for a round voyage must be sufficiently seaworthy at its inception to make it without repairs, unless damaged by extraordinary perils of the sea. Where there is no evidence of such damage, and the vessel requires repairs before the completion of the voyage, a presumption arises that she was not seaworthy at its commencement, and the insured cannot recover (*e*).

If a ship sail upon a voyage and in a day or two becomes leaky and founders, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed; and the *onus* of proving that she was seaworthy

(*a*) *Gillespie v. British Am. F. & L. Ins. Co.*, 7 U. C. Q. B. 108.

(*b*) *Mittleberger v British Am. F. & L. Ins. Co.*, 2 U. C. Q. B. 439; *Gillespie v. British Am. F. & L. Ins. Co.*, 7 U. C. Q. B. 108.

(*c*) See, also, *Coons v. Ætna*, 18 U. C. C. P. 309.

(*d*) *Dixon v. Sadler*, 8 M. & W. 895.

(*e*) *Reed v. Philps*, 2 Hannay 172.

at the commencement of the risk, rests with the assured.

This rule equally applies, whether the seaworthiness is expressly provided for by the terms of the policy, or rests merely on the implied warranty, and if the plaintiff fails to rebut this presumption, he will be non-suited. Thus, where a vessel after sailing all day on a summer sea with a light breeze in the evening, suddenly came up into the wind, or broached to, refused to answer her helm, and at once began settling down, when the crew abandoned her, and after they had rowed about 35 yards, sunk. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to shew, that she was old and rotten in parts; that she in fact leaked before starting across the lake, in the canal, and at the port of lading, and that men would not go in her without being paid extra wages; and the plaintiff himself stated that she was old, and had given instructions not to canal her by night, or leave port in a gale. A diver who examined her, also found one stave wholly out, and another partially so.

Held, that plaintiff failing to give affirmative evidence of seaworthiness at the commencement of the voyage, must submit to a non-suit or verdict for defendants (*a*).

But where, in an action on a time policy expressly excepting losses from unseaworthiness, the evidence shewed that the vessel was in excellent condition and seaworthy, when she left port, and apparently up to the time of the loss; that a squall struck her, and over three hours after it was found that she was leaking much, in consequence of which she filled and went down; there being no charge or suggestion of fraud, mal-practice, over-value, or anything whatever, against plaintiff, the only remarkable circumstance being, that in the protest made by the master and mate,

(*a*) *Myles v. Montreal Ins. Co.*, 20 U. C. C. P. 283; see also *Coons v. Ætna Ins. Co.*, 19 U. C. C. P. 239; *Watson v. Clarke*, 1 Dow., 344.

there was no mention of the squall, nor was any cause assigned for the leak or consequent loss; it was held, that there was fair affirmative proof of the general seaworthiness of the vessel, and that the judge was warranted in submitting the point to the jury, whether the loss arose from some of the perils insured against, and that the evidence fully warranted the finding for the plaintiff (*a*).

Where there was no special contract with the underwriters for higher premium in consequence of the peculiar state of the vessel, nor any communication to them on the subject, but it was merely proved that the risk was accepted by the defendant's agent on the vessel in question, that he had seen but did not examine her, and judged her wholly from the registry insuring her as B 1; that a B 1 vessel would be insured as readily as an A 1, the charge on freight being the same, and the seaworthiness would be expected to be the same, though the A 1 would not be so likely to go to pieces if stranded, it was held that these facts did not bring the case within the principle above laid down, and that, therefore, in the absence of affirmative evidence of seaworthiness, the insured could not recover (*b*).

In the above case there was no implied warranty of seaworthiness but the contract was express, protecting the insurers against rottenness, inherent defects, etc.

In a policy of insurance on a vessel belonging to plaintiff, insuring only against perils of the sea, one of the conditions was that the defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question some fifteen minutes after she had left port began to leak, and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by the plaintiff to rebut the presumption which it was contended therefore arose

(*a*) *Dawson v. Home Ins. Co.*, 21 U. C. C. P. 20.
(*b*) *Coons v Ætna Ins. Co.*, 19 U. C. C. P. 235.

that the loss was not occasioned by perils of the sea. *Held* that the plaintiff was bound to give this evidence, and that the absence of it disentitled him to recover (*a*).

In the ordinary form of a time policy in use in Canada, containing an express exception of losses arising from unseaworthiness, rottenness, inherent defects, or other enumerated causes, there is no warranty whatever that the ship insured is, at the time of the commencement of the risk, or, that it shall be seaworthy at all times, or at any time during the period named in the policy for the continuance of the risk. To an action on this policy, it would be no defence to shew, that even at the time of the loss the vessel was unseaworthy (*b*).

The real contract between the parties is not that the vessel shall be seaworthy, or if unseaworthy that it shall not be exposed to risk, but, that no claim for a loss which is attributable to, or arises from, unseaworthiness or other excepted causes, shall be enforceable against the insurers (*c*), and the insurers may be liable though the vessel is unseaworthy at the time of the loss, if it is shewn that the loss did not arise from the unseaworthiness or other excepted cause. The question whether the loss arises from unseaworthiness within the meaning of the policy, is to be tried like any other question, according to the known rules of law, upon such evidence as may be sufficient to warrant a jury in drawing an inference in the affirmative or negative.

Evidence of the seaworthiness of the vessel at the commencement of the voyage, is admissible, not for the purpose of establishing, as if it was the material fact in issue, that she was seaworthy then; but, for the purpose of enabling the jury to draw the inference, whether if seaworthy then she continued to be so until the time of the loss (*d*).

(*a*) *Coons v. Ætna Ins. Co.*, 18 U. C. C. P. 305.

(*b*) *Dawson v. Home Ins. Co.*, 21 U. C. C. P. 27; *Thompson v. Hopper*, 6 E. & B. 937.

(*c*) S. C. 2 Jur. N. S. 93, Ex. Chr.

(*d*) *Dawson v. Home Ins. Co.*, 21 U. C. C. P. 26.

The advantage to the insurers of specially excepting or enumerating the causes of loss or damage, for which they will not be responsible is, first, that all losses arising from the excepted causes will not be covered by the policy whether referable to the implied warranty of seaworthiness or not; and second, under this warranty the underwriter would only be protected if the vessel was unseaworthy at the commencement of the voyage, whereas, if the causes of loss are specially excepted, the time of the occurrence of the loss is immaterial, for the underwriter will be protected during the continuance of the policy, though the cause of the loss arises after the vessel sails (*a*).

Even if the underwriter fail in securing protection by virtue of the excepted causes, he may still rely upon the implied warranty of seaworthiness at the commencement of the risk (*b*).

A policy of insurance was effected on a vessel "for four calendar months on a fishing voyage beginning the adventure from the 11th of June instant, and to continue until the expiration of four months." The policy did not state where the vessel was to sail from, where she was to fish, or whether she was to return. It was held that this was a time policy, continuing the insurance for four months absolutely, and not limiting it to one departure and return, while the vessel continued in the fishing business, and that the risk was not terminated by the vessel returning from a fishing voyage within the four months (*c*).

The law implies a duty on the owner of a vessel which carries freight, to proceed without unnecessary deviation in the usual course; but it is the duty of ship masters to aid and assist ships in distress at sea, and for that purpose a vessel may go out of her regular course, and it will not be considered a deviation, but having succored those on board the ship

(*a*) *Quebec M. Ins. Co. v. Com. Bk. Can.*, L. R. 3 P. C., App. 234.

(*b*) *Ib.*

(*c*) *Dimock v. New Brunswick M. Assce. Co.*, 3 Kerr 654.

master has no right to risk his own freight to render salvage services. As, however, no wrongdoer can be allowed to apportion or qualify his own wrong when a loss has happened, which is attributable to the wrongful act of deviation, the ship master cannot set up as an answer to the action the possibility of a loss if his wrongful act had never been done (*a*).

To charge the insurer it is not enough that the loss shall have happened at sea ; it must appear to have happened in the course of the voyage described in the policy, and during the continuance of the risk insured against (*b*).

Unnecessary or unreasonable delay in the course of the voyage to the enhancement of the risk must in order to discharge the underwriters, amount to a deviation (*c*).

When a marine policy protects the insured only while navigating certain waters it is necessary that the vessel should continue in those waters from the time of insurance to the time of the loss, even though the loss occurs in the waters covered by the policy, for a deviation during any part of the time, not caused by necessity, puts an end to the policy (*d*).

When, in the declaration, the vessel is alleged to have sailed from a certain port which is not alleged in the declaration to be within the limits covered by the policy, even though the court could judicially notice the fact that there was a port of that name within such limits, they cannot, when the objection is taken infer that such port is the same as the one from which the vessel sailed (*e*).

Not only is it necessary that the voyage be commenced during the existence of the policy, but the loss must also occur during the same period, and if an action is brought on a marine policy it is necessary to aver these facts in the

(*a*) *Tarr v. Desjardins*, 13 L. C. R. 394.
(*b*) *Dimock v. New Brunswick M. Ins. Co.*, 3 Kerr 658.
(*c*) *Orchard v. Ætna Ins. Co.*, 5 U. C. C. P. 449.
(*d*) *Mittleberger v. British Am. F. & L. Ins. Co.*, 2 U. C. Q. B., 439.
(*e*) *Ib.*

declaration, though from the circumstances stated the court might reasonably infer these facts (*a*).

There can be no deviation before the vessel arrives at the port, where, by the terms of the policy the voyage commences and the risk attaches (*b*).

It is not necessary that the risk should be increased by the deviation. If the risk is in any degree varied, the underwriter will be discharged, for his undertaking to indemnify is only upon the implied condition, that the risk shall remain precisely the same as it appears to be on the face of the policy, as interpreted by usage (*c*).

A deviation is not only a departure from the course of the voyage, but it is any material departure from, or change in, the risk insured against, without just cause, and it is not necessary that the change in the risks should increase or diminish them. The reason is not the increase of risk, but the substitution of another voyage for that which was insured, and thereby varying the risk which the underwriter took upon himself.

A ship was insured for a voyage from Dundee to St. John, N.B., thence to a port of discharge in the United Kingdom. She started on her voyage, and arrived at St. John, where she was put on the blocks, detained seventeen days, repaired and re-classed. *Held*, that this materially altered the risk, was equivalent to a deviation, and avoided the policy (*d*)

Where an insurance was effected on a ship "at and from Saint John, New Brunswick, to a port of call and discharge and loading in the West Indies, and at and from thence to a port of call and discharge in the United Kndgdom," and the ship sailed from Saint John to Havanna and discharged her cargo, and then sailed to Mantanzas in the West Indies to load another cargo, and then sailed for Cork, but was

(*a*) *Mittleberger v. British Am. F. & L. Ins. Co.*, 2 U. C. Q. B., 439.

(*b*) *Creighton v. Union M. Ins. Co.*, 1 James 195.

(*c*) *Creighton v. Union M. Ins. Co.*, 1 James, 217.

(*d*) *Reed v. Weldon*, 1 Hannay, 458.

lost on the voyage: it was held that the going to Mantanzas was a deviation, for the expressions above mentioned referred only to one port (*a*).

Where a policy of insurance describes the voyage to be "from Saint John to a port of call and discharge and loading in the West Indies," there is no patent ambiguity in these expressions and the words of the policy mean one port both for discharge and loading, and not two ports, one for discharge and another for loading (*b*).

A vessel was insured for a voyage from Dundee, Scotland, to St. John, thence to a port of discharge in the United Kingdom. The intention of the plaintiff in bringing the vessel out to St. John, was that she should be reclassed. On her arrival at St. John she was placed on the blocks, repaired and reclassed, and thereby detained seventeen days longer than she otherwise would have been. *Held* that the insured undertook that the vessel should be seaworthy for the whole voyage, and in the absence of evidence shewing that it became necessary to repair the vessel in consequence of some damage which she sustained on the voyage from Dundee to St. John, such detention for repairs and reclassing was a deviation and avoided the policy (*c*).

When the contract is for a voyage to several ports in one onward course, any retrograde movement over a part of the onward course will be a deviation.

The plaintiff effected an insurance with defendants on certain wheat, to be carried in a schooner from Port Darlington to Kingston, and from thence to Montreal, by such boats, barges or vessels as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, about three miles below Kingston; the wheat was there transferred to a barge, which *returned* to Kingston in order to complete her cargo, and while so

(*a*) *McGivern v. Prov. Ins. Co.*, 3 Allen 311.
(*b*) *McGivern v. Prov. Ins. Co.*, 4 Allen 64.
(*c*) *Reed v. Philps*, 2 Hannay 172; see, also, *Reed v. Weldon*, 1 Hannay 465.

returning the barge was stranded and the wheat lost. The plaintiff endeavored to prove a custom in support of the course taken by the schooner, but the evidence only showed that certain forwarders having store houses at Port Sidney had been in the habit of doing as was done in this case, but the policy was entered into without any reference to this custom, and it did not, moreover, appear that the custom was so established that it must have been taken as forming an element in the contract of insurance. The contract was for the carriage in one onward course. *Held* that the policy was avoided by deviation (*a*).

But it seems that if there had been such a common established usage thus to go from Port Sidney to Kingston, that the parties must be held to contract with reference to it, the policy would not be avoided (*b*).

A policy of insurance was effected on freight laden on board the Barque "Daniel," on a voyage at and from Buenos Ayres, to Mantanzas, Cuba. There was an endorsement on the policy dated the 28th of April, 1869, to the following effect: "Permission granted under this policy for Barque 'Daniel,' to proceed from Monte Video to Cardenas, calling at Barbadoes for orders instead of Buenos Ayres to Mantanzas." It was held, that the original policy and the endorsement on it should be read together, and that so read, the voyage insured should be taken to have been "a voyage from Buenos Ayres to Cardenas, with liberty to go to Monte Video as an intermediate port," and, that, therefore, the insurers were liable for damage to the cargo sustained at Monte Video (*c*).

A deviation puts an end to the policy from that time, but can have no effect upon any loss which may have previously taken place. Therefore, where the declaration shews a loss before deviation, a plea setting up a deviation, should

(*a*) *Fisher v. Western Assce. Co.*, 11 U. C. Q. B. 255.

(*b*). *Ib.*

(*c*) *Wilson v. Merchants' M. Ins. Co.*, Sup. Ct. Nova Scotia, July 1872.

negative the fact that such loss had occurred before the deviation on which it relies (*a*).

A plea will be bad for duplicity if it sets up several distinct acts of deviation. Thus, if the plea alleges three distinct acts of deviation, to Barbadoes, to Trinidad, and St. Thomas, it will be double.

Where a vessel is insured on a voyage to several ports in a specified order, and there is an inception of the risk by the vessel starting on the voyage insured in due order to the places named in the policy, the insured may shorten the risk by the omission of one or more of the *termini ad quos*. Where, therefore, a ship was insured for a voyage "at and from Liverpool to Cardiff, thence to Aden, and from thence to India, or Burmah." She was chartered for and set sail from Cardiff to Aden, with the intention of proceeding from Aden to Chincha instead of India or Burmah, and was lost before reaching Aden; this was held no deviation. In this case the loss happened after the commencement of the risk and before the vessel reached the dividing point. When a ship is insured on a voyage to several ports, she may visit all or any of them, with this reserve only, that if she goes to more places than one she must visit then in the order named in the policy (*b*).

Where an insurance is effected on goods for a voyage at and from a specified *terminus a quo*, named in the policy, and the risk as to the goods is expressed to begin, "from the loading thereof on board the ship;" in the common form, the policy will only attach on goods loaded on board the ship at the very place named therein as the *terminus a quo* of the voyage (*c*).

This rule, however, is not favored, and the court will

(*a*) *Fairbanks v. Union M. Ins. Co.*, 1 James, 271.

(*b*) *Reed v. Weldon*, 1 Hannay 458; *Marsden v. Reed*, 3 Ea. 572; *Ashley v. Pratt*, 16 M. & W. 471; 1 Ex. 257.

(*c*) *Creighton v. Union M. Ins. Co.*, 1 James, 215; *Rickman v. Carstairs*, 5 B. & Ad. 663; *Roberts v. French*, 4 Ea. 130; *Spitta v. Woodman*, 2 Taun. 416.

gladly lay hold of any circumstances in order to relax its rigor. Thus, under a policy to cover a vessel from the "commencement of loading," and the goods from "the loading thereof on board," at a particular place, the risk will commence at the sailing from that place, although the vessel was loaded prior to her arrival at the *terminus a quo*, provided there is anything to indicate that a prior loading was contemplated by the parties (*a*).

A memorandum endorsed on a policy of insurance subsequently to its execution, and prior to the commencement of the risk, permitting a vessel, for an additional premium, to use a port out of the course of the voyage previously insured, includes permission to take in cargo at that port, and shews that a loading prior to the arrival of the vessel at the *terminus a quo* was contemplated, so that the policy will attach on the goods on the arrival of the vessel at the latter place (*b*).

Under such circumstances, the policy and memorandum will be taken together, and receive a reasonable construction according to the circumstances and course of the voyage (*c*).

The risk on ship and goods generally speaking, only commences at the very port or place named in the policy, as that whence the ship is to sail, or where the goods are to be laden (*d*)

A policy effected on goods at and from any port or place named as the *terminus a quo* of the voyage insured will not protect goods unless loaded on board at the very place or harbor town itself, and if they are shipped and the vessel sails from a port geographically distinct, the policy will never attach unless, indeed, evidence can be adduced to show that the word used in the policy to describe the

(*a*) *Bell v. Hobson*, 16 Ea. 243.

(*b*) *Creighton v. Union M. Ins. Co.*, 1 James, 195.

(*c*) *Ib.*

(*d*) *Creighton v. Union M. Ins. Co.*, 1 James, 214.

terminus a quo is generally understood by mercantile men to comprise the port from which the vessel sails (*a*).

The usage necessary to prove this must be a general usage of the whole mercantile community, or a particular usage of universal notoriety in the trade upon which and of the place at which the insurance is effected, so that it may be presumed to be known to and acquiesced in by the underwriters.

A cargo insured "at and from *Arichat* to *Halifax*," was shipped at *Petit de Grat* a port nearer to *Halifax*, and distant nine miles from *Arichat* by water, and one and a half miles by land, and which by the usage of trade in *Richmond*, the county wherein both ports are situate, appeared to be generally considered and treated by merchants there, and by the masters of coasting vessels in *Isle Madame*, the large Island wherein said ports are situate, and also partly by merchants in *Halifax*, as one and the same port with *Arichat*, the custom house for both ports being *Arichat*. The vessel and cargo were lost shortly after leaving *Petit de Grat*; it was held that this usage did not bind the underwriters, it not being shown that it was known by them, so that their contract could be presumed to be made with reference to it. It is immaterial that Petit de Grat was nearer Halifax than Arichat (*b*).

Though there is evidence of a deviation sufficient to avoid the policy, yet if the underwriter with full knowledge of the facts promise to pay the claim under the policy, the court will not set aside a verdict for the plaintiff for the amount of such claim. No new consideration would be necessary to support such a promise, because the promise does not constitute a new contract, but is merely an admission of the defendants liability on the original contract (*c*).

(*a*) *Hennessey v. N. Y. Mutual M. Ins. Co.*, 1 Oldright 259; see, also, *Constable v. Noble*, 2 Taun 403.

(*b*) *Hennessey v. N. Y. Mutual Mar. Ins. Co.*, 1 Oldright 259.

(*c*) *Reed v. McLaughlin*, 2 Hannay 128; *Gilbert v. Stockton*, 1 Hannay 58.

Whether going to Saint Stephen on the river Saint Croix to get salt for fishing purposes was a deviation, or in prosecution of the necessary purposes of a fishing voyage upon a time policy was considered a question proper for the jury on the evidence (*a*).

Unreasonable delay is properly a question for the jury, and unjustifiable delay a question of law for the court (*b*).

Whether in the event of shipwreck the master is bound to send the goods to an intermediate port for re-shipment, when there are no means of transport direct to destination of cargo, must depend upon the special circumstances of each case. Such as the certainty that the means of re-shipment will be found in such other port, the distance or contiguity of that port, the expense, the state of the cargo, and all the facilities or difficulties of such a proceeding (*c*).

When the vessel is stranded the master is only justified in selling her under pressure of extreme necessity. It is for the jury to say whether such necessity exists in the particular case, and when there is evidence to go to them, their finding on this point will not be disturbed (*d*).

The insurer cannot be understood as undertaking to indemnify against losses, which in the nature of things must happen. The purpose of insurance is to afford protection against contingencies and damages which may or may not occur ; it cannot properly apply to a case where the loss or injury must take place in the ordinary course of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, are not included in an insurance against perils of the sea, as being the unavoidable consequence of the service to which the vessel is exposed (*e*).

(*a*) *Dimock v. New Brunswick M. Ins. Co.*, 1 Allen 398.

(*b*) *Reed v. Weldon*, 1 Hannay 458.

(*c*) *Fairbanks v. Union M. Ins. Co.*, 1 James 271.

(*d*) *Barteaux v. Cobequid M. Ins. Co.*, Sup. Ct., Nova Scotia. Feby. 1873 ; *Australian S. N. Co. v. Morse*, *L. R.*, 4 P. C. App. 222.

(*e*) *Myles v. Montreal Ins. Co.*, 20 U. C. C. P. 287 ; *Coons v. Ætna Ins. Co.*, 18 U. C. C. P. 309 ; *Paterson v. Harris*, 7 Jur. (N. S.) 1279.

A loss happening by the starting of a plank from the shaft working would probably be a loss by perils of the sea (*a*).

It is a rule, to look to the proximate cause of the loss in determining the liability of the insurers, and if such cause be not reducible to some one of the perils mentioned in the policy, the insurers will not be chargeable with it. Thus, the fact that the chief engineer has never been to sea, and is ignorant of the management of the boiler in salt water, will be of no consequence, where, in the opinion of the court, it is not proved that the loss was occasioned or influenced thereby (*b*).

Where a plea to an action on a marine policy alleges, that the plaintiff knowingly and wrongfully sent the vessel from port in an unseaworthy state, and permitted her to remain on the lake in such state, and without being properly equipped, and that by reason of the premises only the vessel was wrecked; it is not sufficient to prove that the vessel was unseaworthy when she was wrecked, but it must be shewn that the unseaworthiness was the proximate and immediate cause of the loss. It will not be sufficient to shew that the unseaworthiness occasioned the loss, by leading to a state of things out of which the loss arose, but if it is intended to rely on this, the facts must be specially pleaded (*c*).

If there is no exception in the policy in regard to losses occasioned by the want of ordinary care and skill, the general rule is that the proximate cause of the loss is to be looked at and not any want of care or skill as producing that cause. Thus in the case of loss occasioned by collision, it would be no defence for the defendant to show that the loss was occasioned by a want of ordinary care and skill on

(*a*) *Laurie v. Douglas*, 15 M. & W. 746; *Coons v. Ætna Ins. Co.*, 18 U. C. C. P. 311.

(*b*) *Quebec Mar. Ins. Co. v. Com. Bk. Can.*, 13 L. C. J. 267.

(*c*) *Woodhouse v. Prov. Ins. Co.*, 31 U. C. Q. B. 176; see also, *Thompson v. Hopper*, E. B. & E. 1038.

the part of the plaintiff, unless he also averred in the plea that the policy did not cover losses produced by the want of ordinary care and skill (*a*).

A marine policy may by express stipulation be so framed that the person whose cargo is insured may be disabled from recovery by reason of the want of care and skill in the captain and crew navigating the vessel (*b*).

In framing the contract it is competent for the parties to except all losses arising from want of ordinary care and skill, but in the ordinary form of marine policy, it would be no answer to the claim of the person whose cargo has been lost or damaged, that the captain or crew had been careless or unskillful.

Although by the law of the place where the loss occurs it is obligatory upon a vessel propelled by steam, to keep out of the way of a sailing vessel, and although in the case of damage or injury to the former, from collision with the latter, it is presumed that the fault lies with the steam vessel, yet, it is still necessary to shew that the loss could not have been avoided by the exercise of ordinary care and skill on the part of those navigating the steam vessel. At all events, such is the law where there is no exception in in the policy in regard to losses occasioned by the want of ordinary care and skill (*c*).

In all cases, when the subject of insurance is not actually annihilated, the assured is entitled to claim, and claiming as a total loss, the very principle of the indemnity requires that he should give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it (*d*).

In these cases, however, it is supposed that the thing exists in specie, and where the thing so exists and there is

(*a*) *Patterson v. Continental Insurance Co.*, 18 U. C. Q. B. 9.

(*b*) *Gillespie v. British A. F. & L. Assce. Co.*, 7 U. C. Q. B. 108.

(*c*) *Patterson v. Continental Ins. Co.*, 18 U. C. Q. B. 9.

(*d*) *Knight v. Faith*, 15 Q. B. 649, 659.

a chance of recovery, in order to make it a total loss, there must be an abandonment (*a*).

The loss will be total if the vessel as injured is useless to the owner, unless at an expense that no prudent man if uninsured would incur an expense exceeding the value of the ship when repaired (*b*).

An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of insurance but it must be such as to effect that transfer absolutely and unconditionally (*c*).

What would otherwise be a constructive total loss, will be held to be an actual total loss when the subject of loss has been sold, and no notice of abandonment will be required for the property by sale has passed, and there is nothing abandoned to the insurers (*d*).

Where the policy is on freight and the ship and cargo are justifiably (*i.e.* under extreme necessity) sold abroad, the assured may without notice of abandonment recover as for a total loss of freight. But if the sale is unjustifiably made when the ship might have been repaired or the cargo sent on so as to earn freight, mere notice of abandonment unaccepted cannot alter the rights of the parties. Where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie, or in a merchantable state at its port of destination, the master is not justified in selling, and the shipowner will not be entitled on the ground of the master's negligence or improper conduct in selling the goods instead of forwarding them, to give notice of abandonment and recover as for a total loss of freight. Where the cargo on board a vessel was partially damaged, and sold by the

(*a*) *Tunno v. Edwards*, 12 Ea. 488.

(*b*) *Harkley v. Prov. Ins. Co.*, 18 U. C. C. P. 335; *Irving v. Manning*, 2 C. B. 784.

(*c*) *Harkley v. Prov. Ins. Co.*, 18 U. C. C. P. 346.-7.

(*d*) *Farnworth v. Hyde*, 18 C. B. N. S. 835.

master, but it was not shown that such a necessity for sale existed as to make the sale a legal one, and it further appeared that the vessel could have been repaired at a reasonable cost and within a reasonable time, and could have put to sea and conveyed the cargo, which the master sold, to the port of destination; it was held that the insurers on the freight policy were completely exonerated. Where there is no total loss of the vessel actual or constructive, and the freight is sold as partially damaged, it is necessary for the plaintiff to show affirmatively that a prudent owner would not have repaired the vessel, and that she could not have been repaired so as to have carried the freight to its port of destination (*a*).

If a ship becomes unnavigable, and cannot prudently be repaired, it seems the assured cannot recover for a total loss without an abandonment (*b*).

A vessel was driven into port where there was no dock to receive her. It appeared she had suffered so much by perils of the sea, that on survey it was judged expedient to break her up and sell her for timber. *Held*, that the assured was bound to abandon her before he could call on the underwriters for a total loss, the ship not being a wreck, but, however maimed and damaged, existed in specie as a ship (*c*)

If goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel, the loss is in its nature total to him, who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other obstacle (*d*).

Where, therefore, a cargo of dried fish on board a vessel

(*a*) *Wilson v. Merchants M. Ins. Co.*, Sup. Ct., Nova Scotia, July, 1872.

(*b*) *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. 159.

(*c*) *Bell v. Nixon*, Holts. N. P. 423.

(*d*) *Roux v. Salvador*, 4 Eng. L. & E. Reps. 500.

was insured, by a policy containing the ordinary memorandum clause, declaring the cargo to be free from average, unless general, or the ship be stranded, on a voyage from Halifax to Pernambuco and a market in the Brazils, and the vessel was so damaged by a sudden squall, as to be forced into the port of Barbadoes for repairs, where it was found that she could not be repaired in time to prosecute the voyage, and that there was no vessel in that port in which the cargo could be re-shipped to its port of destination. No survey however, was made at Barbadoes, but, as the cargo could not be sold there, the master proceeded to Trinidad, and thence to St. Thomas, where, on a survey it was found, that the cargo was so damaged by the salt water, occasioned by the disaster to the vessel before arriving at Barbadoes, that it would have become a total loss to the owners if the voyage had been prosecuted; it was held, that the owners might abandon, and treat the case as one of total loss (*a*).

The fact that the master, who is consignee, sells at a port not the port of refuge, will not affect the owner's claim when he apprises the latter of the disaster on reaching the port of refuge; and when the owners on receipt of his letter, give formal notice of the abandonment, for the owners cannot be held responsible for the conduct of the master after the voyage is abandoned. From that moment he becomes the agent of the underwriters, and whatever he does must be regarded as having been done for them, and not for the owners. In this case the master took refuge at the port of Barbadoes, whence he despatched the letter to the owners, but he afterwards sailed for Trinidad, and then to St. Thomas, where the cargo was sold for the benefit of all concerned.

On the ground that from the moment of the abandonment the master becomes the agent of the underwriters in all acts done by him from that time, if after a constructive to

(*a*) *Fairbanks v. Union M. Ins. Co.*, 2 Thompson, 67.

loss of the vessel, and notice of abandonment given by the owner, the master enter into a contract with certain parties to get the vessel off, and sign it on behalf of the owners and underwriters of the vessel, this will be no waiver of the abandonment as against the owner (*a*).

Notice of abandonment is not necessary in the case of an absolute total loss, but where there is a constructive total loss the insured is not entitled to recover without a proper abandonment, and if the policy contains any conditions as to the form and requisites of the abandonment, it will be a good defence to show that it is not made according to the conditions. The defence will be equally available though the insured has so framed his declaration as to be able to claim for an actual total loss or a constructive total loss (*b*).

A vessel in midsummer in coming up the river St. Lawrence struck on a shoal or reef which runs out northward toward point Iroquois, on the Canadian side of the river in Ontario, where the river is probably from half a mile to a mile wide. The accident occurred about two o'clock in the day. A large boulder at the point of the reef came under the vessel about amidships: she hung upon this and sank at the bow and stern till the water became level within her. From the situation in which she was, she was not exposed to the action of any sea, and could easily be got off and taken to a place of safety. She was, in fact, got off in about a week, at an expense of about $800. *Held*, that this was neither a total loss nor such a constructive total loss as entitled the insured to abandon (*c*).

Where a vessel apparently through unskilful management struck on a rock in Lake Huron, and it appeared that on the ninth day after the vessel went upon the rocks, the captain on returning to her, found her in as good a state as on the second day, and that she remained two or three

(*a*) *King v. Western Assce. Co.*, 7 U. C. C. P. 300.
(*b*) *Meagher v. Home Ins. Co.*, 10 U. C. C. P. 313.
(*c*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B. 607.

weeks on the rocks, and then floated two or three miles below. The back of the vessel was strained, but not broken and she was not at all shattered to pieces. It further appeared that there was not the slightest attempt made to get her off or to recover her, or even to examine her; while all the witnesses said they would have tried to get her off, and it seemed, beyond doubt, that there were eight days during which from the calm state of the weather an attempt could have been successfully made, for within three days after she first run on, she floated again without any assistance, and there was evidence that even one man could have hauled her off, but the captain declared he did not mean to do anything with the vessel. *Held*, that this evidence totally disproved a total loss, actual or constructive (*a*).

The general principle is that the state of things at the time of action brought is to be regarded, and if the vessel is repaired and restored before action, in as good condition as she was before, the case cannot be treated as one of total loss. But the insurers have no right to repair and tender back the ship so as to render ineffectual an abandonment by the insured when the cost of repairs is greater than the value of the ship when repaired. In other words the right of the underwriters to repair and restore the vessel is subject to the right of the insured to abandon in any case where a prudent owner uninsured would do so, on the ground of repairs exceeding the marketable value of the ship when repaired. Where, therefore, the plaintiff sues for a total loss, a plea setting up the repair and restoration of the ship, would be insufficient if it did not state the value of the repairs or show any means of determining such value (*b*).

Even although the facts are such as to justify the assured in giving notice of abandonment, yet the abandonment is not

(*a*) *Harkley v. Prov. Ins. Co.*, 18 U. C. C. P. 335.

(*b*) *Meagher v. Home Ins. Co.*, 10 U. C. C. P. 313.

absolute, but is liable to be controlled by subsequent events and if the loss has ceased to be total before action brought, the abandonment becomes inoperative. Thus, where a vessel was driven on shore, and being supposed to be a total loss, notice of abandonment was given to the underwriters. They refused to accept the abandonment, got the vessel off, brought her to St. John, her port of destination, a place safety, before action brought, and required the owner to take charge of her. The cost of repairing her after she was brought to St. John would be less than her value when repaired. *Held*, that the right of the assured to recover depended upon the state of facts existing at the time the action was brought, and that he could only recover for a partial loss (*a*).

In fact it is well settled that it is not the state of the vessel at the time the notice of abandonment is given, but its condition at the time the action is brought, that determines whether the loss is a total or partial one. The contract of insurance being one of indemnity only, the insured cannot recover for a total loss if at any time up to the commencement of the suit, the vessel is in such a state as to be of value to the insured though at a prior period, or when the notice of abandonment was given, she was in such a state as to justify the assured in treating the case as one of total loss. Whenever the vessel is still in existence, and can be restored to the owner in the character of a ship, or the goods are undestroyed, the underwriters are not liable for a total loss unless the vessel was injured to an extent that renders her not worth repairing, or the goods cannot be transmitted, or have been rendered not worth transmitting to their destined port, and the underwriters are not liable for any loss occasioned by retardation of the voyage or change of market, against which they do not undertake to indemnify the assured. Where, therefore, the vessel insured had struck on the rocks in an exposed situa-

(*a*) *Taylor v. Smith*, 1 Hannay 120.

tion on the 11th of November, 1839, and, notwithstanding, the exertions of the crew and persons from the shore, was abandoned by the crew on the 15th, being then as all supposed in a hopeless condition and not worth further expense or trouble. Notice of abandonment was given to the underwriters by the assured on the 19th, and on the 20th the underwriters accepted the abandonment. On the 21st a heavy gale lifted her off the rocks, and she was brought safely into port, whereupon the underwriters on the 27th gave notice that they would not accept the abandonment. It was held that though at the time the notice of abandonment was given, and accepted by the underwriters, the abandonment was well made, yet, that subsequent events having made that a partial, which was formerly a total loss, the assured were only entitled to recover as for a partial loss (*a*).

In such cases as above the underwriters are only liable to indemnify the assured for the amount of damage done to the vessel or cargo. So in cases of capture while the insured vessel is in the hands of the enemy, the whole property is taken out of the possession of the owners, and unless it is recovered the underwriters must pay for it to the extent of the insurance, but if it be recaptured either by a ship of war, by a privateer, or by the exertions of the captain and crew, the underwriters are only liable for the salvage and other inevitable expenses consequent upon the the capture and recapture (*b*).

Except in cases where the underwriter by accepting or acting upon the abandonment has precluded himself from taking any objection to its validity ; it may be laid down as an universal principle, that no abandonment can have any

(*a*) *Kenny v. Halifax Mar. Ins. Co.*, 1 Thomson 113 ; see, also, *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B. 623.

(*b*) *Ib*, 117-8 ; see, also *Hamilton v. Mendes*, 2 Burr, 119-8 ; *Bambridge v. Wilson*, 10 Ea. 329 ; *Patterson v. Ritchie*, 4 M & S 393; *Naylor v. Taylor*, 9 B. & C. 718.

effectual operation unless the state of things were such as to justify it at the time it was made (*a*).

A condition in a policy "that the vessel was insured against total loss only, and that no claim for general average loss or particular average loss shall attach under the policy," enables the insured to claim only as for a total loss which may be established, though it was not an actual loss by abandoning when the circumstances of the accident entitle the insured to do so. The right to abandon is not enlarged in its operation by a negative condition, that the insured should not have a right to abandon the vessel in any case, unless the amount which the insured would be liable to pay under an adjustment, as of a partial loss, exclusive of general average and charges of the nature of general average, should exceed half the amount insured, and, notwithstanding the latter condition, the insured is entitled to abandon so as to create a total loss, when and only when the nature of the casualty is such as by the law England to entitle him to do so (*b*).

Notice of abandonment is indisputably necessary by law in all cases where the insured elects to abandon.

Where the vessel insured ran upon the rocks on the 11th of October, and the defendant's agent was informed of it by the insured on the 16th of October, but he was not informed of his abandonment as for a total loss until he made the protest before the agent on the 17th of October, and no formal abandonment in writing under the terms of the policy was made until the 27th of December following, when the vessel had been floated off and utterly lost by the carelessness of the insured; it was held that the notice was too late to be available, even if there had been such a loss as would have entitled the assured to abandon (*c*).

A verbal abandonment of a vessel to the agent of an

(*a*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B. 623 per Robinson, C. J.; see, also, *Roux v. Salvador*, 3 Bing, (N. C.) 286-7 per Ld Abinger.

(*b*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B. 607.

(*c*) *Harkley v. Prov. Ins. Co.*, 18 U. C. C. P., 335.

insurance company who is not authorized to receive it, and does not communicate it to the company, is not a notice to the company and especially when the policy requires that the abandonment shall be in writing, signed by the insured, and delivered to the company or their authorized agent (*a*).

The test whether the insured has a right to abandon so as to claim for a total loss is whether a prudent man would think it worth his while to attempt to save and repair the vessel, it being assumed that he would not do it unless he had the prospect of gaining something by the attempt; in other words that he would not make the attempt unless it appeared probable that the vessel when got off, and restored to the state she was in before the accident, would be worth as much as the operation would cost him (*b*).

Where a vessel is stranded, the mere restoration of her by the underwriters, if the insured is called upon to pay as much or more than she is worth when restored, will not prevent the insured from claiming for a total loss; for if the voyage be not worth pursuing, or the ship be reduced to such a state that she cannot proceed without refitting, the expense of which would greatly exceed her value, the insured may abandon and claim as for a total loss. Where, therefore, the jury found that a prudent owner uninsured would, in the state in which the vessel was, have abandoned her; it was held that the insured had a right to give notice of abandonment and treat the case as one of constructive total loss, and this although after the notice was given the master had entered into an agreement for the recovery and repair of the vessel, and she was repaired and tendered to the owner (*c*).

Acts of the underwriters in recovering and repairing the

(*a*) *Harkley v. Prov. Ins. Co.* 18 U. C. C. P. 335; see, also, *Hunt v. Royal Ex. Assce. Co.*, 5 M. & S. 47; *King v. Walker*, 2 H. & C. 384, 11 Jur. (N. S.) 43.

(*b*) *Meagher v. Ætna Ins. Co.*, 20 U. C. Q. B. 607.

(*c*) *King v. Western Assce. Co.*, 7 U. C. C. P. 300; see, also, *Thompson v. Royal Ex. Assce. Co.*, 1 M. & S. 30.

vessel do not amount to an acceptance of the notice of abandonment when the policy contains a provision to that effect (*a*).

The insurer of a ship who has accepted an abandonment made by the insured cannot afterwards resist the claim of the latter under pretext of the violation of the clauses of the policy and a deviation from the route agreed upon (*b*).

Where by the provisions of the policy every $300 in the order of invoice was to be considered separately insured, and coffee was declared to be free from average under 10 per cent unless general, and it appeared that there were thirty bags of coffee, valued in the policy at $654, but only seven of these were damaged to an extent very slightly exceeding 10 per cent. *Held*, that the damage should have exceeded 10 per cent on the whole lot valued at $654, otherwise the insured could not recover (*c*).

If a vessel is driven on a rock by perils of the sea and is injured, the insured is entitled to be indemnified against that loss, but he is not obliged to use exertions to get her off and he may let her go to pieces if he likes, and will still have his remedy for the loss sustained by her getting on the rocks by perils of the sea. He cannot, however, claim for more than this for the rest is his own voluntary loss (*d*).

A policy of insurance on a vessel provided that no partial loss, or particular average should be paid unless amounting to five per cent. The vessel having sailed from Cardiff in perfect order and condition, grounded on a coral reef on entering the harbor of Mantanzas, and continued on it bumping for upwards of twelve hours. She did not leak, however, and on being examined by surveyors was pronounced sound. She took cargo and sailed for Queenstown, but on arriving there was very leaky, but it was thought she might safely continue the voyage on being supplied with new pump gear

(*a*) *Kenny v. Halifax Mar. Ins. Co.*, 1 Thomson, 113.
(*b*) *Leduc v. Prov. Ins. Co.*, 14 L. C. J. 273.
(*c*) *Sun M. Ins. Co. v. Masson*, 4 L. C. J. 23.
(*d*) *Harkley v. Prov. Ins. Co.*, 18 U. C. C. P. 335, 351,

and three additional hands, and she thence sailed to Stockholm with her cargo. She took in cargo again at Sundswall, a neighboring port, and the thence sailed to Sunderland, England, where she discharged her cargo. On being examined there she was found to have sustained damage exceeding five per cent by grinding on the rocks. The court being satisfied that the injury was either wholly sustained at Mantanzas or was the immediate and necessary consequence of what occurred there ; held that the insured was entitled to recover (*a*).

Where in an action on a marine policy the plaintiff recovered as for a total loss, the facts only showing a partial loss, which, however, was not distinctly left to the jury, the court granted a new trial without costs (*b*).

There appears to be no necessity in pleading to specify whether the plaintiff proceeds for an actual or a constructive loss, and it has long been settled that on a total loss alleged, a partial loss may be recovered, because total or partial is not the ground of action ; it is the estimate of damages merely (*c*).

Under a declaration claiming as for a total loss the plaintiff may recover for a partial loss, and in such case when a policy provides that no partial loss shall be paid unless exceeding five per cent, the plaintiff may in the absence of any evidence by defendant of the extent of the injury, recover for a partial loss, on a certificate of a ship carpenter made upon a survey that the vessel is not worth repairing, and this though she is afterwards repaired and there is no direct evidence of the value of the repairs (*d*).

Where the plaintiff sues for a total loss, a plea setting up facts which negative an actual total loss, but do not necessarily show that there was no constructive total loss, is no answer to the action, for the insured may in some cases

(*a*) *Berry v. Columbian Ins. Co.*, 12 Grant 418.
(*b*) *Davis v. St. Lawrence I. M. Assce. Co.*, 3 U. C. Q. B. 18.
(*c*) *Harkley v. Prov. Ins.* Co., 18 U. C. C. P. 345.
(*d*) *Dimock v. New Brunswick M. Assce. Co.*, 1 Allen, 398.

recover for a constructive total loss on such a declaration. So where a recovery and repair of the vessel in case of loss is permitted by the policy, without prejudice to the rights of either insured or insurer, a plea setting up a recovery and repair, but not stating the cost or affording any means of determining the cost of such repair would be no answer to the action, for if the cost of repair exceeds the marketable value of the ship, the insured is not bound to repair and may treat the case as one of total loss (*a*).

Where the declaration is framed so that the plaintiff can claim for an absolute total loss or a constructive total loss, and the declaration avers an abandonment of the vessel, and the defendants' acceptance thereof, which are both material allegations as respects constructive total loss ; a plea traversing these latter allegations would be good (*b*).

So where a declaration contains these allegations as to abandonment, and acceptance, etc., the defendants have a right to treat the declaration as founded on a constructive total loss, and a plea denying that the abandonment is sufficient according to the conditions of the policy will be good (*c*).

The description of the voyage in a policy must be taken in its commercial acceptation and not in its strict geographical meaning. Where therefore a policy is effected at and from a particular port, evidence may be given of an established usage of trade authorizing the vessel's sailing from another port geographically distinct (*d*).

In the construction of a policy evidence may be adduced to ascertain the true meaning of a descriptive or other particular word and the sense in which it has been used and the

(*a*) *Meagher v. Home Ins. Co.*, 10 U. C. C. P. 313.

(*b*) *Meagher v. Home Ins. Co.*, 10 U. C. C. P 313.

(*c*) *Ib.*

(*d*) *Hennessy v. N. Y. Mutual M. Ins. Co.* 1 Oldright 260; *Robertson v. Clarke* 1 Bing. 445; *Higgins v. Aquilar* 2 Taun. 406; *Moxon v. Atkins*, 3 Camp. 200.

meaning being ascertained the construction of the instrument of course belongs to the court (*a*).

A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect. Where in a policy on a steamer the words of description were "on the hull and joiner work of the steamer *Malakoff* (now in Tate's dock, Montreal) navigating the river St. Lawrence between Quebec and Hamilton stopping at intermediate ports," it was held that these words imported an express condition and warranty that the steamer insured was navigating and should continue to navigate while the policy remained in force, and the engagement not having been performed the insurers were discharged (*b*).

If the words used in a policy as descriptive of the vessel insured, import an agreement that she shall navigate, they must be considered as a warranty and if the engagement is not performed whether it is material or not material or whether it produces the loss or not the insurers are discharged. But where a vessel was described in the policy "as now lying in Tate's dock, Montreal, and *intended* to navigate the St. Lawrence and lakes from Hamilton to Quebec principally as a freight-boat and to be laid up for winter in a place approved of by the company who will not be liable for explosion either by steam or gunpowder;" it was held that these words contained no contract to navigate but merely indicated an intention to do so and therefore did not amount to a warranty and that therefore the insurers were liable though the vessel was destroyed in the dock before any removal (*c*).

Any fraud, concealment or misrepresentation on effecting a policy or the suppression of a fact on which it may be important to the insurer that he should be allowed to exercise

(*a*) *Hennessy v. N. Y. Mutual M. Ins. Co.* 1 Oldright 260–1; 8 M. & W. 823.

(*b*) *Grant v. Equitable Ins. Co.* 8 L. C. J. 13; affirmed on appeal *Ib.* 141; 14 L. C. R. 493.

(*c*) *Grant v. Ætna Ins. Co.* 6 L. C. J. 224; S. C. 5 L. C. J. 285 reversed; 6 L. T. N. S. 735.

his judgment either as to taking or refusing the risk or in fixing the rate of premium invalidates the policy (*a*).

It is even held necessary to communicate everything the party knows as to rumors which he may have heard, even though such rumors may turn out to be unfounded, and the reason is that the insurer may know everything which may affect his judgment in taking the risk (*b*).

Where a vessel left Port Wellington on the 6th of October for Kingston; was exposed to a violent gale which drove her above this port and compelled her to take refuge in Presque Isle. In this gale she received some damage, and the cargo was at least partially wet. She had been seen to leave Presque Isle on the 8th, in the evening was known to have been caught in a sudden and violent squall, in which it was feared she had been lost. Other vessels then near her had arrived, and consequently at the time the risk was taken she was a missing vessel. The insurance was effected on the 8th October and it appeared that the insured then knew the above facts and had also attempted to effect an insurance at another office but the risk had been declined. *Held* that the concealment of the above facts was such as to avoid the policy (*c*).

If the insurers before taking the risk make the enquiry whether the vessel has sailed, and are misinformed, they cannot be compelled to make good the loss ; but if no enquiry is made by them and they are merely allowed to take the risk without anything being said on the subject, while the assured knows that the vessel has, in fact, sailed, but omits, whether intentionally or otherwise to state it ; such omission will not avoid the policy unless the ship was at the time what is called a missing ship, that is so long out

(*a*) *McFaul v. Montreal I. Ins. Co.* 2 U. C. Q. B. 59.

(*b*) 14 Ea. 494.

(*c*) *McFaul v. Montreal I. Ins. Co.* supra.

that according to the rule of computation for the voyage she ought to have arrived, but has not been heard of (*a*).

But where the insured is only owner of the cargo and not master or owner of the vessel, and has therefore no control over the sailing of the ship, he cannot be held to make any positive statement on the subject, and when in such a case the insurance was effected by the plaintiff's agent and the evidence as to representations of the time of the ship's sailing was contradictory and inconclusive, the court refused to grant a new trial on a verdict being found for plaintiff (*b*).

In effecting an insurance all facts material to the risk known to the one party and not known to the other must be fully and fairly declared (*c*).

In effecting a time policy, however, it is not necessary to state the time of sailing on, or the *terminus* of the particular voyage the vessel was pursuing at the time of effecting the policy. But these facts may become material as where the policy is to have a retrospective operation, any circumstances connected with the probable whereabouts of the vessel may be important, as if the time of sailing be such as to make the ship a missing ship, or the fact of a hurricane occurring at the *terminus* renders it probable from her time of sailing, and port of destination that she was exposed to the storm.

Plaintiffs applied to defendants on November 12th to insure their vessel on a time policy for six months, beginning on the 9th September previous, the day on which she left Swansea for St. Thomas, where she was then overdue. In the written application in reply to the queston "where bound," the plaintiffs reply was "a port in the West Indies." The news of a violent hurricane having occurred at St. Thomas had been published in the papers that morning, and was known to plaintiffs but not to defendants. The

(*a*) *Perry v. British Am. F. & L. Ins. Co.*, 4 U. C. Q. B. 334 ; *Fort v. Lee*, 3 Taunton, 381 ; *Foley v. Moline*, 5 Taunton, 430 ; *Elton v. Larkins*, 5 C. & P. 385.

(*b*) *Perry v. British Am. F. & L. Ins.Co.*, Supra.

(*c*) See *Bates v. Hamilton*, L. R. 2 Q. B. 604 per Cockburn, C. J.

hurricane was described as taking place about the 1st November. It was held that the destination of the vessel and the fact of the hurricane were material to the risk, and should have been communicated to the defendants, and this not being done, the plaintiffs were non-suited. If, however, the underwriters had known of the hurricane it would not have been necessary to communicate it (*a*).

In determining whether any fact, actual or rumored is material, we must ascertain whether the fact would naturally and reasonably enter into the estimate of the risk or the reasons for or against entering into the contract of insurance.

And if a party having given instructions for effecting a policy, receives intelligence material to the risk, he must forthwith or with due and reasonable diligence communicate it or countermand his instructions (*b*).

A representation by the insured, on an application for insurance as to the value of the vessel, if exorbitant, is a material representation ; and whether it proceeds from a wilful intention to deceive, or from mistake, or even ignorance, the contract will be void. Parol evidence of such representation is admissible, but the materiality of it as well as the truth of it is for the jury (*c*).

The interests of commerce and various complicated rights which different persons may have in the same thing, require that not only those who have an absolute property in ships but those also who have a qualified property therein, may be at liberty to insure them. Possession of a ship with an authority to manage it, confers an interest entitling to insure. There is no doubt that a trustee may insure and one of two trustees being part owners can insure a vessel (*d*).

Where one of the conditions of an open policy provides that it shall not be held to cover any cargo endorsed on it

(*a*) *Mahoney v. Prov. Ins. Co.*, 1 Hannay 622.
(*b*) *Ib*, 627-8.
(*c*) *McCuaig v. Unity F. Ins. Co.*, 9 U. C. C. P. 85.
(*d*) *Moore v. Home Ins. Co.* 14 L. C. J. 77-82.

until the name of the vessel carrying the cargo to be insured is communicated to the company or their agent, a compliance with the condition is necessary to complete the insurance, but the communication of the name will be a sufficient compliance, although the insurers neglect to indorse it on the policy. If, at the time of giving such notice the insured knew that the vessel insured had collided with another vessel, the suppression of this fact would avoid the policy, but if they had no knowledge of the collision the insurance would be effectual (*a*).

To satisfy a condition as to preliminary proof of the loss of a vessel the plaintiff delivered the master's protest describing the loss and a certificate of a ship carpenter, that the vessel was not worth repairing, also examined copies from the custom house of the declaration of ownership and the certificate of registry, it was held that this was sufficient preliminary proof to enable the plaintiff to recover for a partial loss, and that a certificate from the custom house that the register of the vessel had been deposited there as a condemned vessel was not necessary (*b*).

When the value of a ship has been fixed by the policy, a joint owner who has insured the whole of the ship in his own name alone has a right to a moiety of the entire value and not simply to a moiety of the sum insured when this moiety of the value does not exceed the sum insured (*c*).

Where by the conditions of a policy the insurance will only cover vessels of a particular class and there exists no regular classification of vessels or any register, which can be taken as of itself sufficient to settle the question, the class to which the vessel belongs must be decided by the general evidence of her being of that class as recognized by mariners and of her being seaworthy and perfectly adapted to the purposes for which she is used (*d*).

(*a*) *Cusack v. Montreal Ins. Co.* 6 L. C. J. 97.
(*b*) *Dimock v. New Brunswick M. Assce. Co.* 1 Allen 398.
(*c*) *Leduc v. Prov. Ins. Co.* 14 L. C. J. 273.
(*d*) *Cusack v. Mutual Ins. Co.* 6 L. C. J. 97.

The declaration on a marine policy set out as among its provisions, that a regular survey should be held as soon after the accident as possible by competent persons mutually chosen, etc., and when a vessel after survey should be found capable of being repaired and made as good as she was prior to the accident, no abandonment would be allowed without the consent of the defendants; that she should be sound and seaworthy, and well manned and found, and if upon a regular survey she should be declared and found unseaworthy on account of being unsound or rotten, or incapable of prosecuting her voyage, on the same account then the assurers should not be bound to pay anything. Plaintiffs then alleged that the vessel was stranded, disabled and wholly lost. Defendants pleaded that no such regular survey was held as required by the proviso set out in the declaration, although the vessel was at the time of the accident and at the commencement of the suit above water, and was a proper subject of survey, and they were willing to choose a surveyor. *Held*, on demurrer that the plea was good; for the provision for a survey was not confined to the case of a partial loss, and on the declaration the plaintiff could have recovered for that as well as for a total loss (*a*).

Though the circumstances of a loss are very suspicious, yet if there is *prima facie* evidence on the part of the plaintiff that the loss was accidental, and this evidence is not contradicted by the defendant the court will not disturb a verdict for the plaintiff if the question of fraud is fully and fairly left to the jury (*b*).

Where an insurance is made for, and on, behalf of A, but the loss is made payable to B as agent, A can recover in an action on the policy in his own name for by making

(*a*) *Hamilton v. Montreal Assce. Co.*, 23 U. C. Q. B. 437; see, also, *King v. Walker*, 9 Jur. (N. S.) 1157.

(*b*) *Dimock v. New Brunswick Assce. Co.* 1 Allen 398.

the loss payable to B, the latter is only entitled to receive it as agent (*a*).

In a case of marine insurance the policy adopted was a renewable time policy of insurance against fire according to the form used for houses and buildings and the conditions endorsed on the policy which were inapplicable to the subject matter insured were not struck out so that the insurance was subject to the ordinary conditions of a policy on houses and buildings. The policy was subject to a condition that if more than 20 lbs. of gunpowder should be on the *premises* at the time any loss happened, the loss should not be made good. The court held that the word premises should be construed not as signifying buildings for there were none to be insured, but in its legal sense as the subject or thing previously expressed so as to apply to the insurance on the steamer, and that there having been a violation of the condition the policy was void whether or no the loss arose from the violation (*b*).

A barge on a voyage by river and canal, having when navigation was about to close received damage by an accident and partly sank in shallow water, by which the greater portion of her cargo was rendered nearly worthless, though a portion remained sound, and the shipper before the raising and repair of the vessel having abandoned the cargo as a total loss to his insurers by endorsement of bill of lading, and they having removed the cargo to shore, sold the damaged and stored the sound with the knowledge of the master ; and the shipper, not accepting the master's offer afterwards made to complete the voyage when his repairs were finished, which might not have been in time for that season's open navigation. *Held*, (1) that the cargo could not be held to be wholly perished under art. 2,451 C. C., so as to found an action to recover freight advanced by the shipper. (2) That this was such an acceptance by the

(*a*) *Barteaux v. Cobequid M. Ins. Co.* sup. ct. Nova Scotia Feby 73.

(*b*) *Beacon L. & F. Ins. Co. v. Gibb* 13 L. C. R. 81.

shipper of the cargo short of the original destination as bound him to pay freight *pro rata itineris peracti* calculated by distance on the damaged portion of the cargo removed and sold by his assignees, the insurers. (3) That the master was entitled to full freight per bill of lading on the sound portion remaining stored in the possession of the shipper's assignees (*a*).

When the vessel shortly after leaving port becomes leaky or founders, the presumption that she was not seaworthy when she sailed, may be rebutted by positive proof of seaworthiness, but it will not be affected by proof of the strength of the ship, or her age, or the completeness of her equipments. It seems, that if the vessel shortly after sailing be found, by springing a leak or otherwise, to be unseaworthy, it is the duty of the master to make a port where repairs and supplies can be had, and when obtained the liability of the underwriter previously lost or suspended would revive (*b*).

Where it appeared that a schooner sailed from Halifax on a fishing voyage on the 5th October, 1868; that being abreast of Cape Canso on the 7th, at 7 p.m., the wind blowing fresh at the time, when the pumps were tried as a usual thing, it was discovered that the vessel had sprung a leak. The crew manned the pumps and freed her of water. On the 8th they arrived at Port Hawkesbury, and put the vessel on the marine railway and there had her examined and caulked where deemed necessary by the workmen. On the 9th they proceeded on the voyage and the vessel still leaked, when the master concluded that if the leak increased he would touch at the port of Sydney, and put the vessel on the marine railway there. During all this time she could be freed by the pumps, and was so. After leaving the strait the leak increased to such an extent that

(*a*) *Tourville v. Ruchle*, 15 L. C. J. 29.

(*b*) See *Irvine v. Nova Scotia M. Ins. Co.*, Sup. Ct. N. S. 1872; *Wier v. Anderson*, 2 B. & Ald. 320; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227.

the master deemed it prudent and advisable to run no risk in proceeding on, and put into little Canso. After undergoing repairs there, by putting in some new plank abreast the main chains, and further caulking, they again proceeded on the voyage on the 13th, and arrived at their destined port in the Bay of Islands on the 19th without further trouble or accident, and commenced their fishing and continued doing so without interruption until the 18th of November (that is, after an interval of 30 days), when they had caught 300 barrels of herrings, and were hindered from further prosecuting their vocation by the vessel settling down during the night to such a degree that the water in the hold covered the cabin floor, and the pumps being unable to relieve her, the master was obliged to beach her, and she was afterwards condemned as unseaworthy, and sold, producing $49 net proceeds.

The head carpenter at the railway slip deposed that he found the corners of two or three of the butts leaking from the working out of the oakum; found a rotten knot or knot hole; caulked the butts and stopped the knot-hole; made all the examinations and all the repairs he considered necessary to make it seaworthy; considered her a fine, good vessel; a good seaworthy, first-class vessel at that time. On his cross-examination, he said he did not try her planking above the ballast water line; found the planking sound below that line; she had a thick coat of copper paint on; found no worms, and could not account for her going down at anchor. It further appeared from the testimony of one of the witnesses, that in the month of October, when near the Bay of Islands, there was a heavy gale of wind which lasted from Saturday night till Monday morning. The vessel strained heavily in that gale. It was after that she sprang a leak and leaked worse than she did before. This witness had no doubt that the leak was caused by the straining in that gale; the men had to labour more in pumping after that gale. The court considering the absolute

silence of the officers of the ship as to this gale, which rendered it very problematical, and considering also that that there were a number of witnesses on board, several of whom could easily have been produced ; that the evidence of the single seaman examined as to the fact of the gale should be confirmed, and as the jury appeared to have decided on this evidence that the defendants were entitled to a new trial (*a*).

Where an insurance was effected in the Province of Nova Scotia by a time policy, covering a vessel on a voyage from Liverpool to New York, and a loss was sustained on this voyage, which was the subject of general average, and was adjusted according to the usage prevailing in New York ; it was held, that the insurers were bound to pay the general average on the adjustment made in New York, in conformity with the laws and usages in the United States, though a larger sum was allowed than would have been allowed if the adjustment had been made according to the law of Nova Scotia, the place where the policy was made (*b*).

Although a sale of a vessel by the master is made *bona fide* and for the benefit of all concerned, this will not make it lawful ; it must also be justified by urgent necessity. Where, therefore, a vessel lay moored in the harbor of St. Georges, at Bermuda, and could have been there secured with safety to the interests of all concerned, so that if she was left in that harbor a notice of abandonment could have been given to the insurers at Liverpool, so that they could had they thought proper so to do have accepted the abandonment and taken possession of the vessel, and repaired her, and the vessel was in fact in that situation at the moment that the master made sale of her ; it was held that the sale was not justified (*c*).

(*a*) *Irvin v. Nova Scotia M. Ins. Co.*, Sup. Ct. (N. S.) 1872.

(*b*) *Avon M. Ins. Co. v. Barteaux*, Sup. Ct. N. S. 1870, 6 U. C. L. J. N. S. 85.

(*c*) *Morton v. Patillo*, Sup. Ct., Nova Scotia.

BOOK III.

LIFE INSURANCE.

The various Canadian cases on this branch of insurance will be found in other parts of this work. In fact the principles governing the law of fire and life insurance are so very similar, that a learned English author has remarked that he "found it impossible to give separate chapters for life and fire insurance, the principles being generally applicable to both, and the cases fixing those principles being occasionally wanting in one or the other" (*a*).

In the preparation of this work I have found that all the cases which have arisen in Canada on the subject of life insurance are equally applicable to fire insuaance. I have, therefore, dealt with the cases on life insurance while discussing the subject of fire insurance, in order that the chapter on life insurance might be compressed into the smallest possible compass. In the present chapter I have endeavored, in regard to life insurance, to supply what is wanting in other parts of this work, and also to treat of such matters as are peculiar to life insurance. For any thing which may be wanting in this chapter on the subject of life insurance, I beg to refer the reader to other parts of this work.

In life insurance it is only necessary that an interest should exist at the date of the policy: as the contract is not one of indemnity (*b*), the cesser of interest after the date of the policy is immaterial. But the interest must be pecuniary, and no ties of blood or affection are sufficient.

(*a*) See *Beaum.* on Ins. preface p. 4.

(*b*) Ante p. 1; *Hebden v. West*, 3 B. & S. 579.

The interest must ordinarily arise out of some subsisting right of property which may be prejudicially affected by the occurrence of the event insured against, and which, whether in possession in reversion or contingent, would give the insured a standing in a court of equity if the title were in question. There is at common law one exception to this rule; thus, it has been considered, that a wife has an insurable interest in the life of her husband (*a*).

Now, by the Statute of the Province of Ontario, 35 Vic., c. 16, s. 3, a married woman, in her own name or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or, with his consent, the life of her husband, for any definite period, or for the term of her or his natural life; and the amount payable under said insurance shall be receivable for the sole and separate use of such married woman or her children, as the case may be, free from the claims of the representatives of her husband or of any of his creditors.

Section 4 of the Statute enacts that "a policy of insurance effected by a married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, or upon which he may at any time after effecting such insurance, notwithstanding, a year may have elapsed, endorse thereon that the same shall be for the benefit of his wife or of his wife or children, or any of them, shall inure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them, according to the intent so expressed and shall not so long as any object of the trust remains be subject to the control of the husband or his creditors or form part of his estate, save and except for such amounts as the same may be pledged to any person or persons prior to any endorsement thereon for the benefit of his wife or children, or any of them. When the sum secured by the policy becomes payable: in the event of no executor or trustee having been

(*a*) *Reed v. Royal Ex. Assce. Co.*, Peake Add. Cases, 70.

appointed by the husband by will, a trustee may be appointed by the Court of Chancery upon the application of the wife, or in the event of her death by the children or their guardian, and the receipt of such executor or trustee shall be a good discharge to the office in which such insurance is effected ; provided always, if it shall be proved that the policy of insurance was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premium so paid.

The Statute of Canada, 29 Vic., c. 17, also provides, that it shall be lawful for any person to insure *his* life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, or of his wife and some or one of his children, or of his children only, or some or one of them, and to apportion the amount of the insurance money as he may deem proper, when the insurance is effected for the benefit of more than one.

Section 2 provides, that the insurance may be effected either in the name of the person whose life is insured, or in the name of his wife, or of any other person, with the assent of such other person as trustee.

The Statute of Ontario, 33 Vic. c. 21, recited, that in cases under the 29 Vic. c. 17, where the insurance was effected for the benefit of the children, and they happened to be under age, the insurance companies were subjected to great difficulties in obtaining a sufficient discharge for the sum paid; it then provided, that when the children entitled were under age, it should be competent to the insurance company granting the policy, to pay the amount due to such of the children as should be minors, into the hands of the executor or executors of such insured persons, who shall hold the same as trustees for such children, and the receipt of such executor or executors shall be a sufficient discharge to the company. This statute further provided, that if the insured died intestate, without appointing any

one to receive the insurance money, it might be paid to the guardian for the minor.

Section 4 of this Statute provides "that if a person who has effected, or shall hereafter effect, an insurance, in the terms of the Act 29 Vic. c. 17, already referred to, shall find hinself unable to continue to meet the premiums, it shall be lawful for him to surrender the policy to the company granting the same, and to accept in lieu thereof, a paid up policy for such sum, as the premiums paid would represent payable at death, in the same manner as the original policy; and the said company may accept such surrender and grant such paid up policy notwithstanding any such declaration or direction in favor of the wife and children or any or either of them of the assured." Section 5 of the Act provides "that the party insured may borrow on the security of the policy, such sums as may be necessary to keep it in force, and the sums so borrowed shall be a first lien on the policy notwithstanding any such direction in favor of the wife and children or any or either of them."

By Section 6, "in the event of the death of any one of the persons entitled, the money is to be paid to the survivors or survivor, and if all die to the executors or administrators of the insured."

Section 7, "provides that any person insuring with profits may apply the same either in payment of premiums or direct them to be added to the insurance money payable at death."

A husband has not an insurable interest in the life of his wife, nor has a parent an insurable interest in the life of his child (*a*). Neither can a child who has attained his majority have any greater insurable interest in the life of his parent as such than the parent in the life of the child; but, it seems a husband or father may insure the life of his wife or child, or a child that of his parent, when he is possessed of any interest in property dependent upon the life

(*a*) *Halford v. Kymer*, 10 B. & C. 724.

in question. As in the case of fire insurance, the mere chance or expectancy which a person may have as the heir or next of kin of another will not give him an insurable interest in the life of his ancestor, although the premature death of the latter might deprive the former of property which might otherwise devolve upon him (*a*).

An expectant devisee cannot insure the life of his testator so as to secure the value of a promised devise, but it has been thought that a purchaser from him of the value of the expected devise might do so (*b*).

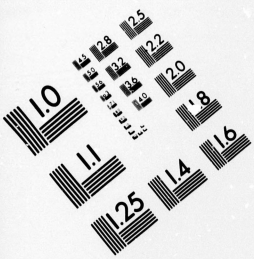
It is presumed that every man has an insurable interest in his own life (*c*). A creditor has an insurable interest in the life of his debtor (*d*), and the circumstance that the creditor has a real security, does not vary the rule. A debt contracted during the minority of the borrower, is sufficient for the purpose, as the plea of infancy cannot be made by third persons; but, a debt for money illegally won at play, will not support the policy (*e*).

The life of an alien enemy cannot, however, be insured by his creditor, though the latter be a British subject (*f*).

A debtor does not possess an insurable interest in the life of his creditor, although the latter has promised not to enforce the debt in his own life time (*g*).

Under the 14 Geo. 3, c. 48 s. 2 (*h*), when a policy is effected by a trustee or executor in respect of any legal interest vested in him, it is sufficient that his name be mentioned in the policy, and it is not requisite that the name of the *cestui que trust* or person beneficially interested should be disclosed by it (*i*).

(*a*) See Ante p. 73.
(*b*) See *Cooke v. Field*, 15 Q. B. 460.
(*c*) *Wainwright v. Bland*, 1 M. & R. 481.
(*d*) *Anderson v. Edie*, 2 Park on Ins., 914.
(*e*) *Dwyer v. Edie*, 2 Park, 914.
(*f*) *Flenot v. Waters*, 15 Ea. 260.
(*g*) *Hebden v. West*, 3 B. & S. 579.
(*h*) See ante p. 37 *et seq.*
(*i*) *Tidswell v. Ankerstein*, Peake 151.



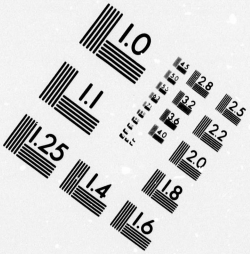
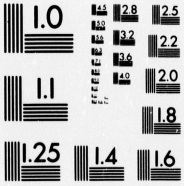
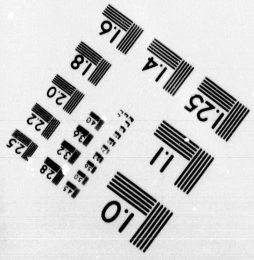
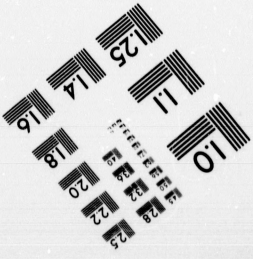


IMAGE EVALUATION
TEST TARGET (MT-3)







Under this Statute the name of the person having the present or primary interest must be inserted as well as that of the party ultimately interested (*a*).

A person cannot evade the Statute by effecting an insurance on the life of a person in which he has no interest in the name of such person, and thus obtain the benefit of the policy by assignment (*b*).

It results from the principles already stated that in life insurance it is not necessary that the insurable interest and the beneficial ownership of the policy should subsist in the same person, and an assignee possessing no such interest will be entitled as the purchaser of the policy to bring an action upon it in the name of the insured (*c*).

The statement or declaration of the assured in effecting the policy are the basis upon which the contract proceeds, and their truth as to all material points, is essential to its validity. Not only must the party proposing the insurance abstain from making any deceptive representation, but he must observe the utmost degree of good faith. The insured must not only state all matters which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything which he knows to be material, it is a fraud; but besides that, if he conceals anything which may influence the rate of premium, although he does not know that it would have that effect, such concealment entirely vitiates the policy (*d*).

All representations made by the insured must be substantially correct, and when the representation amounts to a warranty, it must not only be substantially but literally true. When the declaration is either expressly or by reference embodied in the policy, the terms of it, if unconditional and stated as facts, are in legal language warranties, and

(*a*) *Evans v. Bignold*, L. R. 4, Q. B. 622.

(*b*) *Wainwright v. Bland*, 1 M. & R. 481.

(*c*) *Ashley v. Ashley*, 3 Sim. 149.

(*d*) *Dalglish v. Jarvie*, 2 Mac. & Gor., 243.

must be strictly and literally true; their correctness is a condition precedent to the liability of the insurers (*a*).

This rule equally applies, although the mis-statement arises from an innocent mistake or false information afforded by others, or mere inadvertence. It seems, however, the insured may qualify his statement or declaration with some such words as "to the best of my belief," in which case it will be sufficient if the insured believes in the truth of his statement (*b*).

It is not material whether a representation be in writing or made by word of mouth, and in conversation only. The personal appearance and examination of the insured life does not remove the obligation resting upon the proposer of communicating all material facts in his knowledge to the insurers (*c*).

A party employing an agent to effect an insurance for him will be bound by the acts or statements of the agent in the course of his duty, and, moreover, as the knowledge of the agent is the knowledge of the principal, the concealment of a material fact known to the agent but not known to the principal will avoid the policy (*d*).

Whether the case be that of a warranty, misrepresentation or concealment, the question of materiality is not in any degree determined by the event; the contract is void in its inception. It is not rendered the less so by the circumstance that death may have arisen from some cause totally unconnected with the fact warranted, misrepresented or concealed.

Where death is caused by the felonious act of the assured, as when he dies by the hands of justice, by duelling, etc., public policy avoids the contract and the representatives of the insured cannot recover (*e*)

(*a*) *Anderson v. Fitzgerald*, 4 H. L. C. 484.
(*b*) *Wheelton v. Hardisty*, 8 E. & B. 232, Parke 8th Edn., 932.
(*c*) *Sweet v. Fairlie*, 6 C. & P. 7.
(*d*) *Gladstone v. King*, 1 M. & S. 35.
(*e*) *Amicable Socy. v. Bolland*, 4 Bligh, (N. S.) 194.

A condition is usually inserted as to death by duelling, etc. Where a condition provides, that if the insured dies by his own hands, by the hands of justice, or by duelling, the policy shall be void, except to the extent of any *bona fide* interest therein, which at the time of such death should be vested in any other person or persons, for a sufficient pecuniary or other consideration, this condition is principally for the benefit of the insured, and if the company advance money to the insured, and take the policy as collateral security, they will be in the same position as any third person, and the exception in the policy will extend to and protect them; therefore, if the insured commit suicide, the policy will be valid in their hands (*a*).

If there is no condition of this description in the policy, and the suicide takes place when the insured is insane and not accountable for his acts, the rule arising from the principles of public policy does not apply, and the representatives of the insured are entitled to the policy money (*b*).

An accident within the terms of a policy against accidents means some violence, casualty, or *vis major*; hence, disease or death generated by exposure to heat, cold, damp, the vicissitudes of climate or atmospheric influences cannot be termed accidental, and thus it was decided, that a sunstroke was not an accident (*c*).

It seems, that death by drowning while bathing will be within a policy protecting the insured against any injury caused by accident or violence (*d*).

So where an accident policy grants compensation to the insured "in case of bodily injury of so serious a nature as wholly to disable the assured from following his usual business occupation or pursuits," the insured will be entitled to compensation if disabled from carrying on his business in the usual way (*e*).

(*a*) *White v. British E. M. L. Assce. Co.*, L. R. 7 Eq. 394.
(*b*) *Horn v. Anglo-Australian, etc., L. J. Co.*, 7 Jur. N. S. 673.
(*c*) *Sinclair v. Maritime P. A. Co.*, 7 Jur. N. S. 367.
(*d*) *Trew v. Railway P. A. Co.*, 5 H. & N. 211.
(*e*) *Accidental Death A. Co. v. Hooper*, 5 H. & N. 546.

So, "a railway accident means one happening in the course of travelling, and out of the circumstances of that fact of travelling ending in injury, and does not depend on any accident to the railway itself" (*a*).

Companies are now formed for the purpose of guaranteeing the honesty and proper conduct of persons in confidential positions. In this contract as in that of life insurance, the company relies upon the representations of the parties; and the observance of perfect good faith on their part is a condition precedent to its validity. A misrepresentalion or unfair concealment of any material fact, which, if known to a society might have prevented it from undertaking the risk, will render the suretyship contract invalid. But the rule of law which in the contract of insurance avoids the policy when there has been a non-communication of material facts, however innocent the conduct of the parties may be, is held inapplicable to the contract of guarantee (*b*).

Hence, it is important that enquiry should be made on the points considered generally material, and this is done by putting various questions in the proposal. In all subsequent transactions, the relative positions of the parties must be preserved, and any act on the part of the employer which has the effect of altering the position of the surety, will discharge the latter (*c*).

It is also to be observed, that the contract of guarantee is personal, and that when entered into with partners *nominatim*, the surety is released as to future transactions by the death or retirement of one of the partners (*d*), or even by the introduction of a new partner into the firm (*e*).

In order fully to complete the assignment of a policy, notice should be given to the insurers, and the policy delivered to the assignee. Until notice given the assignor has

(*a*) *Theobald v. Railway P. A. Co*,, 2 C. L. R. 1041.
(*b*) *Lee v. Jones*, 14 C. B. N. S. 386.
(*c*) *Bonar v. Macdonald*, 3 H. L. C. 226.
(*d*) *Simson v. Cooke*, 1 Bing 452.
(*e*) *Pemberton v. Oakes*, 4 Russ. 154.

it in his power to defeat the assignment by surrendering the policy or any bonuses which have accrued thereon, to the office (*a*).

Where notice is given, the insurers become *quasi* trustees for the assignee, having notice of the trust as between the insured and his assignee, and this, although there may have been no acknowledgement of the notice, or any other act equivalent to an acceptance of a trust by them (*b*).

The assignee of a policy takes it subject to all the equities to which it was liable in the hands of the assignor. Thus if by reason of any breach of warranty or false statement made by the insurers, the policy is an invalid contract; it will be equally so after as before the assignment. And where it was one of the conditions of the policy that it should be void in the event of the suicide of the insured, it was held that the condition was equally operative after a transfer to purchasers for value (*c*).

Where a policy has been the subject of sale, fraud on the part of the purchaser will vitiate the contract, and such a fraud will be the concealment of or mere omission to mention the death of the person insured in the policy, if unknown to the vendor (*d*).

The law would seem to be the same, if, instead of death a serious illness had occurred and was concealed by the purchaser (*e*).

A policy may be effected for the benefit and in the name of an infant upon his own life or the life of another, but if he enters into a contract for a policy or a term of which is the issue of a policy as regards any liability that may arise thereon, it will be subject to the ordinary rule affecting the contracts of infants, namely, that they are void or voidable at their election on arriving at full age or according as the

(*a*) *Fortescue v. Barnett*, 2 My. & K. 36.
(*b*) *Ex parte South*, 3 Swanst. 394; *Lett v. Morris*, 4 Sim. 607.
(*c*) *Dormay v. Barrowdale*, 10 Beav. 335.
(*d*) *Turner v. Harvey*, Jac. 169.
(*e*) *Jones v. Keene*, 2 M. & R. 348.

court may pronounce them to be to their prejudice or benefit. When the policy is upon the life of the infant, the person to receive the amount at his death will be his administrator.

If the policy is upon the life of another, the amount insured as in the case of a simple legacy, cannot be paid during the minority of the infant, without the sanction of a court of equity (*a*).

(*a*) *Lee v. Brown*, 4 Ves. 366.

APPENDIX.

The following cases were received too late for insertion in the body of the work :

The performance of a condition of a policy not under seal, may be waived by a parol agreement. Thus, where a condition required notice of any alteration in the premises to be given to the insurers, and allowed by endorsement on the policy, and the declaration alleged that the insured gave notice in writing of every alteration, and requested the insurers to allow the same according to the conditions, and the latter accepted the notice, and waived the endorsement of the same on the policy, and discharged the insured from requiring to have it endorsed, and afterwards continued and confirmed the policy; it was held, that the waiver and discharge in the declaration alleged was sufficient (*a*).

It will be a sufficient excuse for non-compliance with the condition of a policy requiring the delivery of a particular statement and account of loss and damage, that the insurers have, by some act of theirs, prevented compliance with the condition. Thus, it has been held, where the insurers took possession of the premises and of all the goods and property insured remaining after the fire, and deprived the insured of the possession and control thereof, and excluded him therefrom, and prevented him from examining the said goods in detail, and making up a full and detailed account of the loss; that the insured was not bound to deliver the

(*a*) *Smith v. Coml. Un. Ins. Co.*, 33 U. C. Q. B. 69 ; *Jacobs v. Equitable Ins. Co.*, 17 U. C. Q. B. 35, dissented from.

particular statement and account of the loss as required by the condition of the policy (*a*).

If the words "for which the assured are responsible" are added to the words "goods in trust or on commission," it will be necessary at the time of the fire that the goods be at the risk of the assured. A policy of fire insurance expressed the insurance to be on "merchandize, the assured's own in trust or on commission for which they are responsible," in or on certain specified warehouses, vaults, wharves, etc. Whilst the policy was in force certain chests of tea on a wharf included in the policy were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been endorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable to such customers. It was held that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas, having at the time of the fire passed to the purchasers, they were then at the purchaser's risk, and were consequently not covered by the policy (*b*).

An insurance was for $1,800 on a building and $400 on the stock of lumber contained therein. At the time of the fire the assured testified that the value of the building had increased $600, and he claimed $450 for the lumber therein, including under that name doors, sashes, benches and other articles not properly comprised within the term. In his proofs of loss the insured claimed for $600 for the building and $450 on the lumber. The jury found the loss on the former to be $600, and on the latter $350. The court

(*a*) *Smith v. Coml. Un. Ins. Co.*, 33 U. C. Q. B. 69; see ante p. 141.

(*b*) *North B. & M. Ins. Co. v. Moffatt*, L. R. 7 C. P. 25.

considering that the insured had taken the word lumber in its largest sense, as including all his woodstock ; held that there was no false swearing in the claim made (*a*).

On the 19th of September, 1867, the insured obtained possession of certain premises, including a frame building which he intended to convert into a double dwelling house. On the 23rd of the same month he entered into an agreement with the owners to become the purchaser of the premises for $1,600, payable in six years from the 5th of November then next, to which period the parties from whom he obtained possession had a right to retain it. Before the date of the policy the insured had improved the premises and increased their value about $400; he had also paid a small sum towards the purchase money. The insured continued in possession until the date of the policy ; it was held that he had an insurable interest (*b*).

The conditions of a policy provided that " no receipts are to be taken for any premiums of insurance, but such as are printed and issued from the office and witnessed by one of the clerks or agents of the office." Before the expiry of the policy, the agent of the insurers sent the usual printed notice to his sub-agent at Yarmouth, addressed to the insured, requiring him to pay the renewal premium, and bring the notice when renewing, etc. The insured accordingly paid the premium to the sub-agent, and took his receipt with a note of the entry on the face of the notice. The payment was accidentally omitted by the sub-agent to be notified to or included in his remittances to the agent, and the payment was not known to the latter or the company until the property was afterwards destroyed by fire. The court held, that the agent had power to delegate to his sub-agent authority to receive the renewal premiums in the absence of any notice to the contrary, and under the circumstances, the insurers were bound by the payment made

(*a*) *Humphrey v. London & L. Ins. Co.*, Sup. Ct., (N. S.) 1870.

(*b*) *Humphrey v. London & L. Ins. Co.*, Sup. Ct. (N. S.) 1870.

to the sub-agent, notwithstanding the condition of their policy (*a*).

STATUTES AFFECTING INSURANCE.

By s. 14 of the 31 Vic. c. 48, every company licensed under the Act is required to transmit annually to the office of the Minister of Finance, a statement in duplicate, verified by the oath of the president, manager, or agent of such company, or any person cognizant of the facts containing certain particulars set forth in the schedule to the Act, such statement to be made up to the first day of July next preceding, or to the usual balancing day of the company, provided such balancing day be not more than twelve months in the case of life insurance companies, and six months in the case of other companies, before the filing of such statement, and a copy of such statement shall be published in the *Canada Gazette*. Any company failing to comply with the provisions of the Act, shall forfeit one thousand dollars. The Minister of Finance may vary the form of return as far as regards the business done by any company in Canada, or grant an extension of time for filing the same, according as experience or the special constitution of any company may require.

Section 16 of this Statute provides that in case of the insolvency of any company, the stock representing the deposit of such company, shall be applied *pro rata* towards the payment of all claims authenticated against such company, upon or in respect of policies issued in Canada ; and any such company shall be deemed insolvent upon failure to pay any undisputed claim arising, or loss insured against in Canada for the space of thirty days after being due, or if disputed after final judgment and tender of a legal valid discharge, and (in either case) after notice thereof to the Minister of Finance, and the distribution of the

(*a*) *Gardner v. Home Ins. Co.*, Sup. Ct. N. S. 1871.

proceeds of such stock may if applied for in the Province of Ontario, or of Nova Scotia or of New Brunswick, be made by order in Chancery or Equity, or if applied for in the Province of Quebec, may be made by judgment or order of distribution of the Superior Court, within the district where the chief agency is situated ; provided that in any case when a claim for loss is by the terms of the policy payable on proof of such loss, without any stipulated delay, the notice to the Minister of Finance under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due.

Section 17 provides that for the purposes of such distribution the court may order that the stock of the company so insolvent be transferred to and inscribed in the Government stock books at or nearest to the place of the chief agency, and within the jurisdiction of the Court, if such stock be not already inscribed there, and may order that no further interest on such stock be thereafter paid to the company, and that such stock or any part thereof, be sold in such manner and after such notice and formalities as the court may appoint.

The 34 Vic. c. 9 contains further provisions applicable to the case of the company becoming insolvent. An assignee is to be appointed by the court having jurisdiction in that Province in which the chief agency of the company is situate, and the assignee is required to call upon the company to furnish a statement of all its outstanding policies in Canada, and upon all policy-holders to file their claims. The claims are then adjusted in the manner provided by the Insolvent Act of 1869. In case of any fire insurance company becoming insolvent, the parties insured shall be entitled to claim for a part of the premium paid proportionate to the unexpired period of their policies respectively, and such return premium shall rank with judgments obtained and claims accrued in the distribution of assets. In the case of a life company the assignee

may insure all outstanding Canadian policies with some company licensed to transact business in Canada, advertising for tenders to that effect. By section 5 of this act where any company ceases to transact business in Canada it must insure on behalf of its Canadian policyholders all outstanding risks in some company or companies licensed in Canada or obtain the surrender of the policies. Upon making application for its securities the company must file with the Minister of Finance a list of all Canadian policy holders who have not been so insured or have not surrendered their policies, and it must at the same time publish in the *Canada Gazette* a notice that it has applied to the Government for the release of its securities on a certain day not less than thirty days after the date of the notice and calling upon its Canadian policyholders opposing such release to file their opposition with the Minister of Finance on or before the day so named, and after that day if the Treasury Board is satisfied that the company has ample assets to meet its liabilities, all the securities may be released by an order of the Governor-in-Council, or a sufficient amount of them may be retained to cover the value of all risks, respecting which, opposition has been filed, and the remainder may be released and thereafter from time to time as such opposing risks may lapse or proof may be adduced that they have been satisfied, further releases may be made on the authority aforesaid, and after a company has ceased to transact business in Canada after the notice hereby required and its license has in consequence been withdrawn, such company may nevertheless continue to receive the premiums coming due on policies not reinsured or surrendered and may pay the losses arising thereon as if such license had not been withdrawn.

The 31 Vic. c. 48 s. 19, provides, that after any company has ceased to transact business in Canada, and given the notice required by this Act to that effect, it shall be lawful for the Governor in Council, on the report of the Treasury

Board, to authorise the whole or any portion of the stock or other securities so held in deposit for any company as aforesaid, to be released and transferred to the company upon being satisfied that it has no liabilities upon policies issued in Canada, and that no suit or legal proceedings are pending against the company therein, or on proper proof on oath of the state of its affairs being given that such company has ample assets to meet all its liabilities, and upon such authority being given by the Governor in Council, the company shall be entitled to receive instead of any Dominion stock so held, the amount thereof in money at par.

Section 2 of this statute enacts, that no foreign stock company shall transact any business of insurance in Canada, unless such company is possessed of at least one hundred thousand dollars of paid up and unimpaired capital, or accumulated surplus funds invested in good and sufficient securities, nor shall any license be issued in favor of such company, until a statement under oath to that effect is filed with the Minister of Finance, sworn by some one whose duty it is to know and who is personally cognizant of the fact sworn to; provided, that the unimpaired amount of the deposit of any company then in the hands of the Receiver General shall be reckoned as part of its capital.

The 34 Vic. c. 9 s. 2, provides that the deposit required to be made by insurance companies doing business in Canada (*a*) may be made by any company in securities of the Dominion of Canada, or in securities issued by any of the Provinces in the Dominion of Canada, and by any company incorporated in Great Britain, in securities of the United Kingdom, and by any company incorporated in the United States, in securities of the United States, and the value of such securities shall be estimated at their market value at the time when they are so deposited, if any securities other than those above named are offered as a a deposit, they may be accepted at such valuation and on

(*a*) See ante p. 21.

such conditions as the treasury board may direct, and if the market value of any of the securities which have been deposited by any company shall decline below that at which they were deposited, the treasury board may call upon the company to make a further deposit so that the market value of all the securities deposited by any company shall be equal to the amount which they are required to deposit by this act.

The Con. Stats. Can. c. 69, is to the effect that if the managers, directors, or trustees of any fire, life, marine or other insurance company incorporated by the Legislature of Canada, knowingly and wilfully declare and pay any dividend or bonus out of the paid up capital of the company, or when the company is insolvent or which would render it insolvent, or which would diminish the amount of its capital stock ; such managers, directors, or trustees, who are present when such dividend or bonus is declared, and which said dividend is afterwards paid shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, while such managers, directors or trustees respectively continue in office. But if any of them object to the declaration of such dividend or bonus, or to the payment of the same, and at any time before the time fixed for the payment thereof, file a written statement of such objection in the office of the company, and also in the registry office of the city, town, or country where the company is situated, such managers, directors, or trustees shall be exempt from such liability.

The Con. Stats. of Canada, c. 88 enacts, that the coroner within whose jurisdiction any city or incorporated town or village in this province lies whenever any fire has occurred whereby any house or other building in such city, town, or village has been wholly or in part consumed, shall institute an enquiry into the cause or origin of such fire, and whether it was kindled by design or was the result of negligence or accident, and act according to the result of such enquiry.

By section 3, the enquiry is not to be had unless it has first been made to appear to such coroner that there is reason to believe that such fire was the result of culpable or negligent conduct or design, or occurred under such circumstances as in the interests of justice and for the due protection of property require an investigation.

By other sections of the Act, the coroner is empowered to impanel a jury, and summon witnesses to attend before him, etc.

FORMS.—CLAIM FOR LOSS.

To the Insurance Company of Canada.

Province of
County of } I of the of in the county of
To Wit:

make oath and say as follows:

The Insurance Company of Canada, through its agency at did, on the day of A. D. 18 , issue to its policy of insurance, No. the written body of which, with written indorsements and assignments, is as follows:

No. . (Here insert copy of operative part of policy).

Which said policy was subsequently continued in force, by renewal, until the day of 18 , at noon. Besides that insurance, there was $ additional insurance made thereon, as follows: that the whole cash value of the property so insured amounted to the sum of dollars at the time immediately preceding the disaster. interest therein being . The title to the realty was vested in the occupations and occupants of the premises in its several parts, being . That on the day of 18 , a fire occurred, which originated from . The amount of property belonging to so insured which was totally destroyed by fire, was as follows:

	VALUE OF PROPERTY DESTROYED.	TOTAL INSURANCE THEREON.
On	$	$
On	$	$
On	$	$

The sum of damage on that saved, as per Appraisement hereunto annexed, is:

	AGGREGATE DAMAGE.	TOTAL INSURANCE THEREON.
On	$	$
On	$	$
On	$	$

Total loss and damage $

Amount claimed of the Insurance Company, $ as particularly defined in the accompanying statement and schedule, which are made a part of this instrument. I further declare that the said fire did not originate by any act, design or procurement on part, or in consequence of any fraud or evil practice done or suffered by ; that nothing has been done by, or with privity or consent, to violate the conditions of the policy, or to render it void; that no articles are mentioned herein, but such as were in the building damaged or destroyed, and belonging to, and in possession at the time of said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said company to the extent of said loss, has in any manner been made.

Sworn before me at the of in the county of this day of A. D. 18 .

Province of
County of
To Wit:

I, a in and for said county, residing most contiguous to the property of insured as set forth in the preceding affidavit, certify that I am not concerned in that loss or claim, either directly or indirectly, either as a creditor or otherwise, or related to the in-

sured or sufferers, and that I am acquainted with the character and circumstances of and having made diligent inquiry into the facts set forth in the foregoing statement, believe and know that really, by misfortune, without fraud or evil practice, sustained by the described fire, loss and damage to the amount of dollars, on the subject insured the sum stated in affidavit of loss.

In Testimony Whereof, I have hereunto set my hand and official seal, this day of A. D. 18 .

This Form not to be used when the Claim exceeds $100.

To the Insurance Co. of Canada:

Province of } I, of in the
County of } County of make oath
and say as follows:

That the Insurance Company, through its agency at did issue to its Policy of Insurance No. , renewed by renewal receipt, No. said policy expiring 18 , and covering as follows: $ on $ on $ on and that by a fire which occurred on and originated from the assured has sustained actual loss and damage, under the terms of said policy, according to statements attached hereto, as follows: $ on $ on $ on .

That the following is a list of the whole insurance on said property, and the amount of claim against each company:

Insurance Company insures $; proportion is $
do. do. do. $; do. $
do. do. do. $; do. $
do. do. do. $; do. $

Claimant.

Sworn before me at the }
of in the County of }
this day of A.D. 18 .}
A Com'r, &c.

I hereby certify that the above claim is just and true.

Agent.

☞ Agent will retain the Original Receipt, sending Duplicate Receipt and Statement to Head Office.

[ORIGINAL].

Insurance Company of Canada. $, 18 .

Received of the Insurance Company of Canada, through agent at the sum of dollars, it being in full of all claims and demands for partial loss or damage by fire under policy No. issued at the agency of the said company, and in consideration of said payment, the sum insured is reduced that amount, leaving dollars now in force on said policy. Having signed duplicate receipts.

Date of fire 18 .

[DUPLICATE].

Insurance Company of Canada. $. 18 .

Received of the Insurance Company of , through agent at , the sum of dollars, it being in full of all claims and demands for partial loss or damage by fire, under policy No. issued at the agency of the said company, and in consideration of said payment, the sum insured is reduced that amount, leaving dollars now in force on said policy. Having signed duplicate receipts. Date of fire , 18 .

FOR BUILDINGS.

INSURANCE COMPANY OF CANADA.

Agreement for Submission to Appraisers.

It is hereby agreed, by of the first part, and the Insurance company, of , of the second part, that (together with a third person to be appointed by

them, (if necessary,) shall appraise and estimate at the true cash value the damage by to the property belonging to as specified herein, which appraisement or estimate by them or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties ; it being understood that this appointment is without reference to any other question or matters of difference within the terms and conditions of the insurance, and it is of binding effect only as far as regards the actual cash value of, or damage to such property, covered by Policy No. of said company, issued at the Agency.

The property on which the damage is to be estimated and appraised is the story building, with roof, situate . And it is expressly understood and agreed, that said appraisers are to take into consideration the age, condition and location of said premises previous to the fire, and also the value of the walls, materials, or any portion of said building saved ; and after making an estimate of the cost of replacing said building, a proper deduction shall be made by them for the difference (if any) between the value of a new or replaced building and the one insured. Said appraisers are hereby directed to exclude from the amount of damage any sum for previous depreciation from age, location, ordinary use, or any cause whatever, and simply to arrive at the damage actually caused by said fire, returning said damage in the form of a detached itemized statement (in accordance with above agreement.)

WITNESS our hands at }
this day of 187 . }

Itemized statement of damage or loss .

DECLARATION OF APPRAISERS.

Province of
County of } *ss.*

We, the undersigned, do solemnly swear, that we will act with strict impartiality in making an appraisement and estimate of the actual damage to the property of insured by the Insurance Company of Canada, agreeably to the foregoing appointment, and that we will return to the said company, a true, and conscientious appraisement, and estimate of damage on the same, according to the best of our knowledge, and judgment,

WITNESS our hands, this day of A. D. 187 .

} Appraisers.

Sworn before me, at the
of in the County of
this day of A. D. 187 .

To the Insurance Company of Canada.

Having carefully estimated and appraised the damage by fire to the property of agreeably to the foregoing appointment, we hereby report that, after having taken into consideration the age, condition and location of the premises previous to the fire, and making proper deduction for the walls, materials and portions of building saved, we have appraised and determined the damage to be dollars ($), as shown by statement of items herewith.

WITNESS our hands this day of 187 .

} Appraisers.

INSURANCE COMPANY, OF CANADA.

Agreement. 187 .

It is Hereby Agreed, by of the one part, and the Insurance Company, of on the other part, that (together with a third person to be appointed by them, if necessary,) shall appraise and estimate at the true cash value the damage by to the property belonging to as specified in the accompanying schedule, which appraisement and estimate by them, or any two of them, shall be binding on both parties so far as regards such appraisement, it being understood that this appointment is without reference to any other questions within the terms and conditions of the insurance, being so far only as regards the value of or damage to such property as may be found to have been saved in a damaged condition which was iusured by policy No. with the said Insurance Company.

WITNESS.

Agent Insurance Company.

Province of
County of
To Wit :

Declaration of Appraisers.

We, the undersigned, do solemnly swear that we will act with impartiality and fidelity in making an appraisement and estimate of the damage to the property of insured by the Insurance Company, and saved in a damaged condition, agreeably to the foregoing appointment, and that we will return to the Insurance Company, a true and perfect, and a just and conscientious appraisement, and estimate of damage on the same, according to the best of our knowledge, skill and judgment.

Sworn before me,
at the of in the county
of this day of A. D. 18 .

Inventory of Property of

Damaged by on at . The damage on which was fixed by on 18 .

MEMO.—The damaged property should first be placed in as good condition as possible, assorted and arranged, and this list made out of the quantity, the articles, and the actual Cash Value, that appraisers may with facility perform their duties; they will fill the last two columns, avoiding general percentages, and place the damage at a definite sum per yard, lb., bushel, or gallon, &c., as the case admits of. Goods damaged by *removal* should be separately specified from those injured by fire. Articles without apparent or known damage are to be considered uninjured, and and not to be listed on this; or if any are so considered by appraisers, they will mark "no damage."

QUANTITY.	ARTICLE.	CASH VALUE AS SOUND.		APPRAISED DAMAGE.	
		Particular.	Aggregate.	Partic'r.	Aggreg'e.

Award No. , $. Ins. Co. To of Department. Agency , No. Policy , Termination 187 . Property insured and amounts specified, Additional insurance, companies and specifications, Class of Building or Boat Occupancy or Trip Date of disaster at Cause of disaster Value of property insured Amount claimed Adjusted by Date 187 Amount awarded Statement.

STANDARD POLICY.

POLICY, No. . AMOUNT INSURED, $.

BY this Policy of Insurance, Fire Insurance Company in consideration of the receipt of dollars, do insure in the sum of dollars,

1 against all such immediate Loss or damage as may occur

by FIRE to the property specified, not exceeding in any case the sum insured, subject to the condition hereinafter provided, from the day of 187 , at 12 o'clock, noon, unto the day of Eighteen hundred and , at 12 o'clock, noon, to be paid within sixty days after due proof of the amount thereof as hereinafter required. The following are essential conditions of this Policy: The Company are not to be liable for any loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for theft at or after a fire; nor for loss or damage if the assured, or his agent, in the written or verbal application for insurance, which application is made part and condition of this policy, makes any false representation or any concealment materially affecting the risk; nor for loss or damage occasioned by neglect to use all possible efforts to save and preserve the property when on fire or exposed thereto, or after a fire; nor for loss if there is prior insurance, whether of the same interest or not, unless endorsed hereon, nor after subsequent insurance is effected, unless written notice of every subsequent insurance is served on the Company or its duly authorized agent, with all reasonable diligence after the same is affected and allowed in writing by the Company; nor for loss or damage caused by lightning, or explosions of steam or any other thing unless fire ensues, and then only for the loss or damage by fire; nor for loss to property owned by any other party, unless the interest of such party is stated on this Policy; and if the property is assigned, or the title thereof transferred or changed, otherwise than by succession, by reason of death, without written permission endorsed hereon by the Company, this Policy shall thereby become void; this Policy shall be voided by keeping over twenty-five pounds of gun or blasting powder on the premises without written consent of the Company; if the above mentioned premises

shall become vacant or unoccupied and so remain for more than thirty days without notice to and consent of this Company in writing, then this Policy shall be void; any change affecting the risk either in itself or adjacent premises, whether occuring after the making or after the renewal of the Policy, and whether within the control or knowledge of the assured or his tenant, or other occupant of the premises, shall avoid the Policy, unless notified to the Company; and when so notified, the Company may at once cancel the Policy without returning the premium or any part thereof.

All persons entitled under this Policy shall give immediate notice of any loss by fire, and render a particular account thereof, with an affidavit, stating the time and circumstances of the fire; the whole value and ownership of the property insured; the amount of the loss or damage; and of other insurance, if any. They shall also, if required, furnish a copy of all policies, and their books of account, and other proper vouchers, and the certificate of the nearest resident magistrate as to the extent of the loss and damage, if required, by the Company; and in the case of damaged goods or personal property the assured shall at once make or cause to be made an inventory in detail of the same, giving cost and quantity of each article; appraisers mutually appointed shall then appraise the damage on each article; and until compliance with all such requirements, the loss shall not be payable; and in no case shall the Company be liable for a greater sum than the actual damage or cash value at the time of the fire; the Company may, instead of paying money for the loss or damage, enter on and repair, restore or replace the property damaged or lost, on giving notice of such intention within thirty days after due proof of loss, and if prevented, in consequence of municipal restrictions or otherwise, may pay the sum it would cost to repair or reinstate; assignors,

unless the assignee owns the property, must furnish proofs of loss; if the property is injured by removal when exposed to loss by fire, the Company shall bear only such proportion of the damage or loss as the sum hereby insured bears to the whole value of the property insured; the property cannot be abandoned to the Company; the assured shall not recover or demand of this Company any greater portion of the loss or damage by fire than the amount hereby insured shall bear to the whole sum insured on said property; any fraud or attempt at fraud, or any false swearing, on the part of the assured, shall cause a forfeiture of all claim under this policy. The insurance may be terminated at any time, at the option of the Company, on giving notice to that effect to the assured, or to any person then in possession, occupation, or charge of the property whereupon the Company shall be liable to return a rateable proportion of the premium for the unexpired term of the Policy. Whenever, by the Policy, notice is required for any purpose, such notice must be in writing, and no waiver of any stipulation of the Policy shall be effectual unless clearly expressed in writing, and signed by a duly authorized officer of the Company.

Every suit, action, or proceeding against the Company for the recovery of any claim under or by virtue of this Policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage shall occur. Either party, by serving a written notice on the other within sixty days after any loss or damage may have occurred, may require a reference of the claim in respect thereof, to arbitration, and thereupon an award in pursuance of such reference shall be a condition precedent to the bringing of any action, suit, or proceeding in any court for the recovery of any such loss or damage.

Books of Account, Securities for Money, Evidences

110 of Debt and Money are uninsurable; Plate, Jewels,
111 Medals, Paintings, Sculptures, Curiosities and Musical
112 Instruments are not insured, unless particularly men-
113 tioned in the Policy.

WITNESS the Common Seal of the said Company, and the hand of the President and Secretary, at , this day of in the year of our Lord 187 .

{SEAL.}

President.

Secretary.

INDEX.

PAGE

ABANDONMENT—
- Of vessel creates actual total loss 323
- Notice of, not necessary where goods sold 324-5
- Master of vessel becomes agent of insurers after..... 325
- Notice of, not necessary in absolute total loss... 326
- Notice of, must be absolute to be operative..... 328
- Must be justifiable at time it is made.....329-30
- How affected by condition in policy as to total loss.....329-30
- Notice of, indispensable, where insured elects to abandon.329-30
- Verbal notice of..... 331
- Test as to right to abandon..... 331
- Notice of, once accepted by insurer binds him 332
- Of cargo in shallow water, effect of 341

ACCEPTANCE OF PROPOSAL—
- General doctrine on this point..... 37

ACCIDENT—
- Definition of 352
- Compensation for 352
- By railway 353

ACKNOWLEDGMENT—
- Of notice under condition 154

ACTION ON POLICY—
- What damages recoverable.....98-99
- Negligence of insured no defence to 104
- Result of, where there is double insurance 106
- Violation of condition in policy as ground of, by insurer ... 141
- Against company, time in which to be brought 184
- On assignment of policy, must be brought in name of original insured..... 197
- May be brought by assignee under late statute 197
- May be brought by assignee on a new promise 199
- Bar of, by acceptance of bill of exchange from insurers..... 247

PAGE
Insurable interest necessary to give right of..... 266
Person insured must bring 267-68
Mortgagee may bring, where insurance is by mortgagor ... 268
Persons jointly insured should join in bringing 269
Partner who insures partnership property may alone bring. 269
Agent effecting insurance may bring, for principal..... 269
Assignee of policy cannot in his own name bring 269
Renewal receipt received by assignee will entitle him to bring..... 269
Where property insured maliciously burnt, owner of property must bring..... 270
Effect of Statute 29 Vic. cap. 28, sec. 7, on..... 270
May be brought by executor or administrator on death of insured..... ... 271
Must be brought within twelve months after loss under condition 271-2-3
Where no condition limiting time, ordinary rules of limitation prevail..... 272
Second, brought after non-suit, too late if brought after limitation..... 273
Limitation of, in case of re-insurance 274-5
In case of mutual companies, under statute..... 275
Service of process on agent in another province..... 276
Service on foreign companies.....276-7
Trial in case of fire policy may be by jury 277
Declaration in case of 277
Admission of averment by not traversing, extent of 278
Pleading non-compliance with condition precedent.....278-9
Averment of condition precedent in declaration 279
Ambiguous pleading, how construed..... 279
Facts only must be pleaded..... 280
Condition forming defence to, should be set out in declaration 280
Replication setting out documents in..... 281
Demurrer to plea 281
Departure in pleading 281-2
Exception of defendants to count in declaration..... 283
Duplicity in pleading..... 284
Assured wilfully destroying property is good defence to ... 293
May be maintained against insured where policy taken in name of agent..... 302

ACTUAL TOTAL LOSS.—(*See total loss.*)

PAGE

ADJUSTER—
Duties of 240
Adjustment by, must be in accordance with conditions of policy 256

ADJUSTMENT OF LOSS—
Basis of 239
Amount to be recovered under policy liquidated by 239
Plea of 239-40
Definition of, in fire policies 240
Of indemnity to insured, principle of 240
Profits of business not recoverable unless insured as such. 240-5
Should be only for what is actually lost 241-4
In case of separate insurance of several properties 243-4
Condition as to average, effect on 245
Of loss of goods, where assortment broken 245
Intrinsic value of property insured to be considered in 246
Actual value of goods may be recovered 246
Sale of damaged goods by auction under 247
Salvage in insufficient insurance belongs to insured 247
Company may be compelled to pay entire loss by 248
Pro rata clause in policy as to loss 249-50
Non-concurrency of policies, effect on 250
Examples of 251-2-3-4-5-6
Rules as to 256-7
Observations on the subject of 257-58

ADMINISTRATOR—
Interest of should be endorsed on policy 198
May bring action on policy on death of insured 271

AFFIDAVIT—
Proving loss must comply with conditions of policy 218
Irregular, in proof of loss, effect of 218-221
Signature of justice of peace sufficient on 218
Of loss must be made by assured notwithstanding assignment 219
Of loss, of one of several partners insured sufficient 220
Should contain all legal requisites of 221
Swearing to what is false in, in proof of loss 232-3-4

AGENT—
Of Insured, may insure when 44

PAGE
Of Insurer, may be appointed by writing or verbally 50
Authority may be general or special 50
Of Insured may effect insurance in his own name for principal 51
Extent of authority of, How measured and exercised ... 52-5-6
Notice to, of facts is notice to company 53, 120
All facts material to Risk must be imparted to 53-4
Of company when deemed agent of insured 55
Contracts of, when required to be under seal..... 57
Effect of various forms of applications on authority of 66
How authority of, for foreign company is proved..... 61
Interest of, insurable..... 74
Insured liable for representations of agent to insurers 120
Insurers not bound by incumbrances concealed from them 135-6
Examination of premises by, binds insurers, ... 138
Knowledge of, as to facts, binds insurers..... 138
Of insurer has not ordinarily authority to dispense with conditions 160
Parol waiver of conditions by..... 171
Notice of loss received by resident 213-14
Of insured may bring action on policy in his own name ... 269
Service of process on, in another province 276
Admissions of agent of company, evidence of..... 288
Burden of proof as to agency is on person dealing with..... 288
Opinion of insurance agent inadmissible as evidence..... 289
Insuring in his own name, principal liable on policy... 302, 351

AGREEMENT TO INSURE—

Effect of 36
When policy may have same date as..... 36

ALIEN ENEMY—

Cannot insure in Canada 44
Creditor cannot insure life of 349

ALIENATION OF PROPERTY INSURED—

In case of mutual companies.....3, 194
After insurance prevents insured from recovering on policy 192
Effect of, under statute..... 192-3
Execution of mortgage not 193
Assignment in insolvency, condition as to 193
Of one partner, where several distinct subjects of insurance 194
Levy of an execution on premises not 194-5

PAGE

Agreement to convey not 195-6
Lease of property insured, condition as to 195
Release by one partner to another not, condition as to.... 195
From one tenant in common to another will avoid policy under condition 195
Descent of title to heirs not..... 196
Nominal transfer not, under condition.. 196
Chattels, prohibition of, effect on policy 196
Remedy of alienee under 196
Interest in policies, not transferred merely by virtue of..... 201
By mortgagor, effect on policy 208

ALTERATION—

Of policy, how effected 43
Of premises insured condition as to 143-5-9
Which in fact increases risk, is breach of condition as to ...146-7
And additions to buildings insured condition as to..... 147
In case of mutual companies under statute 172

AMBIGUITY—

When allowed to be explained in policy 14
In pleading how construed 279

APPLICATION—

For insurance, is notice to insured 17-18
Effect of various forms of 59-60
Declaration in, by insured, when a warranty 119
Reference to, in policy, effect of..... 119
Defect in, when known to agent of insurers, effect of 120
False statements in, avoids policy.....120-181
Must state title accurately..... 126
Omission in, of incendiary attempts on property..... 132
Fire of adjoining buildings, must be stated in 132
Condition as to..... 144
What is usually stated in 181
For insurance, must be in writing..... 181
For time policy, not necessary to state time of sailing in.... 337
Representation of value of vessel in..... 338
For life insurance, requisites of..... 350

APPPLICANT–

Assignee of policy not, under condition 180

APPOINTMENT—

Definition of..... 240

PAGE

ARBITRATION—

Condition as to..... 183
Reference to, may be condition precedent... 296-7
Where reference to is collateral to agreement to pay..... 298
Judge may stay action, policy under condition to refer to.. 298

ASSIGNEE—

In insolvency has insurable interest 79
Of policy must have vested interest to sue on policy.....43-197
Could not at common law maintain action in his own name. 197
Of policy may bring action on policy under 35 Vic. cap. 12. 197
Effect of assignment of policy on..... 198
Of policy may maintain action in case of new promise by company 199
Undertaking by to perform conditions of policy, effect of, 199-200
Defence good against assignor will be good against..... 202
Non-compliance with policy by assignor avoids it against.... 206
Taking assignment of policy without notice of forfeiture is protected 209-10
Need not state his interest to company on ratification of assignment 210
When notice of loss will be sufficient when given by... 212
May in some cases recover without giving any proof of loss. 212
In insolvency, must comply with condition as to certificate of loss..... 228
Of life policy, when interest may be claimed by 247
Of policy cannot sue thereon in his own name..... 269
Policy not void, where premium note, not paid by..... 300
Of life policy may bring action on policy..... 350
Of policy takes it with all equities..... 354

ASSIGNMENT—

Of interest under interim receipt..... 34
Of policy by mortgagor to mortgagee, effect of..... 50
Of policy must be by consent of company.....181, 198-9, 204
In insolvency, effect on policy under condition 193
Of policy, remedy of assignee in case of loss.....196-7
Interest in property should be vested in assignee in case of. 197
Under 35 Vic. cap. 13 197
Of policy, condition as to 197-8
Notice of should be given to company before loss 199
After loss, condition as to..... 203
Of policy, must be of equal solemnity with policy 204-5

PAGE

By insured to mortgagee not necessary in some cases..... 208
Of part of mortgage debt, effect on mortgage 208
Of policy, effect of consent to, where policy assigned to mortgagee..... 208
Assignee need not state his interest for ratification of 210
Of right of action to insurers on payment of loss..... 261
Insurers entitled to assignment of mortgage on payment of mortgage 263
Notice of should be given to insurers to complete 253

AVERAGE—
Condition as to..... 191
Adjustment of loss, where there is condition as to..... 245

BASIS—
Of adjustment (*see adjustment.*)

BRITISH AMERICAN ASSCE. CO.—
Peculiar conditions in policies of 187-188

BROKER—
Notice of loss given to, effect of 214

BUILDINGS—
Insurance on, what? 95
Falling down, conditions as to in policy..... 95
Alterations and additions in, condition as to 147, 177-207
The erection of others by insured effect on policy under condition 149
Insured as, "dwelling houses" condition as to vacation of 176

BURDEN OF PROOF—
Of showing an agency, is on person dealing with agent..... 288
In case of pleading alteration of premises lies on person pleading 288

CANCELLATION—
Of policy 42
When and how effected 42-3

CARGO—
Risk on, only commences at port named in policy..... 318
Must be loaded at place named in policy for policy to attach 318-19
Effect of sale of, upon claim for total loss of freight 323

PAGE

CARRIERS—
Insurances by 44

CERTIFICATE OF LOSS—
Condition as to 228-230
Production of, condition precedent to payment of loss..... 230
Production of, may in some cases be dispensed with 231-2
Fraud in, forfeits policy..... 232

CHARTER OF COMPANY—
Must be conformed to by company in issuing policy...22, 23, 32 51
Requirements of, should be adhered to 24

CITIZENS' INS. CO.—
Peculiar conditions in policies of 186

CIVIL COMMOTION—
Losses arising from 104-5
Loss by, need not be negatived by insured in statement of loss 225

COLLISION—
Between steam and sailing vessel, presumption as to..... 322

COMMERCIAL UNION INS. CO.—
Peculiar conditions in policies of 185-7

COMMISSION MERCHANT—
May insure all goods in his hands by one policy..... 94

COMPANIES—
Insurance, what only can do business in Canada..... 21
License must be obtained by..... 21
Must make deposit with Receiver General 21
Bound by fraud of their agents 54
Must transmit to Minister of Finance certain returns 360
Ceasing to do business in Canada must insure their policy-holders 362
Directors of, paying dividends when company insolvent ... 364

COMPENSATION—
Insured entitled to, in accident policy 352

PAGE

CONCEALMENT—

Of material facts by insured or his agent, avoids policy 54, 135, 335-6
Of nature of interest insured, avoids policy 122
On part of insured may be waived by insurer 124
Of incumbrance on property insured 126, 130-1
Of true title to one parcel in policy which covers others ... 128
On incumbrances on one of several parcels in policy 129
Unintentional omission of facts by insured not 129
Of fires, before application, fatal to policy 132
Of interest and extent of property insured 134
Nature of, that will avoid policy 134-5
By mistake or ignorance, of material facts, same as wilful. 133-5
Facts known to insurer, though not stated by insured, not. 137
Of material facts in life policy, vitiates it 350-1-3
Of death of insured on sale of policy, vitiates sale 354

CONDITION IN POLICY—

How construed ..... 13, 141-2 (See policy).
Looked upon as part of the contract 139
Compliance with, condition precedent to right to recover... 139
In case of mutual company, void when unreasonable 139-40
Of three kinds, precedent, express and implied 140
No expresss provision as to non-compliance with precedent necessary 140
Violation of by insured, no ground of action by insurer ... 141
Insured relieved from compliance with in some cases 141
Effect of, where insurers are foreign corporation 141
Evidence of what occurred at time of insuring does not affect 142
Immaterial whether loss happens by violation of express... 142
As to alteration in premises 143, 145-49
Breach of, not *ipso facto* avoidance of policy 143
Waiver of breach of, by insurers 143
Printed on back of policy, effect on insurance 143-4
As to application for insurance 144
As to steam engines, etc., on premises 144
As to increasing risk of insurers 145-6-7-8
As to hazardous trade carried on, on premises 146
Relating to tenants increasing risk 148
Erection of other building by insured, effect on policy under 149
As to terminating risk, by notice to insured 152
That notice of all previous insurances shall be given to insurers 152-3

PAGE

As to notice of subsequent insurances to be endorsed on policy:..... 154
As to notice of other insurances where condition violated by neglect of insurers.....153-4
Acknowledgment of notice under..... 154
As to further insurance on the same property ...155,157,166-169
Verbal notice when sufficient under..... 156
Courts of law and equity equally bound to observe..... 158
Ignorance of requirements of, does not relieve insured..... 159
Agent of company has not ordinarily power to dispense with 160
Notice of additional insurance, to be given before fire, under.....160-161
Reasonable diligence in giving notice under.....162-163
If second policy actually void, no violation of..... 164
As to subsequent insurance, to be construed strictly 168
Under seal, cannot be waived by parol.....171-172
As to gunpowder on premises insured 172-174
As to goods on storage 173
As to change in occupation in premises insured...175, 177, 178 179-184
Relating to payment of premium note..... 180
As to contribution between co-insuring companies 182
Relating to preservation of property insured..... 182
As to the removal of property.....92-182
Relating to property burnt by lightning..... 182
Relating to theft of goods insured..... 182
As to "memorandum" articles insured..... 182
Relating to payment of loss 183
As to continuing insurance..... 184
As to survey and description of premises..... 184
Relating to chimneys..... 184
As to highly inflamable substances..... 184
Relating to average..... 191
As to release by one partner to another of property insured 195
Relating to assignment of policy..... 197
Prohibiting assignment of policy..... 203
As to immediate notice of loss, construction of.....213, 216, 217
As to written notice of loss..... 215
Compliance with, condition precedent to right to recover... 216
As to furnishing copy of written portion of policy in proving loss... 219
As to producing vouchers, &c., in proof of loss..... 222
As to certificate of loss 228

PAGE

As to insured undertaking acts of strangers 231
As to payment of proportion, where several insurances..... 248
As to action on policy being brought within twelve months from loss... 271
As to care and skill in marine policy 322
Waiver of by parol in policy not under seal..... 357
Sufficiency of excuse for non-compliance with..... 357

CONSENT—
Of company, as to further insurance should be endorsed on policy 155-162
As to additional insurance, by whom given..... 157
Of company as to additional insurance, when implied..... 157
Of company on assignment of policy should be obtained... 198
Effect of consent to assignment of policy 198
Of company to assignment given on separate paper and not endorsed 202

CONSEQUENTIAL DAMAGES.—(*See Damages*).

CONSTRUCTIVE TOTAL LOSS—
How effected by abandonment..... 323
Notice of abandonment must be given to insurers 326
Action for, where insurers repair vessel..... 327
State of vessel at time action brought determines whether... 328
Capture of vessel by enemies, when 329
Declaration of, in action for 333

CONTRACT OF INSURANCE.
Parol, not binding on company 22
No general provision of law in Canada requiring written.. 24
Must be mutual between parties..... 37
Divisibility of 39, 40, 41
To be construed literally 83
Is a contract *uberrimæ fidei* 126
Is a personal contract with insured..... .....200, 270
Does not run with the land. 271
Of life insurance, not one of indemnity..... ... 345

CONTRIBUTION—
Between co-insuring companies, condition as to..... 182
Definition of, in fire losses 240
Proportional abatement substituted for in some cases...249, 250
By insured, where several insurances on same property..... 250
By insurers where several insurances..... 250
In cases of re-insurance..... 264

PAGE

CORONER—
May give certificate of loss 228
To institute enquiries as to fire 364
May empanel jury 365

COVENANT TO PAY LOSS—
Satisfaction of, before and after breach of 247-8

CREDITOR—
Has insurable interest in life of debtor 349

DAMAGES—
Actual, only recoverable in fire policies 4, 107, 248
Consequential, not generally recoverable 106
How estimated 107, 108
Measure of, on failure of insurers to rebuild 260
Insurers may *enter* on premises after fire to ascertain 261
Measure of, in case of re-insurance 264
Evidence of measure of 292
In case of total loss 333

DEATH—
Of insured, policy and interest vests in representatives ... 198

DEBTOR—
Has not insurable interest in life of creditor 349

DECLARATION—
In case of action on policy 277-8
Averment of condition precedent, what proved under 279
Condition forming defence to action, should not be set out in 280
Need not allege that policy under seal 281
Exception to count in declaration by defendant whose plea is demurrable 283
Duplicity in 284
By mortgagor, in action on behalf of mortgage is good 284
Of constructive or actual total loss 333, 334

DEFENCE TO ACTION ON POLICY—
Which is good against assignor is good against assignee of policy 202
Assignment of policy without notice of forfeiture good 209
Assured wilfully and maliciously burning property good ... 293

PAGE

DELAY—
Amounting to deviation in voyage, discharges insurers..313, 320

DEMURRER—
On ground of inconsistency between plea and policy 281

DEPARTURE—
In pleading, effect of 281-2

DESCRIPTION OF PROPERTY IN POLICY—
Must be accurate..... 83
Misdescription of property, effect of..... 84
Condition requiring accurate, refers to date of policy..... 86
Premises insured must not be varied from 87-8
Effect of insurers having notice of change in premises 88
In case of leasehold premises 89
Where error in, arises from act of insurers, effect of.....89, 90
Sufficient, if substantially described 90
Not a warranty on part of insured 121

DEVIATION IN VOYAGE—
Law implies that vessel will proceed without 312
Delay must amount to deviation to discharge insurers..... 313
Of vessel insured in certain waters..... 313
Although risk not increased..... 314
Any material departure from voyage is.....314-15
In case of vessel bound to several ports..... 315
Defeats policy from time of..... 316
Plea of, when bad for duplicity..... 317
May be agreed for by insured paying additional premium... 318
Goods insured must be loaded at place named in policy..... 318
Waiver of, by insurer..... 319
Shipwreck, effect on insured..... 320

DIRECTOR OF COMPANY—
Evidence of, immaterial at trial 290

DOUBLE INSURANCE—
Insured not entitled to two satisfactions 106
Requirements of *statute* as to 158
How established..... 161
Grant of interim receipt, effect on..... 164
Where effected with foreign company..... 165

PAGE

What constitutes 166
Effected by mortgagor, effected on first policy 167
Inoperative in policies of re-insurance 263

DUELLING—

Condition in policy as to 350-51

DUPLICITY—(*See Pleading*).

ELECTION—

Of insurers to rebuild, effect of 261

ENCUMBRANCE—

On property insured, bond for conveyance of property not, 123-4
In case of renewed policy 126
Misrepresentation of, effect on policy 126-7-8
Disclosure of subsequent, condition as to 128
Concealment of, on one parcel in policy which covers others 129
Existence of, fact material to be disclosed to insurer 129
Where none exist on property, application may be silent as to 130
Concealment of, avoids policy 130-1-5
Condition as to notice of, being giving to insurers 226
Plea of violation of condition as to 283

ENDORSEMENT—

On policy of additional insurance, effect of 155
On policy of executor or administrator's interest 198

ENTRY—

Of insurers on premises to ascertain damages 261
Condition as to 261

ESTOPPEL—

Evidence of, in cases of encumbrances 292

EVIDENCE—

Satisfactory, condition as to, in proving loss 227
Of admissions made by agent of company 288
Opinions, when admissible as 289
Of underwriters, to what extent admisible 289
Of experts, inadmissible 289
Of agents of company inadmissible 289
Admissible to show mistake in description of premises 290

PAGE

Of director of company immaterial 290
Of character inadmissible in civil suit 290
Answer to collateral question, conclusive 290
Circumstantial outweighs positive testimony 291
Of ownership of vessel 291
Of offer to sell property 291
Of waiver of payment of premiums 291-2
Of estoppel, in case of incumbrances 292
Policy, best evidence that insurance is on foot 292
Of measure of damages 292
Right to begin, belongs to person asserting affirmative of issue 292
Presumption of innocence favored 293
Of seaworthiness at commencement of voyage admissible, 311, 342
Of usage in insurance on cargoes 319
Of usage in case of voyages 334
Of meaning of particular words in policy 334
Of seaworthiness admissible to rebut presumption of unseaworthiness 342-3-4

EXAMINATION—
Of premises by agent of insurers binds them 138
Of premises by experts, condition as to 180-1
Of insured as to loss, condition as to 226-7

EXECUTOR—
Interest of, should be endorsed on policy 198
Can enforce contracts of insurance on death of insured 271

EXPERT—
Condition as to examination of premises by 180-1
Evidence of, inadmissible on trial 289

EXPLOSION—
Condition in policy as to 182
By gas, responsibility of insurers and liability of gas company 262

FACTORS—
Insurances by 45
Interest of, in property, insurable 74
May insure all property in their hands by one policy 94

PAGE

FALSE SWEARING—

In proving loss, avoids policy.... 232
Must be intentional and of something material 233

FIRE—

Definition of, as used in policy 95-6
Concealment of fire having taken place, at time of application is fatal to policy..... 132
Coroner shall institute enquiries as to 364

FIRE INSURANCE COMPANIES—

What losses they are liable for 96

FOREIGN INSURANCE COMPANIES—

Must make deposit with Receiver-General 21-2, 363
Policies of, how interpreted in Canada.....30-1, 287
Cannot do business in Canada without having capital of $100,000 363

FORFEITURE OF POLICY—

By breach of condition, must be proved strictly 166, 222
Receipt of assessment after fire, no waiver of 170
Assignee taking assignment of policy without notice of, is protected 209-10

FREIGHT—

Who has insurable interest in..... 79

FURNACES—

Condition in policy as to 144

GOODS—

Consigned, to be delivered to another may be insured..80, 181
Position of, must be communicated to insurers 92
Removal of goods, covered by policy, condition as to (see risk).92
Value of, at time of loss, rule as to payment of loss.....108-9
On storage, condition as to, in policy 173-4
Adjustment of loss of, when assortment broken 245
Actual value of, may be recovered..... 246
Damaged, may be sold at auction by insured 247
Risk on goods in ship, commences at port named in policy. 318

GUARANTEE—

Insurances for purpose of 353
Contract of, personal..... 353

PAGE

232
233

.95-6

132
364

96

363
287

363

222
170

)9-10

79

144

181
92
ɛ).92
.08-9
73-4
245
246
247
318

353
353

PAGE

GUARDIAN INS. CO.—
Peculiar conditions in policies of..... 188-9

GUNPOWDER—
Condition as to, in policy.....93, 172, 184
Premises insured blown up by.....99, 100-1

HAZARDOUS ARTICLES—
Insured, effect on policy 122, 132
Hazardous trade carried on, on premises insured condition as to..... 146
Stored on premises insured, condition as to 173-4, 184

HUSBAND—*See Insurance Policy.*

IMMEDIATE LOSS—
Meaning of, in policy..... 2

IMPERIAL INS. CO.—
Peculiar conditions in policies of..... 188

INCHOATE RIGHTS—
Insurable Interest in..... 80

INDEMNITY—
Insurance, contract of 1
What is to be considered in actions for..... 1
Only given to persons interested in property insured..... 62
For damaged goods, rule as to..... 108
Adjustment of 240
Is only for loss arising from external causes..... 246

INFANT—
Insurance may be effected for benefit of 354
On death of, during minority, policy paid by sanction of Court of Chancery..... 355

INFLAMMABLE SUBSTANCES—
Condition as to, in policies 184

INSOLVENCY OF COMPANY—
Distribution of deposit *pro rata* 360, 361
Appointment of Assignee..... 361

PAGE

INSURANCE—

Definition of 1
When valid where no policy actually issues..... 34
Cannot be effected in name of trustee only 38
On goods in trust or in commission 47, 358
Condition as to additional.....154, 155
Consent of company necessary in additional 157
Requirements of statute as to double 158
Double, how established 161
Effect of granting interim receipt in double..... 164
Second insurance with foreign company, effect of 165
Proof of second, lies on defendants 165, 167
Second insurance must be made on same property to avoid first policy 166, 167
Second must be made by same person to avoid first ...167, 207
Prior insurance against by-laws of company, effect of 168
Second insurance under statute on goods..... 180
Previous and subsequent insurances must be notified to company 181, 226
Separate insurances upon several subjects 243
Observations on the subject of.....257, 258
On goods in ship, at and from a place 317
Effected by married women on husband's life 346
Husband may insure his life for benefit of wife 346–7
May be effected by husband in name of wife 347
For benefit of children 347, 354
Survivor of joint insureds entitled to benefit of policy 348
With profits..... 348
Effected by person having no interest void 350
On life, effected by agent binds insured 351
Of guarantee 353
May be effected for benefit of infant 354
On goods on commission, must be at risk of insured 358–9

INSURABLE INTEREST—

Necessary to have, in property insured..... 272
Definition of 65
Mortgagor and mortgagee both have 67
Tenant by the courtesy has..... 69
Tenant from year to year has 69
Lessee in some cases has..... 70
Purchaser under verbal contract has not 73
Expectancy is not 72

PAGE

Distinguishable from ownership.....73, 74
Of execution debtor in goods seized by sheriff..... 74
Of sheriff in goods seized 74
Of consignee, factor or agent 74
Assignee of bond, conditioned to convey real estate has..... 75
In a ship 75, 338
Of a bailee in subject of bailment..... 77
Of widow in property of husband 78
Grantee from Lunatic has..... 78
Person in possession of property as apparent owner has..... 78
Of assignee in insolvency 79
In freight..... 79
Various subjects of property, owners of which have 79
In ship hypothecated..... 79
In goods consigned by one person to another 80
In inchoate rights... 80
In ships seized by officers of the crown 80
Need not be stated in notice of loss to company 215
Builder has, in buildings, &c 80
Of owner, cannot be defeated by title of stranger to the land 81
Possession of, by insured necessary to give right to recover 266
Possession of a ship confers an insurable interest to possessor 338
Of wife in life of her husband by statute 348
Husband at common law had not, in life of wife..... 348
Nor parent in life of child..... 348
Expectancy not sufficient to give..... 349
Of creditor in life of debtor 349

INSURERS—
Should contract to pay sum insured 33

INSURRECTION—
Losses arising from..... 104
Condition in policy as to 182
Loss by, need not be negatived in statement of loss by insured..... 225

INTEREST—
When assignee of life policy may claim..... 247

INTEREST IN PROPERTY INSURED—
Effect of transfer of 2, 3, 192
Parted with and regained, effect of..... 3

PAGE

Must be vested in assignee of policy to allow him to sue 43, 197
Only of person named in policy is insured 48
Must be in insured at time of effecting insurance 58, 62
Not always insurable 62
Necessary to entitle insured to maintain action on policy... 63
Want of, invalidates the policy 63
Cessation of, before loss happens effect of 64, 192
Must be possessed by insured at time of loss 64
Equitable interest sufficient 71, 72
Of purchaser in possession insurable 71
Lost to insured by alienation of property 92
In property and policy must concur in same person 197
In policy vests in representatives on death of insured 198
Of executor or administrator should be endorsed on policy 198
In property, condition as to setting forth in notice of loss.. 215
In life insurance, should exist at date of policy 345
Must be pecuniary in life insurance 345
Name of person primarily interested to be inserted in policy 350

INTERIM RECEIPT—

Rights of parties under 35, 57
Undertakes effect immediately on grant of 36
Court of Chancery will compel payment of policy under ... 36
Agent of Company may bind them by 57
Effect of granting, on second insurance 164

INVASION—

Losses arising from 104
Condition as to, in policy 182
Loss by, need not be negatived by insured in preliminary proofs of loss 225

JUDGMENT—

Defence to action brought on foreign 286-7

JUMPING—

System of, in adjustment of losses 241

JURY—

May draw conclusions of law from facts 295-6
Must decide on good faith of applicant in his answers 296

PAGE

LANCASHIRE INS. CO.—
Peculiar conditions in policies of..... ...187, 189

LEASE OF PREMISES INSURED—
Condition as to, in policy..... 195

LEGAL DISABILITY—
Imprisonment for misdemeanor not 275

LESSEE—
Covenant by, to insure results to lessor 270

LIEN—
Of insurers on property insured abolished 301
Foreign legislation cannot create lien in Canada..... 302

LIMITATION OF ACTION ON POLICY—
Condition as to, in policy 272-3
Suit to correct mistake in policy may be brought after time of 273
In case of second action brought where non-suit in first... 273
Plea of, in condition 274
Time begins to run only when cause of action accrues 274
In case of action on policy of re-insurance 275
In action against mutual company..... 275
Imprisonment for misdemeanor not legal disability against 275
May be waived by company..... ...275-6

LONDON, LIVERPOOL & GLOBE INS. CO.—
Peculiar conditions in policies of 185, 186, 187, 188

LONDON ASSCE. CO.—
Peculiar conditions in policies of..... 188

LOSS—
Consequential, covered by policy 2
Over-valuation of amount of, effect on policy 19
Extent of, measured by interest of insured 64
By lightning 96–182
What loss fire insurance companies are liable for..... 96
Sustained by removal of goods not covered by policy..... 97
Occasioned by theft 98, 99, 182
By gunpowder explosion..... .....99, 100
By concussion of the atmosphere 100

PAGE
Proximate cause of, must be considered 101
Extent of, covered by policy 102
Must arise from some of the causes insured against 102
Arising from invasian, riot, &c., usually provided for in policy 104
Of profits of business, not recoverable 106
Of rent of premises..... 106
How estimated.....107, 108
Value of goods at time of, to be made good by insurance... 108
Market value of goods, when estimate of 108, 109
Insurer's liability for, reduced *pro tanto* by partial payment of..... 109
Immaterial whether violation of express condition occasions 142
Notice of, must be immediately given to company..182, 211, 213
Payment of, when made, condition as to..... 183
General notice of, in case of fire policy, sufficient 214
Condition precedent that amount of, must be stated in notice 215
Verbal notice of, when sufficient..... 216
Affidavits used in proving, must comply with condition of policy 218
Manner of, need not be described by insured in proof of. .. 226
Certificate of, condition precedent to payment of 230
False swearing in proving loss avoids policy 232-3-4
Notice of, may be waived by insurers 235
Proof of, may be waived by insurers..... 235
Adjuster to ascertain exact amount of 240
By spontaneous combustion not recoverable..... 246
Company may be compelled to pay entire loss on adjustment 248
Condition as to payment of rateable proportion of, where several insurances 248
Rules as to adjustment of 256-7
Arising from unseaworthiness, not enforceable 311
Which in nature of things must happen, not indemnified... 320
By perils of the sea, insured entitled to indemnity..... 332
Though suspicious, yet if accidental, insured entitled to recover..... 340
Payable to third person, not party to policy, how recoverable..... 340-1

MALICIOUS BURNING—
Action for must be brought by owner of property 270

PAGE

MARINE POLICY—
Valuation of property insured in 19
Warranty of seaworthiness implied in, from act of insurance 303
Warranty differs under circumstances 304-5
Effect of fire policy being used to insure the subject of..... 341

MARINE INSURANCE—
At and from a port, risk attaches from date of policy 304

MARRIED WOMAN—
May insure her husband's life..... 346
Husband may insure life of..... 347

MECHANIC—
Has insurable interest in buildings erected by him 80
Effect of recent act of Ontario on 81

MEMORANDUM ARTICLES—
Condition as to in policy 182

MINOR—
Insurance for benefit of..... 347

MISREPRESENTATION—
Distinguished from non-compliance with warranty..... 113
Of facts not material, does not avoid policy..... 113
Is either affirmative or promissory 114
Of incumbrances upon property insured, avoids policy..123-6-8
May be waived by insurer..... 124
Election of insurer to rebuild is waiver of..... 124
Renewal of policy, a waiver of 125
By mistake, ignorance or negligence same as wilful..... 125
Of material facts avoids policy 135, 335-6, 350-1-3

MISTAKE IN POLICY—
When allowed to be corrected..... 24
Must be made out by clear evidence 25
Misrepresentation of material facts by..... 133

MONEY ADVANCED ON FREIGHT—
Insurable interest in..... 79

MORTGAGE—
Insurers entitled to assignment of, on payment of..... 262

PAGE

MORTGAGEE—
Of vessel named in policy 47
May insure to full value of the property 48
May insure jointly with mortgagor 49
May insure property to extent of his lien 49
On assignment of mortgagor's policy, may recover entire loss 50
Has an insurable interest 67
Of chattels has an insurable interest 68
Effecting second insurance, effect on first policy 168, 207
Consent of Company necessary where policy is assigned to. 208
Is entitled to have insurance money expended in rebuilding 259
Subrogation of rights of, to insurers..... 262
Action on policy may be brought by, where insurance in name of mortgagor..... 268

MORTGAGOR—
Of vessel, not to be deemed owner 47
May insure to the full value of property.....49, 130
May insure jointly with mortgagee 49
Has an insurable interest 67
Of chattels has an insurable interest..... 68
Omission of, to mention amount of mortgage, effect of..... 132
Effecting second insurance effect on first policy 167, 168
Assignment of policy by, only transfers his interest..... 206
Insuring before giving mortgage and subsequently without notice of first 206
Alienation of property insured by, effect on policy..... 208
Insurance effected by, under covenant results to mortgagee 270

MUTUAL COMPANY—
Policy invalid unless signed by president of 33
Condition as to rebuilding, in policies of 260
Actions on policy against..... 275
Every person insured in, becomes a member of..... 299
Two kinds of polices issued by.....299, 300

NEW TRIAL—
Will not be granted where verdict for insured, on criminal charge..... 294-5
Will be granted where verdict grossly excessive 295
Waiver of challenge of juror not ground for granting..... 295

NORTH BRITISH & MERCANTILE INS. CO.
Peculiar conditions in policies of 187, 188

PAGE

NORTHERN INS. CO.—
Peculiar canditions in policies of.....185, 8-9

NOTICE—
Acknowledgement of, under condition 154
Waiver of, in case of additional insurance..... 155
Of further insurance on same property to be endorsed on policy.....155, 162
Required to be in writing, condition as to.....155, 184
Verbal, when a compliance with condition.....156, 316
Of further insurance should be given to the company themselves 156, 165
Of previous or subsequent insurance must be given before fire happens.....160, 161, 181
May in some cases be given after fire..... 161
Time within which notice of double insurance must be given 161
Reasonable diligence to be used in giving, under condition162-3
Omission to give, notice of second insurance how cured..... 169
Of change of occupation of premises, condition as to ...175, 184
Of loss must be given to company immediately....182. 211, 212
Of assignment of policy, to be given to company before loss.....199, 203, 353
Assignment of policy without notice of forfeiture.....209, 210
Of loss can only properly be given by party insured 212
When it may be given by assignee of policy 212
One of several insured can give notice of loss 212
Immediate notice of loss, condition as to, how construed 213, 6-7
Of loss given to resident agent of company effect of.....213, 214
General notice sufficient in case of fire policy 214
Of loss required to be in writing, condition as to..... 215
Of loss given by local agent to secretary of company sufficient 215
In proving loss, notice should contain all legal requisites... 221
Of loss may be waived by insurers 235
Of abandonment. *(See abandonment.)*
Of name of ship, condition as to 339

OCCUPATION OF PREMISES—
Condition as to change of 177-8, 184
Change of occupant, effect on condition..... 178

PAGE

OMISSION—
Unintentional omission of facts by insured not concealment 129, 336
Of insured to inform insurer of nature of goods..... 132
Of mortgagor to mention amount of mortgage effect of..... 132
Of incendiary attempts to destroy property, in application 132
To give notice of second insurance when cured..... 169

OVERVALUATION OF PROPERTY—
When fraudulent 19, 20

OWNER—
Endorsee of a warehouse receipt is deemed 47
Mortgagee or mortgagor of vessel not..... 47
Property should be insured in name of..... 47
Of equity of redemption has insurable interest..... 67

OWNERSHIP OF SHIP—
Evidence of..... 291

PAROL EVIDENCE—
Not admissible in construing policy 14, 24
Admissible to explain policy in cases of trade.....25, 26
Admissible to show what interest is intended to be protected 27, 28
Of agent of company admissible to show mistake in description of premises 290

PARTIAL LOSS—
Condition as to 332
May be recovered in action for total loss..... 333

PARTIES TO POLICY—
Who may be generally 44, 49
Must have an interest in property insured 57
Benefit of policy may be adopted by person having an interest..... 58
Mortgagor and mortgagee may be 67, 68
Tenant by the courtesy may be 69
Also a husband 69
And a tenant from year to year 69
Widow in respect of property of deceased husband 78

PAWN—
Insurable interest in goods in 80

PAGE

PERILS OF THE SEA—
Loss by starting of a plank in ship is loss by 321, 332

PLEA—
Of limitations under condition in policy.....273-4
Of non-compliance with condition precedent.....278-9
Demurrer to 281
Of violation of condition as to encumbrances 283
Of warranty in policy 283
Of breach of condition to give notice of other insurances.... 285
Insufficiency of proofs should be by special 286
Amendment of 286
To action on a foreign judgment 286-7
Of set-off against premium note..... 293
Of arson, what proved under 293-4
Of deviation in voyage 313, 317
To an action for total loss 333-4

PLEADING—
Extent of admission of averment, when not traversed.....278-9
Ambiguity in, how construed..... 279
Facts only must be set forth in 280
Of documents under Com. Law Pro. Act..... 281
Need not allege policy is under seal 281
Duplicity in..... 284
A double assurance, effect of 285
Surplusage in..... 285
Several pleas..... 286

PLEDGEE—
May insure in his own name..... 44

POLICY—
Either open or valued 3, 4
Valued, when binding 4
Need not be signed by both parties..... 5
Commencement and termination of 8
When it may have retroactive operation.....9, 10
Renewal of, effect of..... 11
How construed.....11, 16
Terms of cannot be varied 12
Ambiguous words in, how construed..... 14
Generally printed 16
Where part of written, effect of 16, 17

PAGE

Construed most strictly against insurers 17
Overvaluation of property insured, effect on 19
Must be in conformity with charter and by-laws of company 22
Parol insurance not binding on company 22
Corporate seal required on..... 23
Not required by any general rule of law in Canada to be in writing..... 24
When parol evidence admissible to vary terms of..... 24
Interpreted by lex loci..... 30
Of foreign company how interpreted in Canada.....30, 31
When valid without seal..... 32
Voidable where insured has not fee simple of property insured 32
Sum insured should be contracted to be paid by insurers in 33
Delivery of, necessary to complete..... 33
Of mutual company invalid unless signed by president of company 33
In what cases valid although not actually issued..... 34
Will have retroactive operation under agreement to insure 36
Names of persons interested must be inserted in.....37, 38
Divisibility of.....39, 40, 41
Fraud as to part, vitiates whole..... 41
How cancellation of, may be effected..... 42
Alteration of, how effected..... 43
When benefit of policy may be adopted by person having interest in property 58
Ratification of, by person insured.....58, 59
When goods insured may be removed from building..... 61
Gambling policy 63
Void where insured has no interest in property insured ... 63
Construction of, in relation to things insured..... 64
To be construed liberally 83
Condition in, as to correct description of property insured..83, 84
Effect of misdescription in..... 84
Must be no change in premises insured..... 84
When change allowed..... 85
Effect on, of condition as to commencing dangerous trade on premises 86
Rendered void by breach of warranty in description..... 86
Vitiated by act of insured increasing risk 87, 88
Change in occupation of premises vitiates, unless communicated to insurers 91

PAGE

Essence of, that position of goods insured be known to all parties 91, 92
Condition for removal of goods covered by 92
Insurance on merchandize by open policy, what covered by 94
On a building 95
Condition in, as to building insured, falling down 95
Definition of "fire" in 95, 96
Does not cover loss by removal of goods from house on fire, 97, 98
Action on, what damages recoverable 98, 99
Premises blown up by gunpowder, effect on 99, 100, 101
Extent of loss covered by 102
When insurers liable for sum insured 109
Fraudulent representation, effect on 113
Non-compliance with warranty, effect on 112, 113
Avoided by insured withholding information increasing risk 120
Avoided by false statements in application 121
Hazardous articles, insured by, effect on 122, 132
Misrepresentation of incumbrances on property, effect on... 123
Deemed to be made on original representation 125
Representation as to renewal of 125
On several parcels, avoided by misrepresentation of title to one 128
Avoided by concealment of fires, having taken place before application 132
Omission in application as to incendiary attempts on property, effect on 132
Avoided by fraud, concealment, or misrepresentation of material facts 135, 335
Effect on, of insured leasing building insured 148
Avoided by non-compliance with condition to give notice of previous insurance 152-3
When avoided by breach of condition under statute 160
Non-occupation of insured premises, in absence of condition, does not avoid 175
Non-compliance with a by-law, effect on 177
Not in its nature assignable at common law 197
Interest in property and policy must concur in same person 197
Interest in, vests in representatives on death of insured ... 198
Avoided by assignor not complying with terms of, against assignee 206
Avoided by insured swearing falsely in proving loss 232-3
Condition in, as to recovery of two-thirds value of property 243

PAGE

Pro-rata clause in, as to payment of loss, effect of 249
Is best evidence that insurance is on foot..... 292
Avoided by premium note in arrear in mutual companies... 300
Marine policy, condition in, as to care and skill..... 322
In construction of, evidence of meaning of particular words admissible 334
Fire policy used, for marine insurance, effect of 341
Insured may borrow money on security of 348
Avoided by public policy, as in duelling 351
Assignee of, takes it with all equities..... 354
May be effected for benefit of an infant..... 354

PREMIUM—

Payment of, condition precedent 5, 7, 81
When actual payment of, dispensed with 6
Receipt for binding, in absence of fraud 6
Payment of, may be waived by insurers 6, 7
Not returnable, when risk *entire*..... 27
When returnable to insured 27, 28, 29, 65
Note, condition as to payment of 180
Evidence of waiver of payment of 292
Note in arrear for thirty days avoids policy in mutual company 300
Note not payable by instalments in cash premium principle 301
When paid, no further assessment on insured..... 301

PRESERVATION OF PROPERTY—

Condition as to 182

PROFITS—

Of cargo, insurable interest in..... 79
Of business, insurable interest in 79
Not recoverable unless insured as such 240, 245

PROOF OF LOSS—

Condition as to..... 182, 183, 211
Notice of loss verified by oath must be given to company immediately.....211, 212
Notice of loss must be given by party insured... 212
When notice of loss may be given by assignee of policy..... 212
Assignee in some cases may recover without furnishing any 212
One of several insureds can give notice of loss..... 212
Condition as to giving immediate notice how construed.....213, 216 217

PAGE

Should be presented to secretary or president of company... 213
Resident agent of company receiving notice of loss, effect of 213, 214
Broker receiving notice of loss effect of.... 214
General notice of loss sufficient in fire policy.... 214
Condition precedent that amount of loss must be stated.215, 221-2
Condition as to written notice of loss.... 215
Notice of loss given to secretary by local agent sufficient..215-16
Verbal notice of loss, when sufficient.... 216
Compliance with condition as to notice of loss, condition precedent 216
Condition as to furnishing notice within a limited time.217, 218
Affidavits used in, must comply with conditions of policy... 218
Where affidavit irregular, effect of 218, 221
Condition as to furnishing copy of written portion of policy 219
Affidavits used in, must be made by insured notwithstanding assignment....219, 220
Condition as to preliminary proof of loss, must be strictly complied with 220, 225
Affidavit of one of several parties insured sufficient in 220
Affidavit used in, should contain all legal requisites 221
Account of loss, verified by affidavit must be put in...221, 3-4, 235
Production of vouchers, &c., condition as to....222, 224
Not necessary to describe manner of loss.... 226
Other insurances must be set forth 226
Incumbrances on property must be set forth.... 226
Condition as to insured submitting to be examined 227
Condition in policy as to satisfactory evidence of.... 227
Magistrates certificate of loss, condition as to 228-9, 230
Certificate of loss, condition as to 228-9, 230
Condition as to insured undertaking acts of strangers 231
Certificate of loss may be dispensed with in some cases..231, 232
Fraud or false swearing in, effect of 232-3-4
False statement of loss avoids policy....232-5
In preliminary proof, notice of loss may be waived by insurers 235
Proof of loss may be waived by insurers.... 235
Furnished by insured when demanded cannot be objected to 236
Defects in must be notified to insured 236
Silence as to defects in, not a waiver of.... 236
Refusal to pay on ground of one defect, waiver of others... 237

PAGE

Condition as to, how complied with in case of reinsurance 264
Plea of sufficiency of, should be special 286
Of ship, to recover for partial loss 339

PROPERTY—

When covered by several policies 38, 39, 41
May be insured by third party for benefit of owner 58
Some subjects of, not insurable 62
Must be in existence at time of insurance 65
Insurable interest in, what 65
Right in, may be insured 65
Equitable interest in, may be insured 72
Insurable interest in property considered 79
Subjects of, covered by policy, construed according to the maxim *nos citur a sociis* 83
Misdescription of, condition as to 124
Qualified interest in, effect of not disclosing 134
Condition as to preservation of 182

PRO-RATA CLAUSE—

As to payment of loss 248, 249. 250

PROVINCIAL INS. CO.—

Peculiar conditions in policies of 189

PROXIMATE CAUSE—

Meaning of term 2
Must be considered in determining loss 101
And in determining liability of insurers 321

PURCHASER—

Of insured property does not acquire interest in policy merely by virtue of his purchase 201-2

QUEEN INS. CO.—

Peculiar conditions in policies of 185, 187, 190

QUEEN CITY INS. CO.—

Peculiar conditions in policies of 187

RATABLE PROPORTION OF LOSS—

Condition as to payment of where several insurances 248-9

RATIFICATION—

Effect of, where policy effected by another 58-9
Of policy by company on assignment in case of forfeiture... 209

PAGE

RE-BUILDING—
Insurers may rebuild under 14 Geo. 3, cap. 78 258
Must be at request of person interested 258
Tenant from year to year may claim right of..... 258
Mortgagee entitled to have insurance money laid out in.... 259
Condition as to, usually inserted in policies..... 259
If company exercise option of, bar to action on policy..... 259
Option of, must be carried out with reasonable diligence... 259
Measure of damages for failure in..... 260
Condition as to in case of mutual companies..... 260
Clause in policy as to recovery of two-thirds loss inconsistent with..... 260
Election of company to rebuild, effect of 261

RE-INSURANCE—
Contract of 263
Clause of double insurance inoperative in policy of 263
Contribution in case of..... 264
Condition as to notice of loss in case of..... 264
Measure of damages on total loss under.....264-5
Limitation of action in policy of 274-5

REMOVAL OF GOODS—
From premises insured, condition as to 92, 182

REPLICATION—
Setting out documents in..... 281
Departure in. 281-2
Of warranty in policy 283
Duplicity in..... 284
Is bad if declaration is bad on whole matter 286
Test for allowing or disallowing, equitable 286

REPRESENTATION—
Definition of..... 112
Distinguished from a warranty..... 112
Where material must be complied with 112, 113
Effect on policy of fraudulent 113
May be made orally, not necessarily in writing..... 113
Is either affirmative or promissory 114
Materiality of, matter of fact, consequence of, matter of law 116
Distinction between fire and marine insurance in regard to 116, 117
May be changed into warranty..... 117

PAGE
In cases of mutual companies 117
Of agent of insured, effect on principal 120
Made to first underwriter, extends to all subsequent ones.. 121
Policy avoided by false 121
Test of materiality of, as to titles 123
As to incumbrances upon property insured 123-6-7
Policy deemed to be made on original, condition as to 125
As to renewal of policy 125
Of title to property 126
Of value of vessel, material representation 338
Amounting to warranty of facts must be strictly true 350-1

RIGHT OF ACTION—
Insurers entitled to assignment of, on payment of loss 261
Once vested, can only be divested by lapse of time 273-4

RIGHT TO BEGIN—
Person asserting affirmative of issue has 292

RIGHT TO RECOVER ON POLICY—
Possession of insurable interest by insured necessary to.... 226

RIOT—
Losses arising from 104, 105
Condition as to in policy 182
Loss by, need not be negatived by insured in statement of loss 225

RISK—
All facts material to must be communicated to company 53, 133-4-5, 337-8
Only such as arises by accident covered by policy 67
Nature of discussed 82
Liability of insurers results from immediate peril.....82, 95
Effect of misdescription of property insured on..... 84-6
Change in premises insured, when allowed..... 85
Arising from more hazardous trade must be provided for in policy.....86, 87, 90
Act of insured increasing, under condition vitiates policy, 87, 88
Description of leasehold property, effect on..... 89
Effect of error in description of property by act of insurers, 89, 90
Change in occupation of premises must be communicated to insurers 91, 177-8
Position and place of goods insured should be communicated to insurers 91, 92

PAGE

Condition for removal of goods covered by policy, effect on 92, 182
Identity of goods insured immaterial to..... 93, 95
Removal of goods from burning house, effect on..... 97, 98
Premises blown up by gunpowder, effect on..... 100, 101
Only extends to cause insured against..... 102, 103
Negligence of insured or his servants, effect on..... 104
Introduction of new invention on premises insured, effect on 106
Insured withholding information increasing, avoids policy.. 120
Condition in policy as to increasing..... ...145-6-7, 151
Alteration in premises increasing, condition as to, 146, 149, 177, 179
Increase of, as to part of the premises insured.....150-1
Condition as to terminating, by notice. 152
Increase of, by non-occupation of the premises insured... .. 175
Change in occupation of premises insured, increasing.....177-8
In marine insurance at and from a port when risk attaches, 304-5-6
On ship only commences at port mentioned in policy..... 318
To be considered when determining whether facts material. 338
Of goods held by insured on commission.....358-9

ROYAL INS. CO.—
Peculiar conditions in policies of 188

SALE—
Of property after insurance, effect on claim of insurer 262
Of realty after insurance, effect on unpaid purchase money where loss is paid to vendor..... 263
Evidence of offer of..... 291
Of ship by master only justified by urgent necessity 344

SALVAGE—
Insurable interest in..... 79
Expenses of, ratably contributed between co-insuring companies..... 182
In insufficient insurance belongs to insured..... 247

SATISFACTION OF LOSS—
Before and after breach of covenant to pay loss 247-8

SEAWORTHINESS—
Warranty of 303-4
Insured must repair vessel so as to render it..... 306

PAGE
Compliance with warranty of, effect of..... 306
Stipulations as to, considered with reference to navigation. 387
Extent of warranty as to, where no express stipulations, 308, 312
In vessel insured for round voyage..... 308
Onus of proving rests on insured 309-10
Losses arising from unseaworthiness not enforceable..... 311
Evidence of, at commencement of voyage, admissible..... 311
Advantages to insurers in excepting losses arising from..... 312
Implied warranty of at commencement of risk..... 312
Plea of unseaworthiness, what must be proved under..... 321
Presumption of unseaworthiness arises where vessel founders soon after commencement of voyage.....342-3-4

SERVICE OF PROCESS—
On agent in another province..... 276
On foreign companies 276-7

SET-OFF—
Right of, against premium note..... 293

SHIP—
Insurable interest in 75, 338
Hypothecated, insurable interest in 80
Seized by officers of the crown, insurable interest in..... 80
Insurance of goods in, at and from a place..... 317
Risk on, commences at port mentioned in policy..... 318
Stranded, master may sell her in extreme necessity..... 320
Condition as to name of ship being endorsed on policy 339
Joint owner of, insuring in his own name, entitled to moiety of insurance money 339
Insurance on ships of particular class how determined..... 339
Sale of, only justified by urgent necessity..... 344

SPONTANEOUS COMBUSTION—
Loss by, not indemnified by insurance 249

STATUTES—
Con. Stats. L. C. cap. 68 5
" " U. C. " 52 32
" " C. " 41 (registration of vessels)..... 47
" " U. C. " 54 66
" " L. C. " 93 81
" " " " 22 281
" " C. " 69 364
" " " " 88 364

PAGE

19 Geo. 2, cap. 37 62
14 Geo. 3, " 48 .....28, 37
" " " 78 258
28 " " 56 .....37, 130
11 Geo. 4 & Wm. 4, cap. 68 (carriers act)..... 44
4 Wm. 4, cap. 33 61
1 & 2 Vic. cap. 110 78
23 Vic. cap. 24..... 286
24 " 23..... 66
27 & 28 " 38..... 171
28 " 38..... 21
29 " 28..... 270
29 Vic. cap. 17 347
" " 37 275
" " 94 300
31 " 32 301
" " 48 21
33 " 21 347
34 " 9 361
35 " 16 346
" " 12 197

STEAM ENGINE—
In buildings insured, condition as to..... 144
In additions to buildings, condition as to..... 145

STOCK IN TRADE—
Insurance of, does not mean identical goods throughout risk 93
Distinction between merchants and mechanics in regard to 94

STOVES—
Condition in policy as to 144

SUBROGATION—
Of rights of action of insured to insurers on payment of loss 261-2
Insurers not entitled to subrogation of rights of mortgagee who insures 262
Of insurers to rights of insured as against third persons ... 263

SUICIDE—
Condition in policy as to 352

SURRENDER OF POLICY—
By insured when unable to meet payment of premiums 348

PAGE

SURVEY OF PREMISES—
Reference to, in policy, effect of....119, 120, 182
Definition of the phrase 120
By agent of insurers, binds them 138
Of ship, in action for partial loss 340

TENANT—
When he may insure 70
From year to year has insurable interest.... 69
Risk increased by, condition as to in policy.... 148
From year to year may claim to have premises re-built.... 258

TENANT BY THE COURTESY—
Has insurable interest in lands of wife 69

TERMINATION OF INSURANCE—
Condition in policy as to 42

THEFT—
Liability of insurers for 98, 99

TIME—
Does not begin to run under condition until cause of action accrues 274

TIME POLICY—
Not necessary for insured to state time of sailing 337

TITLE TO PROPERTY INSURED—
Must be represented accurately 126, 130
Misrepresentation of, as to one parcel, affects others in same policy 128
Assured need not disclose nature of, unless enquired into... 134

TOTAL LOSS, ABSOLUTE—
Where subject of insurance not actually annihilated.... 322
Effect of abandonment of vessel in creation of 323-4
Unjustifiable sale of ship or cargo, entitles insured to.... 323
Of goods damaged by perils of the sea 324-5
Notice of abandonment not necessary in case of 326
Repairs on vessel before action brought for 327
State of vessel at time of action brought, determines whether 328
Capture of vessel by enemies, when 329
Condition in policy as to 330
Restoration of vessel by insurers, effect on 331
Declaration of, in action for.... 333

PAGE

TRANSFER—
Of property insured, effect of 2
Of partial interest in property, effect of..... 3

TRUSTEE—
May insure for his *cestui que trust*..... 46
Goods held in trust should be insured as such..... 46
Should always insure as 46
May be appointed by Court of Chancery for benefit of married women 347
Not requisite that name of *cestui que trust* be in policy 349
On notice of assignment of policy insurers become quasi.... 354

UNDERTAKING—
Condition as to insured, for acts of a stranger 231

UNDERWRITERS—
Evidence of 289

UNSEAWORTHINESS—*See Seaworthiness.*

USAGE—
Evidence of, in construction of policy 14, 24
Of company insuring, not admitted to modify policy..... 26
Evidence of, in insurances on cargoes..... 319
And in description of voyage 334

USURPED POWER—
Losses arising from.....104, 105

VALUATION—
Of property insured 19

VALUE OF INTEREST—
Need not be specially set out in policy 83

VOYAGE—
Loss recoverable must happen during course of..... 313
Must be commenced during existence of policy..... 313
Description of, in policy must be taken in its commercial acceptation 334

WAIVER—
Of forfeiture (*See forfeiture.*)
Of condition in policy under seal cannot be by parol..171, 172
Of proof of loss by insurers 235
Silence as to defects in proof of loss, not 236

PAGE

Refusal of company to pay on ground of one defect waiver of other defects....236, 237
Arbitration negotiations pending, does not create 237
Evidence of, in payment of premium.... 292

WAREHOUSEMEN—
Insurance by....45, 40
Not liable for identical goods insured in his custody.... 66

WARRANTY—
In policy not to be explained by parol evidence 27, 111
Breach of, in description of property insured, effect of.... 86
What amounts to, in description of premises, in policy, 87, 184
Description in policy of place in which goods are, involves. 91
Definition of.... 110
Must be literally complied with 110
Effect of non-compliance with express warranty.... 111
Is either express or implied 110, 111
Implied not extended by construction.... 111
May apply to matter subsequent or precedent.... 111
Affirmative and promissory, meaning of 111
Differs from representation....112, 113
Must always be in writing in policy 113
Of insured, even where defects known to insurer binding... 115
Extent of, limited by words creating it.... 115
May be changed into representation 117
Declaration of insured in application, when considered, 117, 118, 119
Description of premises insured not 121, 122
Condition to keep books of account, &c., not 237
Plea of, in policy.... 283
Of seaworthiness, implied in marine policy....303-4
Differs under different circumstances....304-5
Compliance with, effect on liability 306
Extent of, where no express stipulations 308
Of particular fact must be strictly true....335, 350
Agreement that vessel shall navigate, considered.... 335

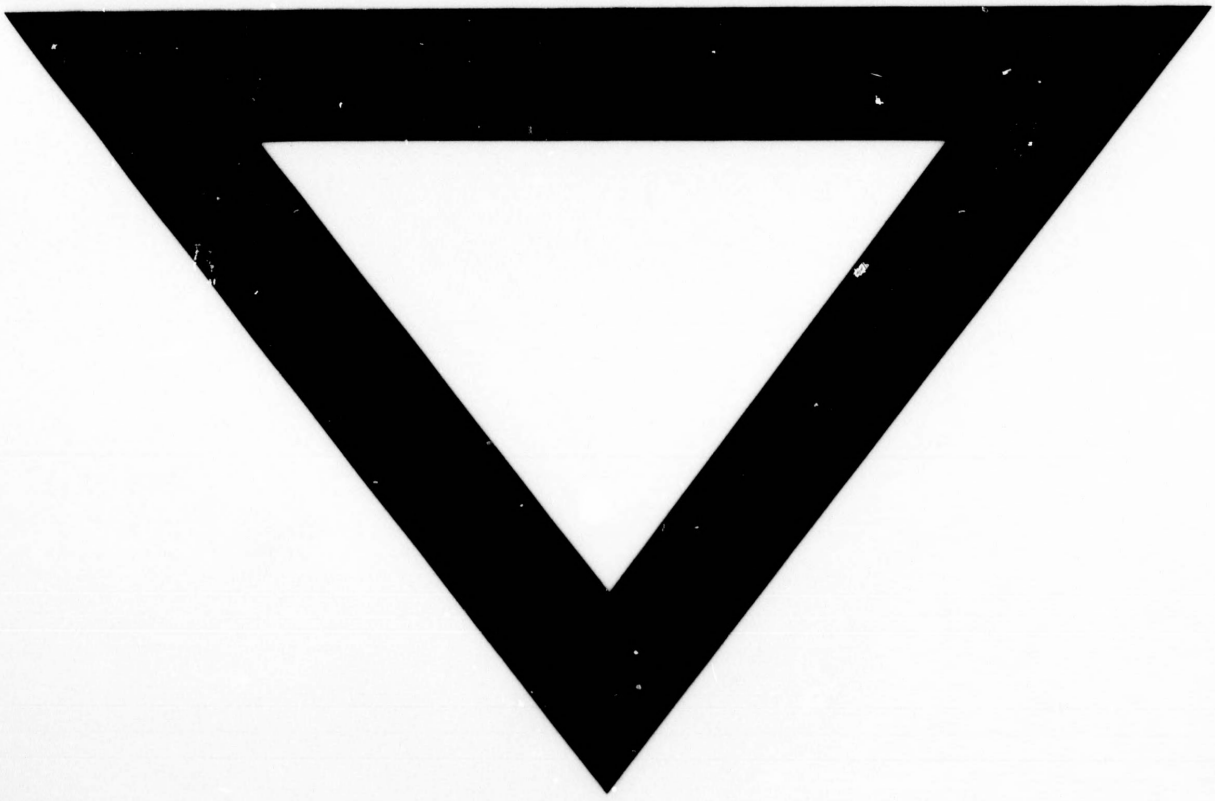
WHARFINGERS—
Insurances by 45, 46

WITNESS—
Skilled, may give opinion evidence 289
Underwriters may be witnesses.... 289
Expert, incompetency of.... 289

PAGE
er
6, 237
.. 237
.. 292

5, 40
.. 66

7, 111
... 86
7, 184
s. 91
... 110
... 110
... 111
0, 111
... 111
... 111
... 111
2, 113
... 113
... 115
... 115
... 117
7,
8, 119
1, 122
... 237
... 283
..303-4
..304-5
... 306
... 308
5, 350
... 335

5, 46

... 289
... 289
.... 289