(MONTREAL)

No. 79.

# Queen's Bench,

## APPEAL SIDE.

BENJAMIN GRANT,

*(Plaintiff in the Court below)*

APPELLANT;

*and*

THE ÆTNA INSURANCE COMPANY,

*(Defendants in the Court below)*

RESPONDENTS.

## CASE OF THE RESPONDENTS.

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## CASE OF THE RESPONDENTS.

This was an action for the recovery of $4000 insured by a Fire Policy, dated 30th July 1858, on the steamer Malakoff. The insurance was distributed as follows:— $2400 on the hull and cabins; $1200 on the engines and boilers; $400 on the tackle and furniture. The vessel was further insured in the "Home" Insurance Company for the same amount and the same manner as with the defendants, and in the "Equitable" Insurance Company, on the hull and cabin, $2400; on the engine alone, $1600. The fire took place on the night of the 25th of June 1859. The vessel was consumed with the exception of the engines and boilers and a portion of her hull. As the allegations of the declaration are particularly adverted to in the Remarks of the honorable Judge who rendered the judgment appealed from, which are given at length in the Appendix, it is unnecessary to repeat them here.

The Defendants pleaded (besides a *défense en droit*) seven distinct pleas.

1. That it was an express condition of the Policy that in case of difference touching any loss, such difference might and should be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing should be binding; that differences had in fact arisen touching the loss in question in this cause, which the Defendants had been ready and willing, and then offered to submit to arbitration, but the Plaintiff had refused to do so. That the condition for submission to arbitration was a condition precedent and not having been complied with by Plaintiff, he had not at present any right of action. The conclusion of this plea is for the dismissal of the action unconditionally.

2. The second plea is the same as the first, but the conclusion is that the Plaintiff do submit the differences in question to arbitration and that in case of neglect or refusal so to do, and to name arbitrators in that behalf, the action be dismissed.

3. A clause of warranty on the face of the Policy by which it is stipulated as an essential condition that the "Malakoff" was to navigate from Hamilton to Quebec. That the boat did not so navigate, nor was it intended by Plaintiff that she should, he having not done what was necessary to fit her to navigate. That Plaintiff obtained the insurance fraudulently, representing, prior to obtaining it, that the vessel was to navigate as aforesaid, while in fact he intended to leave and did leave her in Tate's dock, where she then was and where she was exposed to greater risk from fire than if she had been navigating under the laws in force respecting steamboat inspection, and where she was burned.

4. Denial of the insurable interest of the Plaintiff; the Defendants alleging the "Malakoff" to have been in fact the property of William & George Tate, and that any agreement or contract under which Plaintiff might claim to be owner was fraudulent and simulated.

5. That no loss was occasioned by the burning of the Steamer, the hull of which instead of being new (as falsely represented by the Plaintiff,) being the rotten and worthless hull of the old steamer "North American." That the timbers of the "Malakoff" were rotten, her engines, boilers, furniture and tackle were old, worn-out and useless, and in fact the steamer and her appurtenances were valueless. That the Defendants never surveyed or valued the vessel as falsely alleged by Plaintiff.

6. That at the time when the Policy declared upon was executed the "Malakoff" and her engines, boilers, machinery, furniture and tackle were and had been insured by the Plaintiff in the "Home" Insurance Company for £1000, and in the "Equitable" Insurance Company for a furthur sum of £1000, both which sums are claimed by the Plaintiff and actions pending therefor. That it was one of the express conditions of the Policy executed by the Defendants that in case of any other insurance upon the hull and cabins, engines and boilers, tackle and furniture of the said steamer, whether prior or subsequent to the date of their Policy, the Plaintiff should not, in case of loss or damage, be entitled to claim from Defendants any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount insured on the said property. That consequently the Defendants could in no case be compelled to pay more than one fourth part of the loss.

7. *Défense au fonds en fait.*

To the first and second pleas above referred to (those setting up the arbitration clause as a condition of the Policy) the Plaintiff demurred and they were, after hearing, dismissed. The other pleadings were answered generally by the Plaintiff. The cause was tried before a special jury, upon suggestions of fact, thirteen in number, settled by the Court below. Of these the following were answered unreservedly and absolutely in favor of the Plaintiff: 1. The Defendants' execution of the policy; 3. The Plaintiff's ownership and his loss of £3,000; 4. Namely, £1,000 on hull and cabins, £900 on engines and boilers, and £300 on furniture and tackle, with estimate of the remains worth as old iron, £300; 5. Plaintiff's compliance with terms of the policy; 6. The fitness and proper condition, or nearly so, of the Malakoff to navigate at the date of the policy, but that she had not navigated; 7. That she was in running order at that date; 8. That there was no greater risk in the Dock than if navigating; 9. That she was put in order and required no further outlay; 10. The Defendants' knowledge of other insurances effected; 12. Absence of concealment by Plaintiff from Defendants of the sameness of the hull of the Malakoff with that of old steamer North America, and the immateriality of that fact; and 13. The finding for Plaintiff of sum demanded, £1000, less £100 for ¼ share of the value of the remains.

To the 2nd question which is as follows: "Were the steamer Malakoff and subjects insured wholly or partly consumed by fire on the night of the 25th June 1859, and if in part state what parts were so consumed by fire?" the jury returned the following answer: "Nearly all. The hull and cabins with the furniture and tackling, excepting the bottom of the vessel and the remains of the engine and boiler." The answer to the 11th question is also worthy of notice. The enquiry is: "Did the Plaintiff declare or represent to the Defendants that the Malakoff would and should navigate as aforesaid and be laid up for the winter in a place to be approved by the Defendants, and was the said representation material, and was it complied with?" and the answer given: "No, he conformed to the conditions of policy."

At the first term of Court which took place after the trial the Defendants made three simultaneous motions. 1. In arrest of judgment; 2. For a new trial, and 3. For judgment in their favor, non obstante verdicto. The Plaintiff made no motion for judgment in accordance with the verdict. Each of the motions made by the Defendants will here receive a cursory examination in the order in which they stand upon the record.

1. *The motion in arrest of judgment.* This motion rests upon the insufficiency of the answers of the jury to the questions put to them and more particularly to that fourthly submitted, and upon the fact that the last finding, viz. of £900 in favor of the

Plaintiff, cannot, by any arithmetical process, be made up from the previous special findings of the jury. It will be observed that the insurance was effected for separate sums upon three distinct portions of the vessel, viz., the hull and cabins, the engine and boiler, and the furniture and tackle. As these subjects were insured *in unequal proportions* in three different Insurance Offices, it became necessary for the jury in order to adjust the proportion of loss to be borne by each company, to find as they were required to do by the 4th question submitted, the actual cash value *of the subjects respectively*, immediately before the fire and in case of a partial loss (which was the case here) to determine the value *of the parts respectively* which were not consumed by fire. How imperfectly this duty was performed will be seen upon reference to the answer to the 4th question. The value of the subjects before the fire is definitely fixed but the value *of the parts respectively* which remained unconsumed is not defined, the jury contenting themselves with the general and unsatisfactory answer "the remains worth as old iron £300." The answer to the last question submitted ought (upon the supposition that such a general question was proper to be submitted at all) to be deducible by mere arithmetical calculation from the answers to the previous special inquiries. That it is not so, as well as the fact that the sum of £900 found by the jury in favor of the Plaintiff is excessive, can be easily shewn. The jury found that the different subjects were insured in all as follows:

| | | |
|---|---|---|
| The hull and cabins, (in equal proportion in the three Offices) for.. | | £1800 |
| The engine and boiler, in the Ætna, for..... | £300 | |
| In the Home, for..... | 300 | |
| In the Equitable, for..... | 400 | |
| | | 1000 |
| The tackle and furniture, in the Ætna, for..... | £100 | |
| In the Home, for..... | 100 | |
| (Not insured at all in the Equitable) | | 200 |
| Total..... | | £3000 |

It will thus be seen that the Ætna had one third of the risk on the hull and cabins, three tenths on the engine and boiler, and one half on the furniture and tackle. The actual loss, must, of course be shared by the companies in the same proportion. This loss was found by the jury to be as follows:

| | | |
|---|---|---|
| Hull and cabins,..... | £1800—Share of Ætna one third,..... | £600 |
| Engine and boiler,..... | 900 " " three tenths,.... | 270 |
| Tackle and furniture,..... | 150 but as these were only insured for £200, share of Ætna is one half, ..... | 100 |
| | Total share of Ætna..... | £970 |
| | From which is to be deducted, as the jury found, one third of remains valued at £300..... | £100 |
| | Share of Ætna according to special findings..... | £870 |

It is thus manifest that the verdict is excessive by the sum of £30. How much greater the excess ought to be it is impossible to say as the jury failed to value separately the remains. The insufficiency of the finding in answer to the 4th question will be still further apparent by reference to the "Equitable" policy by which it will be seen that that Company had no insurance on the boiler a fact which was entirely overlooked by the jury. The remains of the engine and boiler ought therefore to have been separately valued, the Defendants being entitled to a deduction of three tenths of the value of the former and one half of that of the latter. The insufficiency of the verdict will be further apparent from the fact, which the Respondents unhesitatingly assert, that no definite sum could be arrived at by the most skilful accountant from the twelve special findings of the jury as the just share of loss to be borne by the Respondents,

2. *The motion for a new trial.*

The principal grounds upon which this motion rests are so fully examined in the remarks of the Honorable Mr. Justice Badgley, printed in the appendix, that little

more than a general review of them will be requisite here. The most important reasons urged by the Respondents for a new trial were sustained by the court below, but as by the final judgment their motion for judgment *non obstante veredicto* was granted that for a new trial was, of course, dismissed as unnecessary. These reasons are the following:—1. The admission of illegal evidence at the trial; 2 The rejection of legal testimony offered by the Defendants; and 3. Misdirection of the presiding judge in his charge to the jury, as well upon the evidence, as upon the law applicable to the case. Upon all these grounds the Respondents conceive that their motion for a new trial was well founded. The private letters and report of the agent of the Company written nearly a year after the issuing of the Policy, and stating in confidence to his principal, his opinion as to the circumstances of the fire and the liability of the Company could not legally be admitted in evidence, and the questions submitted by the Defendants, to the witnesses Lunn and Tate, tending to elicit, under the allegations of fraud and misrepresentation set up in the pleadings, the fact that the Plaintiff had made contemporaneous false and fraudulent representations to a previous underwriter, executing a policy on the same day, were, as the Respondents respectfully maintain improperly rejected and the testimony which might have been obtained in answer to those questions illegally prevented from going to the jury. The Respondents would respectfully call the attention of the Court to the remarks in the Appendix upon these two grounds, as well as to the authorities there cited in support of them. The remaining reason that of misdirection by the presiding judge, perhaps requires more extended notice, as it covers many objections, of greater or less importance, to the rulings of the judge in his charge to the jury. The Respondents cannot persuade themselves that the evidence was fairly commented upon, while it will appear from the charge that most important evidence, adduced by the Defendants was withdrawn by the judge, from the consideration of the jury. The Honorable Judge told the jury that Mr. Wood, the agent of the Company, "went on to the vessel between the first application and the "effecting of the insurance, and if he did not examine her in detail it was his own fault". The Respondents believe they are correct in saying that no such fact was established in evidence. The jury were instructed to set on one side the evidence adduced by the Defendants, from the sale of steamers similar to the "Malakoff" which the judge charged "was not to be considered." The jury were instructed to rely in this particular upon the evidence adduced by the Plaintiff. With reference to the policy itself, the jury were charged that the special clause descriptive of the risk (which will be referred to more at length below), was not a warranty, and that it was a mere statement of intention on the part of the assured. This, as the Respondents claim, was a misdirection of the gravest character. Upon the important question of the proper mode of estimating the loss, the Defendants had equal cause of complaint against the directions of the presiding judge. The policy, it will be observed, declares that the loss is to "be estimated according to the true and actual cash value of the property at "the time the loss shall happen." This most important clause is virtually set aside by that part of the charge which directs the jury to estimate the loss "according to the true *intrinsic value* at the time of loss," and as before stated, the jury are instructed to disregard the evidence of actual cash value adduced by the Defendants.

3. The motion for judgment *non obstante veredicto*. This motion rests entirely upon a written clause in the policy descriptive of the risk undertaken by the Company. The Respondents claim that the clause in question fulfils all the conditions of what is termed by the English Insurance writers a promissory warranty, and that as it had been confessedly uncomplied with, the policy was made void. This view was fully sustained by the Court below upon reasons to be found in the Appendix and the action of the Plaintiff was dismissed, judgment being entered in favor of the Defendants upon the motion now under consideration. By the clause in question the insurance is stated to be effected upon particular parts "of the steamer 'Malakoff' 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 the winter in a place "approved of by this Company who will not be liable for explosions, either by steam "or gunpowder." These words contain the only description of the risk assumed by the underwriters to be found in the policy, and the character of this important clause may be easily ascertained by submitting the simple test question, What is the risk here

assumed? Upon a careful reading and fair interpretation of the whole clause the Respondents submit that no reasonable doubt can remain that the permanent risk undertaken by them was upon a boat *to navigate* and not upon one lying idle and unproductive in a repairing dock. Upon the contrary supposition the greater portion of the clause would be devoid of any appropriate meaning. The words "*now* lying in Tate's dock" and "intended to navigate" shew clearly that the vessel was in dock for a temporary purpose and that she was destined for immediate navigation. Again if she were insured to remain in dock the words that she was to run "principally as a freight boat" and that the underwriters would not be liable for "explosions by steam" would be utter nonsense. Would it not be strange too, if the insurers had meant by their contract to take the risk upon a boat lying during the summer in a repairing dock, without watch, open to the visits of vagabonds and with the interest of the owner being rather for her destruction than her preservation, that they should be so careful to stipulate that she should be "laid up for the winter (a season when the danger from fire would be much less than in summer) in a place to be approved by the Company." No particular form of words is required to constitute a warranty and the Appellant will rely in vain upon any fancied indefiniteness in the words made use of in the policy. The real character of the risk is apparent and the Appellant had no right to attempt to substitute another risk for that intended by both parties when the insurance was effected. It is important to be borne in mind that the policy is the contract of the Respondents and the language made use of their language. Keeping this in view it is clearly erroneous to say (as the Honorable Judge who presided at the trial instructed the jury) that the words "intended to navigate &c." were the mere statement of an intention existing in the mind of the assured. They are plainly descriptive of the risk which the underwriters *intended* to assume and when once written in the policy became by law binding on the Plaintiff as a promissory warranty which he was to comply with on pain of forfeiting his insurance. It is useless for him to urge that there is no time fixed within which the boat was to navigate, as it is evident she was to do so before the ensuing winter (the only winter before the expiration of the policy) during which she was to be laid up in a safe place. Disregarding the common sense construction of the policy which he had in his hands, the Plaintiff allowed his boat to lie for eleven months in a dry dockyard, and the result was such as might, perhaps, have been safely predicted. The experience of underwriters has long since demonstrated that unproductive property is peculiarly liable to burn and it is accordingly avoided by them as a subject of insurance.

The Respondents do not think it necessary to make more than a passing allusion to the verbal representations of the Plaintiff at the time of effecting the insurance, which were fully proved in evidence, nor to enter into a consideration of the difference between representations and warrranties in matters of insurance. Both these subjects are noticed at length in the remarks in the appendix, before referred to. Were it necessary for the Respondents to take such a position, they might safely rely upon the before mentioned clause in the policy as a material representation on the part of the assured, but in their view it is manifestly a warranty, the materiality of which is unimportant.

ROSE & RITCHIE,

for Respondents.

Montreal, August, 1860.

# APPENDIX.

## REMARKS OF THE HONORABLE MR. JUSTICE BADGLEY, IN RENDERING JUDGMENT IN THE COURT BELOW.

Three motions have been submitted in this cause, the first in arrest of judgment, the second for entry of judgment for Defendant *non obstante veredicto*, and third for a new trial, all predicated upon a verdict found in Plaintiff's favour upon his action against the Defendants for the recovery of $4,000 on an open Policy of Insurance effected with the Defendant upon portions of the late steamer Malakoff. The motions are severally based upon special grounds detailed in the respective motions, and will be adverted to particularly in the course of my observations. The contract of insurance between the parties is in the following terms and conditions contained in the Defendant's policy: The Defendant agreed to insure the Plaintiff "for $4,000, namely, $2,400 on the Hull and Cabins, $1,200 on the "Engines and Boilers, and $400 on the Tackle and Furniture of the steamboat Malakoff, now lying "in Tait'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 the winter in a place approved by this "Company, who will not be liable for explosions either by steam or gunpowder. The Company "agree to make good to the insured any loss or damage, not exceeding in amount the sum insured, "as shall happen by fire to the property as above specified, from the 30th of July, 1858, to the 30th "of July, 1859, the said loss or damage to be estimated according to the true and actual cash value "of the property at the time the same shall happen." The other stipulations were those generally adopted, namely, the exemption of Defendants from liability for loss occasioned by civil commotion, &c.: the avoidance of the policy for want of notice to the Defendants and of indorsement on their policy of any other insurance effected by the insured on the same subjects; in case of other insurances, the Defendants' liability only for such sum as their insurance shall bear to the whole amount insured on the said property; and the acceptance of the policy subject to the printed conditions annexed thereto. It is proper to state that two other insurances were also effected by the Plaintiff, the first with the Equitable Office for $2,400 on the Hull and Cabins, and $1,600 on the Engines and Boilers, together $4,000, of the said steamboat Malakoff, and the other with the Home Office for £1,000, to wit—$2,400 on the Hull and Cabins, $1,200 on the Engines and Boilers, and $400 on the Tackle and Furniture of the said steamboat, making the total insurance £3,000, distributed as follows—£1,800 on the Hull and Cabins, £1,000 on the Engines and Boilers, and £200 on the Tackle and Furniture of the Malakoff. Of these the Defendants had ⅓ of the first, 3-10 of the second, and ½ of the third. The insurance with the Equitable is noted in Defendants' policy, and it is admitted that they had notice of that effected with the Home Office. It only remains to add that all these policies were open policies, without special valuation of the subjects insured by them.

The verdict was found upon special issues; articulations of facts, as follows:—1. The Defendants' execution of policy; 2. The destruction by fire of *nearly all* the subjects insured, except the bottom of the vessel and the remains of the Engines and Boilers; 3. The Plaintiff's ownership and his loss of £3,000; 4. Namely, £1,800 on Hull and Cabins, £900 on Engines and Boilers, and £300 on Furniture and Tackle, with estimates of the remains worth as old iron, £300; 5. Plaintiff's compliance with terms of the policy; 6. The fitness and proper condition, or nearly so, of the Malakoff to navigate at the date of the policy, but that she had not navigated; 7. That she was in running order at that date; 8. That there was no greater risk in the Dock than if navigating; 9. That she was put in order and required no further outlay; 10. The Defendants' knowledge of other insurance effected; 12. Absence of concealment by Plaintiff from Defendants of the sameness of the Hull of the Malakoff with that of old steamer North America, and the immateriality of that fact; and 13. The finding for Plaintiff of sum demanded, £1,000, less £100 for ⅓ share of the value of the remains. The 11th finding is peculiar; the special issue inquires, "Did the Plaintiff declare or represent to the Defendants that the Malakoff would and should navigate as aforesaid and be laid up for the winter in a place to be approved by the Defendants, and was the said representation material, and was it complied with?" The finding is, "No, he conformed to the conditions of the policy."

The contract and findings having been stated, the motions under discussion will be examined; 1st, that in arrest of judgment is grounded upon the irregularity and inconsistency of the findings generally, and the failure of the Jury to answer several of the articulations of fact submitted and specially the 3rd and 4th, and the consequent impossibility to make up a judgment in Plaintiff's favour. In my view of the case the 11th articulation was not matter for the Jury at all, being part of the contract itself, and forming part of the policy. The subject matter could not be affected by evidence of fact upon which the Jury could legally pass; but, as it was submitted to them, they should have given a sensible and applicable finding; but as it stands the finding is no answer to the special issue. The Defendants' general objection to the other findings, and particularly to those to the 3rd and 4th special issues, cannot be sustained; and, inasmuch as the 11th as above should not have been submitted, and the other findings are not apparently objectionable,

the motion in arrest of judgment upon the grounds stated will be rejected. The second motion to enter up judgment for Defendants *non obstante*, and the third for new Trial, will be considered together; and, to get rid of a little written superabundance, the grounds which require least remark will be taken up first, and these are among the number set out in the third motion, that for a new trial, which object to the rulings of the Judge at the Trial, in his alleged admission of illegal and rejection of legal testimony, misdirections in law, and erroneous instructions upon the evidence and points submitted. Now, of these the 5th and 6th objections are untenable; they refer to the rulings as to the proof of ownership in the Plaintiff by the Customs certificate and other proof adduced. But these do show title and possession both in him; his interest in the subjects insured is satisfied by the proof adduced, and that proof is uncontradicted. The Plaintiff appears, therefore, as the registered owner of the Malakoff under the public document, and as in possession of her at the time the insurance was effected, as well as at the accident. 1st Taylor on evidence, p. 126, says, that, "in "an action on a policy of insurance of a ship and her cargo, the Plaintiff may rely on the mere fact "of possession, without the aid of any documentary proof or title deeds, unless rendered necessary by "the adduction of contrary evidence." The 10th objection of concealment, and its materiality, is likewise untenable. Whether the hull of the Malakoff was or was not that of the North America was unimportant in an insurance against fire: it might have been otherwise in a purely marine risk, inasmuch as in this latter case the unseaworthiness or incapacity to perform the voyage would have given operation to the implicit obligation upon the assured, of not concealing something important within his own knowledge, and any loss or damage would, therefore, have fallen upon the insured himself. The fact in evidence, however, in this respect is satisfactory, inasmuch as the old hull had been almost altogether renewed at the time of the insurance, when indeed the Malakoff was a strong serviceable steamer. Moreover, this implied obligation relieves the insured from volunteering such spontaneous information—1st Arnold, Nos. 567-8—however material it might be under other circumstances, although it is quite true that the insured would have been held to disclose all he knew had the information been particularly demanded of him by the insurers. So far from this being the case the latter waived the inquiry, and forestalled the information about the Malakoff by reference to documents in possession of Defendant's agent. The jury found the fact not to be material, and their verdict in this respect will not be disturbed—1st Arnold, No. 570.—The 11th objection has been already mentioned, and the very general and unimportant ground contained in the 12th, 15th, 16th, 17th, 18th, 19th, 20th, and 21st objections need not be dwelt upon, nor prevent an immediate reference to the really important objections contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 13th and 14th grounds. The four first of these have reference to the admission of illegal and the rejection of legal evidence: Nos. 1 and 2 refer to the former; Nos. 3 and 4 to the latter. As to the admission of illegal evidence it appears that Mr. Wood, the Defendants' agent, who had taken the risk, was examined by the Plaintiff as his witness, and with the purpose of negativing the warranty contained in the policy pleaded by the Defendants, the witness was compelled to produce to the Jury certain private letters and reports to his foreign principals from himself as their agent, but written after the loss had occurred. This evidence is not legal, and the requisition to produce it is not warranted by law. The general principle cited arguendo by Plaintiff's counsel, from Paley, on Agency 322, and 1st Taylor, § 539 and page 755, is undoubtedly correct, "that no Agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except Counsel and Attorneys." The limitation of the general principle is also stated by them who echo the unanimous opinions of text writers and of Judicial decisions, that the generality of the rule does not apply to such circumstances as the present. From the leading case of Fairlie vs. Hastings decided by Sir Wm. Grant, Master of the Rolls—Paley 269—to be found in 10 Ves., Jr., p. 123, to the present time no difference of opinion exists. He lays it down as a general proposition of law, that what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement and in many cases by his acts. What the agent has said may be what constitutes the agreement of his principal, or the representations or statements made may be the foundation of or the inducement to the agreement. Therefore, if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or other of those ways, he observes, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot be proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of the agent cannot be assimilated to that of the principal. A party is bound by his own admission and is not permitted to controvert it. But it is impossible to say that a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his contract or his agreement, merely because that person has been his agent. If any fact rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertions. Lord Kenyon carried this so far "in 1 Esp. Cas 375 Masters vs. Abram as to refuse to "permit a letter by an agent to be read to prove an agreement by the principal, holding that the agent "himself must be examined. If the agreement were contained in the letter, I should have thought it

"sufficient to have proved that letter written by the agent: but, if the letter even offered as proof of "the contents of a pre-existing agreement, it was properly rejected."—See Taylor § 539.—The letter in this cited case was, in fact, subsequent to the contract. In the cases of 4 Taunt. 511 and 565 of Langhorn vs. Allnott and Kahl vs. Janson, the Court of Common Pleas decided that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, were not admissible in evidence against the principal as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also Reyner vs. Pearson Ibid 662—where the general rule is this, when it is found that one is the agent of another, whatever the agent does, or says, or writes at the making of the contract as agent, is admissible in evidence against the principal: but what this agent says or writes afterwards is not admissible. So also 4 Rawl- 294 per Rogers, J.: Hough vs. Doyle—so this same principle will be found in Betham vs. Benson, Neil Gow's R. 45. Ch. J. Dallas there says it is not true that when an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on behalf of his principal, and in that single case they become admissible, these declarations, at a different time, have been decided not to be evidence; numerous English and American authorities may be cited in addition; a few will suffice:—1, B and C, 473; 8, Bing, 471; 19, Pick, 220; 7, Cranch, 336; 2, Hill, 464; 3, Hill, 362; and, lastly, Taylor on evidence, p. . Considering these authorities as the true exponents of the law on this point, it follows that the evidence in question was not legal and should not have been submitted to the jury; it was not contemporaneous with the contract not *dum fervet opus*. It may also be remarked that, as that evidence was intended to disprove the existence of a warranty written in the policy, its admission controverted another established rule of evidence, which prohibits the admissibility of parol or extrinsic evidence to contradict, vary, or control written contracts. Nos. 3 and 4 refer to the rejection of evidence offered. The Defendant proposed to show, by the witnesses Tait and Lunn, that the insurance effected by the Plaintiff with the first Insurer, the Equitable Company, was accompanied by false and fraudulent misrepresentations at the time of making the insurance with that Company, as to the condition and circumstances of the Malakoff, and as to the stipulation of her navigating. The Judge in limine stopped the question and prevented any answer from being given. As the ruling is reported, without stating the legal ground taken for it, the authority from 3 Kent Com. p. 284, cited by Plaintiff's counsel arguendo upon the motion may probably be the support, and is as follows:—"This rule has not been favourably received by later judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same risks. See, also, 2, Johns, 157. The facts in the evidence in relation to this ruling are as follows: Wood, the witness above spoken of, was the agent of the Ætna, the Defendants, and of the Home Offices, and was applied to by Tate, the Plaintiff's agent, to ascertain the rate of Insurance. Tate intimated to Wood his desire to effect insurance upon the Malakoff for £3,000, to be distributed among three different offices for £1,000 each. Having effected insurance on the 30th of July with the Equitable, he, on the following day, the 31st, applied to Wood to complete his original purpose; stated his previous insurance with the Equitable, and obtained from Wood insurance with the Defendants for another £1,000, as, above, and with the Home Office for the third £1,000. The original purpose and intention intimated to Wood, was in this way perfected, and the insurance with the Equitable was noted in the Defendant's policy. In England these insurances would, of course, have been effected with the underwriters by the usual slip process, showing the signature of the Equitable as first insurer, and those of the Defendants and the Home Office as second and third insurers, and there any false or fraudulent representation made to the Equitable would avail to the Defendants in resisting the claims against them. In Barber *vs.* Fletcher, Dougl. 305, Lord Mansfield said "it had "been determined in divers cases that a representation to the first underwriter extends to all the "others." See also other cases—"Pearson *vs.* Watson, Cowp. 785; Stackpool *vs.* Simon, Park, 932; Marsh 772; Tersé *vs.* Parkinson, 4 Taunt. 440 and 849; Forrester *vs.* Pigou, 1 M. and S. 9; 3 East. 572; 2 Camb. 544. So also Phillips's commenting upon this rule, at No. 554, says:—"The principle on which this rule rests is, that in offering to a party a policy subscribed by another, "the insured implies a proposal that the party to whom it is offered shall enter into the same contract "which that other has entered into whose name is already upon it, unless such presumption is "rebutted by what passes between the parties to the subsequent signature; and the contract will not "be the same if there are certain conditions between the parties to the prior subscription which do "not form a part of the contract between those to the subsequent one. The rule is usually stated, "generally, that a representation to the first underwriter is such to the others, and the meaning "evidently is, that the subsequent subscribers may avail themselves of the rule in defence against a "claim on the policy, and this is the result of the jurisprudence on this matter." The exigencies and necessities of trade in the extensive and busy marts of England, and the number and variety of insurance transactions that must be effected within short periods of time, have established the system of slip certificates, by which each subscriber in effect becomes an individual insurer, though on the same policy, and the usages of trade then come in and give effect to the separation; hence it becomes necessary to recognize the influence of "such a rule, which is grounded upon the reasonable pre-

" sumption that the subsequent underwriters subscribe the policy from the confidence reposed by " them in the skill and judgment of him whose name they see stand first in the policy and from " their belief that he had duly ascertained and weighed all the circumstances material to the risk."—1 Arnould, p. 531; 10 Pick, 402; 1 Peters, S. C., 186. It is true there are limitations to the rule, as " that it 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 to the policy." The rule is also confined to the first underwriter, and to underwriters on the same policy. It has not been extended, nor is the presumption on which it rests made applicable, to underwriters on a second policy on the same interests and risks, *unless*—says Arnould, p. 537—perhaps, it could be clearly shown that the second policy was fraudulently obtained by the exhibiting of the first. Duer, 68-9; Tibbald *vs.* Hall, 2 Dow, p. c. 262. This latter remark shows that the rule is not altogether absolute against the admission of evidence to sustain fair dealing between the parties and resting authoritively upon the broad legal principle that fraud annuls contracts. 2 Duer, p. 673. The rule, with its restrictions and limitations of English decisions, is adopted as unquestionable, and Mr. Duer, with his usual perspicacity and learning observes:—" In the United States, although from the disuse, almost total, " of private underwriters, the application of the rule is now of rare occurrence, its validity has been " often recognised; and, however strongly we may be disposed to question the sufficiency of the " reasons on which it was introduced, it stands on too firm a basis of precedent and authority to be " now shaken. I confess my own adherence to the rule, on the *ground of reason as well as of* " *authority*. I regard the presumption on which it is founded as reasonable, sound and practical. " It springs from acute knowledge of men. and of the usual mode in which business is conducted, " and, as will appear hereafter, it is the very presumptions on which other decisions, of which the " propriety and wisdom have never been doubted, are solely placed and can *alone* be vindicated." Now, this is made to rest upon presumptions only: how can such presumptions be reasonably refused their operations in this case, under our legal system? The aggregate insurance, whereof that of the Defendants was a part, was in effect one insurance, as originally contemplated and designed by the Plaintiff; the influence of the insurance effected with the Equitable Company, as the first insurer, must have been felt by the Defendants, and the benefit of the Plaintiff's false and fraudulent misrepresentations to that first insurer, may not in reason be refused to the Defendants under the circumstances of the case. It may be that the first policy may have been exhibited to the Defendants, or other facts adduced, showing that or other implications against the Plaintiff; at all events false representation and fraud have been pleaded to this action, and the preventing of the introduction, *in limine*, of testimony tending to support these allegations and the rejection of the questions proposed to the witnesses Tate and Lunn, appear to have been at least premature and not consonant with law, the more so as our legal system is more enlarged than that from which we derive our commercial law of evidence, because it partakes more of the Equity than the common law principles in practice in England. A casual remark upon the 9th objection, that all material representations had been made by the Plaintiff to the insurer will suffice. It is quite true that all such matters are within the sole province of the Jury and not for the Judge to express his Judicial opinions upon them, and thereby in effect to substitute his opinion for their findings. It is undeniable that the Judge cannot pass either upon the existence or extent of misrepresentations put in issue as matters of fact. The same observations apply to the 11th objection as to fact of Plaintiff's concealment in relation to the hull of the Malakoff. It is not, however, meant to be asserted that Judges are precluded from the expression of their own opinions to Juries upon facts submitted; but even then the latter are independent of such opinions, and themselves weigh the effect and importance of the evidence adduced. In a recent case in England in 40 Eng. Rep. p. 358, it was held that strong comments by the Judge to the Jury on facts of the case was no ground for a new trial; and Pollock, C. B., said—" I know of no rule of " morality which tells a Judge that he is not to make observations on the evidence in a cause. He " may tell the Jury it is strong or weak, if really it is so. I can go farther and say it is a dereliction " of duty if he does not."—2 Duer, 396.—As to concealment and its legal bearing upon the insurance, it may be observed that where there is entire good faith, non-disclosures are not to be deemed material simply that their communication might have excited suspicion in the insurer. Where there was no intention to deceive, but the non-disclosure was witheld solely from the 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 embracing the risk and justifying an increase of premium. The insured should not be required at the peril of his contract to anticipate all the suspicions that might arise in the mind of the insurer, by disclosing facts which he reasonably believes could have no effect in varying the risks he desired to cover. It is true that an erroneous belief will not protect him; but the error, wholly unmixed with fraud, that is to deprive him of an indemnity, ought to be conclusively established. The 13th and 14th objections refer to the ruling in the first instance, by which the decision of the Jury upon the value of the subjects was to be based on; " *their intrinsic value to* " *be made out from the evidence of Merritt and the Engineers; and, in the second instance, that* " *their value was to be the fair value at the time of the loss, unaffected by local circumstances or by* " *other accidental causes of depreciation.*" The Defendants' evidence of the market price and sale

of other steamboats similar or nearly so to the Malakoff, and at or about the time of the accident, as the policy criterion of the value of the Malakoff was rejected by the Judge, who said that he could not accept the Defendants' view of the law, who wished to estimate the value by bringing a steamboat into the market and selling her suddenly for cash. These rulings are not in conformity with the contract or with law. The stipulation in the policy, the binding contract between the parties, is, *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.* What, then, is that cash value, and by what other fair mode of ascertainment can it be found than by its cash price in the market? Old Hudibras expounds the rule perfectly, "The value of a thing is what it will bring." It cannot be by taking the intrinsic cost of the subject, there can be no intrinsic value of such a thing, nor by separating the subject from the circumstances of time and place, which alone can give it a current value. If the destruction of the subject render it not available for appreciation by actual sale, its cash value may be found by ascertaining the price obtained in cash for like or nearly like subjects at the time. The abstraction of time and place from the estimation would make it impossible to know the cash or even the fair value of any thing, and specially of the subjects in this case at the given time of the contract, as ruled in this case. The money value in the existing market is the only rule and guide to carry out the stipulation of the contract, and this rule is moreover supported by authority. 2 Phillips, No. 1176, says—Insurance being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained; whether the loss be total or partial, its amount cannot be ascertained without determining the value of the subject. In No. 1245 the author says—The value of a building or of any article in a fire policy is what it could be sold for, since its value must be proved; and it does not appear what other value than this could be satisfactorily shewn. He remarks that the obvious presumption is that the rule is the same in a fire policy as in a marine insurance, namely, that the value of the subject at the beginning of the risk is referred to *where the policy by its provisions* or the description of the subject does not require a different construction. The authorities from Hammond and Ellis, cited to the jury, rest upon the general rule of the value at the beginning of the risk, but do not apply to this and similar cases in which the policy contracts expressly for an exception; the effect of the ruling would absolutely set aside the policy stipulation of the true and actual cash value at the time of the loss, and substitute for it, either that of intrinsic value or the mere fair value at the time of the loss, independent of all circumstances regulating or applying to it. Angell, on Fire insurance, §264, 5, says, "that loss or damage to goods is to be estimated according to the true and actual value of the property at the time the loss happens," and cites a judgment in Louisiana, by which a fair sale at auction, after notice to the insurers, may be considered by the jury in estimating the damage and ascertaining the indemnity. 1. Bell's Com. on Law of Scotland p. 643, says the loss is estimated on the destructible parts on the whole value of the house as it would have sold in the market, &c., and so, also, the French authorities are equally precise. See Boudousquié, p. 164—"Mais quoi doit-on entendre par la juste valeur des choses? Ce n'est ni la valeur de convenance, ni celle d'affection, ni même le prix d'achat, c'est la valeur vénale, c'est-à-dire le prix qu'on en pourrait retirer si on les mettait en vente. *Valere res dicitur quantum vendi potest.*' Dans la règle le juste prix est celui auquel les choses de pareilles nature et qualité sont vendues dans les mêmes lieux, dans le même tems, dans les mêmes circonstances et à toutes sortes de personnes sans avoir égard à la valeur extraordinaire, c'est-à-dire au prix qu'on peut obtenir en certain cas, et sous certains rapports. Le contrat d'assurance n'étant pas une mesure conservatoire des objets assurés mais seulement un contrat d'indemnité, &c. En un mot l'assureur garantit l'assuré contre la perte réelle qui résulte de l'incendie mais cette perte payée son obligation est éteinte. See, also, Grun and Joliat, p. 25; Persil, p. 90, Nos. 71, 72. Emerigon Meredith's Translation, cap. 9, §1; and Gouget and Merger vo. *Assurance Maritime*, p. 364, who hold that the contract would be one against public policy and morality if the contrary doctrine were maintained. This policy, then, having expressly stipulated for the kind and time of valuation; any other judicial instruction to the jury upon the matter is not warranted, and hence the ruling and instruction as above are illegal. There only remain the questions of representation and warranty. The written words of the policy in connection with these points are as follows: after stating the particular amounts upon particular parts "*of the steamer Malakoff 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 the winter in a place approved of by this Company, who will not be liable for explosions, either by steam or gunpowder.*" This statement must necessarily be subjected to legal construction to determine its nature, whether of representation or warranty. Then, as to its being a representation, the language is plain, simple, and explicit, adverting to navigation during the season, the course of that navigation, the principal manner of conducting it, and because of the date of the policy providing for laying up the steamer during the intermediate winter period between the open summer periods containing the winter. It is impossible for such language to require constructive explanation. But if it be a Representation, testimony is admissible with reference to it, but to what purpose here, where it is in writing and in plain and clear phraseology? Angell, p. 194, condensing other authorities, remarks, "A representation in the technical sense in which that term bears to the law of insurance, and, as distinguished from warranty has been well defined, a verbal or written statement made by the assured

" to the underwriter before the subscription to the policy, as to the existence of some fact or state of " facts, tending to induce the underwriter more readily to assume the risks, by diminishing the esti- " mate he would otherwise have formed of it." He elsewhere observes, " it is of some matter intrinsic " to the contract, and generally, if not always, relates to the present state and condition of the subject " insured. The term in insurance, it has been considered, as in the nature of a collateral contract " either by writing, not inserted in the policy, or by parol, and is a communication of facts and cir- " cumstances relative to the insurance made to the underwriters with the view to enable them to esti- " mate the risk and calculate the premiums to be paid." So also, 1 Arnold, 439; Ellis, p. 30. c. 4. " It is asserted that it is said to be material when it communicates any fact or circumstance which " may be reasonably supposed to influence the judgment of the insurer in undertaking the risk or " calculating the premium, and whatever may be the form of the expression used by the insured or " his agent in making a representation of it, have the effect of imposing upon or misleading the " underwriter, it will be material and fatal to the contract. There is a material difference between a " Representation and a Warranty; the former being a part of the preliminary proceedings which " propose the contract, and only a matter of collateral information on the subject of the insurance, " and makes no part of the policy; the warranty is a part of the written contract, as it has been " completed, and must appear on the face of it. The former may be substantially correct, but ren- " ders the contract void on the ground of fraud; the latter must be strictly and literally complied " with, and non-compliance with it is an express breach. Fraud is an element which vitiates every " contract, and a want of truth in a representation is fatal or not to the insurance, as it happens to " be material or immaterial to the risk undertaken; but when a thing is warranted to be of a parti- " cular character or description, it must be exactly such as it is represented to be, otherwise the " policy is void and there is no contract. This may be considered as a first principle in the law of " insurance." These representations have been classed as positive representations and as statements of belief, expectation or opinion; the latter are not representations of what is stated to be intended or expected or believed as a matter of fact to be made good by the assured, and will not affect the contract, though the fact prove otherwise, if the statement is made honestly and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might decline. On the other hand, positive representations are affirmative and promissory, although the distinction is one more of form than substance, as in fact most positive representations, even when in terms affirmative are, in effect, promissory, and whenever it is a positive statement of the actual or evident existence of some first material of the risk, it is only distinguishable in form from a warranty by not being on the face of it. At the trial the statement in the policy was assumed as a representation, and as such parol evidence was admitted in relation to it. That evidence clearly proved that Tate, the agent, did represent the Malakoff to be in Tate's Dock temporarily for repairs, and that when completed she would navigate between Hamilton and Quebec, principally as a freight boat, affirming the written statement on the policy. In spite of written and parol testimony, the Jury find that Plaintiff made no such declaration or representation; the finding is manifestly contrary to clear evidence adduced by parol and is singularly contradictory of the written evidence of the statement afforded by the contract, thereby in opposition to a rule not of law alone, but of common sense, that what is contained in the policy or other instrument or written upon it, purporting to belong to it, at the time of signing is part of the contract and is adopted by the signature. Both parol and written evidence concur with the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement the Plaintiffs' intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on Plaintiffs' part that she should be kept in the dock during the entire insurance year; and the Jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, inasmuch as Mr. Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the Jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above adverted to, and the irregular and incorrect findings of the Jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, for the entering up judgment for the Defendants *non obstante veredicto*, urge its importance upon the Court, because the final determination and judgment of the Court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c., and the Plaintiffs' non-compliance and breach with them, the Malakoff having, in fact, never left the Dock from the time of effecting the insurance in question. The judicial ruling and instruction declared the statement to be merely permissive. Bearing in mind the express written statement in the policy, it must be observed that the

person who sought and obtained the insurance was himself the proprietor in possession of the Malakoff at the time of the insurance, and must himself have known what was to be done with the boat during the season of navigation; that being in dock for repairs, she was there to fit her for the only purpose for which she was originally built, that of navigating; that having possession of the Malakoff he was not only open to an offer, but actually bargained for the hiring of her for navigation purposes without reference to the Defendants. Moreover, why was the intention to navigate so particularly stated, specifying the line of voyage and business travel that she was to follow; the manner of the business to be done principally as a freight boat; the stipulation that after her navigating done, she should be laid up in some place to be approved by the Defendants; finally, that Defendants should not be liable for explosions by steam, her usual mode of propulsion, or by gunpowder, which might possibly form part of her freight. Permission to navigate does not seem to form any ingredient of these stipulations; on the contrary, taking the contract in the fair and obvious import of words and equivalent to an express statement of all the inferences naturally and necessarily arising from it, a positive promissory representation becomes plainly manifest, which it is proved had not been complied with, and the contract has, therefore, been rendered inoperative. It must be remembered that the statement is not a mere verbal representation extrinsic and collateral to the contract, mere verbal explanations previous to the contract, but, on the contrary, that it forms part of the contract itself, and that as a Court of Law will only construe not reform a policy, the construction adverted to above in the discussion of the question of representation gives to the written statement the significant character of a warranty. Now Philips on Insurance, No. 544, says, "it is law that promissory representations "of material facts made and referred to in the policy usually have the effect of express war- "ranties and come under that head." Arnould, p. 490, says, "that the same statement indeed, "whilst when made verbally or in writing *distinct from the policy* by the broker to the insurer "is construed as a positive representation and would if written in the face of the policy in almost "all cases amount to warranty, the insertion in the policy causing it to be so construed," and Ellis "p. 39, says, "it is the practice of most offices to insert the statement or representations made "at the time of effecting the insurance on the body of the policy. By this means they become a "warranty and prevent questions from arising on the subject of the materiality or immateriality "of the statements." In this case the statement being written on the policy, it is for the Court to decide upon its legal bearing as a warranty and condition, and upon the general effect of its non-fulfilment upon the rights and remedies of the party in fault. The provinces of court and jury are plainly distinct, here the Court decides upon the sense and constructions of the common words and phrases, of the language where no peculiar meaning is proved. Arnould, p. 142, says, "a warranty in "a policy of insurance in whatever form created is a condition or contingency and unless 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." Any direct or even incidental allegation of a fact relating to a risk has been held to constitute a warranty. "It is simply sufficient and ought to be sufficient," observed Lord St. Leonards, "to avoid the policy that only one thing warranted is not true." In this case the stipulation undertakes for the peformance of a future act,—the navigating of the "Malakoff"—and is therefore classed among promissory warranties. The contract depends on the event taking place literally, and Phillips, at p. 762, says, "it is held that the intention of the parties in a warranty, "except as to the meaning of the words used, is not to be inquired into. The assured has chosen to "rest his claims against the insurers on a condition inserted in the contract, and whether the fact or "engagement which is the subject of the warranty be material to the risk or not, still he must bring "himself strictly within that condition. The rigid construction put upon warranties, in this parti- "cular, has perhaps arisen in part from the maxims of the Common Law, that conditions are to be "severely construed in regard to the party imposing them upon himself." And Ellis, p. 29, concludes the matter thus—"A breach of warranty will avoid the contract. The doctrine of warranties "has been a more frequent subject of discussion in cases of marine policies; but, so far as it is appli- "cable to the subject, that doctrine is of equal authority in cases of life and fire insurance. A War- "ranty is a stipulation or agreement on the part of the insured in the nature of a condition precedent, "and as applicable to fire policies, is usually of an affirmative nature, as that the property insured is "of the nature described in the policy. A Warranty being in the nature of a condition precedent, it "is quite immaterial for what purpose or with what view it is made; but, being once inserted in the "policy, it becomes a binding contract on the insured; and, unless he can show that it has been strict- "ly fulfilled, he can derive no benefit from the policy. The meaning of a Warranty is to preclude "all questions whether it has been substantially complied with or not; if it be affirmative it must be "literally true; if promissory it must be strictly performed. The breach of warranty, therefore, con- "sists either in the falsehood of an affirmative or the non-performance of an executory stipulation. In "either case the policy is void, and whether the thing warranted be material or not, whether the breach "of it proceeded from fraud, negligence, misinformations, mistakes of an agent, or any other cause, "the consequence is the same. With respect to the compliance with warranties, there is no latitude "nor equity. The only question is whether the thing warranted has taken place or not, or be true "or not; if not, the insurer is not answerable for any loss, even though it did not happen in conse-

" quence of the breach of the warranty." Considering the statement in the policy to be a warranty, the Court is constrained to go beyond according the motion for a new trial in this cause, and to adjudge finally upon the motion *non obstante*, and order the judgment to be entered upon the record for the Defendants, notwithstanding the verdict in favour of the Plaintiff, with costs against the Plaintiff.

## NOTES OF EVIDENCE ADDUCED BY DEFENDANTS.

GEORGE BRUSH is Engineer and founder, makes engines, has manufactured engines for the last 21 years. Originally steamboat Captain. Knows the steamer Malakoff, knows her engines and boilers. Saw engines and boilers for the last time after the fire. Had not examined them for some years before the fire. The engine aboard the Malakoff was an old engine belonging to the "Great Britain," and was built in 1829. The engine was old, it was perhaps well built at first, it broke down several times while on board of the Great Britain. The engine and boiler would not at the present time be worth putting into a boat considering the improvements in machinery. At the date of the fire the engine and boiler would not bring more than the amount of old iron. They would weigh together about sixty tons at $20 per ton. We have made as many engines as any foundry in Montreal, and a great deal larger than any other in town.

CROSS-EXAMINED.

Never examined the engines before the fire, but saw them occasionally for the last 30 years. It is three or four years since the Malakoff was made out of the North America. Was on board the Malakoff in Tate's dock in 1859, is not positive, cannot say when he was aboard of her before the fire. Was on board the Malakoff perhaps the same year she was made. Is pretty sure he was on board when the old engines were placed on board of her. Thinks he was on board of her 3 or 4 years ago. Thinks he was on board of every boat in Montreal. Cannot say he was on board the Malakoff in 1859 before the fire. Cannot say whether he was on board in 1857, nor 1856, nor 1855. Knows the shafts of the engine were new. The boiler on board was that he saw in the "Niagara," in 1836 or 1837. Knows the boiler on the Malakoff was the one that came from the "Niagara," having seen it on the Malakoff; made the beam used in the Malakoff. Received more than one hundred and fifty pounds. The beam of engine is a small item. Never examined particularly the engine and boilers after being placed in the Malakoff. Never examined the engines particularly, but knew them well. A new frame costs one hundred and fifty pounds, new water wheels cost from one hundred and fifty to two hundred pounds. The engines in question were complete engines, cannot say they were perfect, thinks they were somewhat defective. Cannot say what it cost to place the engine on board the Malakoff. It would take more than the value of one engine, it would cost more than $1000 to take down and put up the engine in question. Bartley & Dunbar put the engine in working order. Cannot say what new parts were put in the engine, except the shafts, would not risk his life to cross the Ontario in a boat like that, thinks she ran for 3 or 4 years. The boiler on board the wreck is the same boiler he saw in the "North America." One half the steam would work an engine of double the capacity of that of the Malakoff now, owing to the progress in machinery.

JAMES DUNBAR, is an engineer employed in the manufacture of engines for twenty years and has had much experience in that line. Was not particularly aware of the condition of the engines on board the "Malakoff," before the fire. The reparations consisting of shafts and flanges were made by our firm. Never examined the engine in question. Knew it a little. Saw it thirty years ago on board the "Great Britain," the boiler is the same as that on board the Great Britain. Cannot say what was the value of the engine at the time of the fire. The engine and boilers are old fashioned. They would not bring as much as engines and boilers made upon the latest plans, but it would cost nearly as much to make them.

CROSS-EXAMINED.

Never saw the Great Britain navigate. Was on board of her in Upper Canada in 1837. An engine like that on board the Malakoff would cost as much in the making as a modern one, a modern boiler would not cost so much. It would cost twenty two hundred pounds to place an engine on board a boat capable of doing the same amount of work as that on board the Malakoff. To make a modern engine 48 cylinder 10 feet

stroke would cost more than four thousand pounds and perhaps five thousand. Does not know if the Malakoff was the most powerful freight boat on the St. Lawrence, but knows that she had the largest cylinder. Belonged to the firm of Bartley & Dunbar. Furnished shafts and flanges for the Malakoff and other small pieces which from the account which he has in his hand would have cost three hundred and one pounds; this account is in my partner's hand writing. Last saw the Malakoff at the time he put in the shafts, the engine and boiler must have been in a condition to work at the time for she ran for some time.

JAMES A. GLASSFORD, is a forwarder for the last 15 years. Is acquainted with steamboat property. Knew there was a steamer of the name of Malakoff in 1859. Cannot say what would be the cash value of the said steamer in 1859. Does not think she could be sold for cash then. Heard of the Huron being sold and the Colonist in 1859. The Colonist was sold for twenty two hundred pounds, and he thinks she was more suitable for the river and lake navigation than the Malakoff. The St. Lawrence was sold for twelve hundred and twenty five pounds. Does not know the St. Lawrence sufficiently to compare her with the Malakoff.

CROSS-EXAMINED.

Does not give his opinion as a builder of boats but as a purchaser of boats which he had formerly. The Colonist was sold by the assignées of a bankrupt estate; the St. Lawrence was also sold in the same manner. Knew the Wellington which was sold at the same time for five thousand pounds at a forced sale; that the Huron was sold at a forced sale at four thousand pounds. The Wellington cost Hooker, Jacques & Co., nine thousand pounds and she was sold by them for five thousand pounds. Thinks these boats were sold below their value, and if sold at such a low price it was because there was nothing to be done and not because they were intrinsically deteriorated in value. The Huron was sold on a long term of credit.

JAMES H. HENDERSON is a forwarder for several years. Was a steamboat proprietor. Knows the Colonist was sold in 1858. for twenty one hundred pounds. Thinks the Colonist was a better boat than the Malakoff. In speaking of the Malakoff, he speaks generally, never having examined her. The St. Lawrence was sold for twelve hundred pounds at private sale; does not think the St. Lawrence was a better boat than the Malakoff. Knows very little of the Malakoff.

CROSS-EXAMINED.

All the boats he referred to were sold by forced sales. The Colonist was purchased by the firm to which he belonged for six thousand pounds in 1855. She was finished in 1854, and purchased that winter, was built for Lake Erie and so as to go through the canal locks; the Malakoff would not go through the locks. Understood that the Malakoff would bring four thousand barrels of flour. The Wellington was sold in 1858 as belonging to bankrupt estate for five thousand pounds.

WILLIAM LUNN has been an Insurance agent for some years. The risks would be greater on a boat laying in Tate's dock than one navigating. Would not take a risk on a boat laying in Tate's dock for a year. Mr. Grant's agent, Mr. Tait, effected an Insurance with the Equitable for one thousand pounds.

*Question.*—Did not George Tait, acting as agent of the Plaintiff, effect an Insurance with the Equitable Insurance Company on the 30th July 1858, and prior to the Insurance with the Defendants upon the Malakoff and subjects insured or some of them. and did he not then make some and what representations to the said Equitable Insurance Company with respect to the condition and circumstances of the Malakoff and in respect to her navigating, when or prior to effecting such insurance with the said Equitable Insurance Company?

Witness answers "yes" to the first part of the question. Plaintiff objects to the latter part of the question. Objection maintained by the Court.

CROSS-EXAMINED.

Is not aware that there is an action against the Equitable by Plaintiff. Witness had conversation with Mr. Woods respecting the mode of defence. The Equitable is not to pay half the expenses of this action.

DAVID TORRANCE has been a forwarder and steamboat proprietor. Saw the Malakoff; never was on board; has an idea of boats of that description. Does not think that any man would be prepared to buy that boat owing to the state of trade for three years past, the prospects and the competition of the Grand Trunk. No man, in witness's opinion, could run her without loss; and such shall be his opinion as long as the Grand Trunk lasts. The Colonist was a far superior boat to the Malakoff, and was sold for fifteen hundred pounds. The Malakoff in 1859 would not bring more than one thousand pounds. Does not think that any man could buy her to run her.

CROSS-EXAMINED.

A man who would give a thousand pounds for the steamer Malakoff for the season would not be able to pay that amount, and would be two thousand pounds in debt. He sold the Colonist, or rather gave her away. The Huron was sold for four thousand five hundred pounds, with interest. Is not a Director of the Equitable Insurance Company. My opinion of the worthlessness of the Malakoff, or any other boat, is for the want of trade.

JAMES J. D. BLACK is a forwarder, and has been for a long time past. Saw the Malakoff; was an inefficient boat; this is my opinion from what I have heard of her. I know very little about her; was on board of her in 1856. It would be difficult to sell her in 1858, owing to the depression of the market.

NELSON M. BOCKUS is a forwarder. Was agent for the Malakoff in 1856; was agent for a season. Cannot say whether she ran profitably that season or not. She ran into debt that season, and those debts are not yet paid. While he was agent he had much difficulty in getting freight, on account of the bad character of the boat. She could not have been sold for cash in 1859; that is, she could not be sold as a boat to run, but might be to be broken up and sold as old metal.

CROSS-EXAMINED.

Could not get dry goods as freight. Got some, sometimes, when the parties did not know the bad quality of the boat. Cannot name any person who refused freight on account of her bad reputation. Knows that in 1857 the Malakoff was employed in carrying freight from the Ocean Steamers. The owners of the steamer are indebted to witness in the amount of about one hundred pounds; it still remains an unsettled account.

JOHN RYAN has been engaged in steamboat business for the last 40 years. Knew the Malakoff in 1859; was on board of her in 1858. It would be a difficult matter to sell her in 1859, and doubts whether she would bring five hundred pounds. In 1856 the Crescent was sold for fifteen hundred pounds, and was much better than th Mclakoff.

CROSS-EXAMINED.

Being asked if he believes in God, witness refuses to reply. Judge Pyke rejected witness' testimony in this city once before.

WILLIAM P. REYNOLDS is an Insurance Agent in Montreal, and has been for a number of years. Thinks that a boat lying in Tate's docks in the summer would be a greater risk than if she navigated; thinks the risk much greater; would not take a risk of that nature.

CROSS-EXAMINED.

Never heard of any other boat being burnt at Tate's dry dock. Believes that vessels are constantly undergoing repairs in Tate's docks. It is a frequent thing to see boats burn out on the St. Lawrence. If a steamer remained in the dock a longer time than witness, as an agent, would think reasonable, he would require notice.

ALEXANDER MURRAY has been in the employ of the Montreal Insurance Company more than 15 years. Thinks that the risk would be greater in Tate's dock than if the steamer was navigating. Would not take a risk on a boat laying in dock for a summer.

CROSS-EXAMINED.

Never heard of a boat being burnt in Tate's dock; heard of many being burnt on the river. The premium depends on the nature of the fuel. Varies from 2½ to 3 per cent. Does not know of any difference in premium for boats navigating and boats in dock.

MATHEW H. GAULT has been an Insurance Agent in Montreal for the last 9 years. Witness refused the risk on the Malakoff. Considers the risk on vessels in dock when surrounded by other vessels to be greater than when navigating.

CROSS-EXAMINED.

Never heard of a boat being burnt in Tate's dock. Heard of several being burnt navigating.

ANGUS R. BETHUNE is an Insurance agent. Would not take a risk at Tate's dock. Never had an offer to insure a steamer in Tate's dock. Thinks the risk greater.

JAMES REAVES is a clerk in the employ of the Defendants for the last 9 years. Recollects that Mr. Tait came to his office in 1858 to insure the Malakoff. Saw Mr. Wood taking down the Register and turning it to himself. Does not recollect that Mr. Wood read anything out of it. Saw the entry in the book of evaluations respecting the Malakoff. There was nothing in the book of evaluations concerning the fact that the Malakoff was a part of the old North America. Being shewn a book of evaluations for 1859 he declares that the entry in it is similar in substance to that of 1858. Was present when the insurance was effected on the Malakoff, by George Tait, who stated that the steamer was then laying in his dock undergoing repairs, and that when complete she would be employed upon the Lake and River between Hamilton and Quebec. Mr. Tait said that the boat was then laying in their dock, that she was undergoing repairs or refitting, when those were completed she was to be taken out and run on the Lake and River principally between Hamilton and Montreal, but that she might run to Quebec as a freight boat. This is the meaning of Mr. Tait's conversation, but I cannot cite the precise words. He then stated that he had effected an Insurance with the Equitable for one thousand pounds. The policy was not then made but a receipt was given containing the clause that she was to navigate and the policy was afterwards made in conformity with said receipt. Witness proves exhibit "X," to be a true copy of the register of 1859 respecting the Malakoff.

CROSS-EXAMINED.

Copied the policy from the policy book. The stipulation of Mr. Tait is in the policy. The book in question did not come from Buffalo for the occasion. They have it since last February or some time afterwards. The representation made by Mr. Tait was never talked over between Mr. Wood and Witness. Nevertheless the witness told Mr. Wood what he was going to say, but Mr. Wood did not tell him what he was going to say. Read Mr. Wood's testimony in the Herald to day. Mr. Wood asked witness about a week ago if he recollected any of the representations made by Mr. Tait. Swears that the extract fyled from the book of evaluations is a true copy of the entry respecting the Malakoff in the same book of 1858. Saw said book in last February or January for the last time.