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PHASES OF QUEBEC LAW.

"*Phases of Quebec Law*," by "Victim," is the title of a pamphlet printed at Sherbrooke, which, as the preface states, is "an attempt to show, in narrative form, some of the features of our civil law imperatively calling for amendment." It purports to give the experience of a person who came from England and settled in this province. The new comer proceeded to employ his capital in loans at interest, on the security of real estate. The misfortunes of the lender are intended to illustrate defects in the law. Let us see what they were. "Victim" lost the amount of his first loan because the property securing it was sold for a trifle by the sheriff without his knowledge. The second loan was also lost, but in a peculiar way. "Victim," whom we shall call F., bid the property up when brought to sale, but was overbid by a person acting at the instance of a judgment creditor. The purchaser did not pay the price, and when the property was re-sold at his *folle enchère*, F. did not attend, and the property was then sold for a trifle to the judgment creditor. F. lost his third loan in consequence of the property securing it being sold for taxes, and the two years allowed for redemption had expired before he was aware of the sale. The fourth loan was lost in a more extraordinary manner. The borrower paid interest regularly for ten years, and then ceased to pay. F. found that he had sold the property soon after obtaining the loan, and the new owner had acquired a title by ten years' possession under his deed of purchase. The fifth loan was a small one of $500, on a property valued at $800. The mortgagor died. The property was brought to sale by a creditor. F. bought it in for $800, and found that this amount was eaten up by expenses of last illness, costs of suit, and other privileged claims. The sixth and last loan was on personal security. The borrower repudiated his signature (a cross) to the note given by him, and F. was unable to prove his case because the witness to the signature did not believe in a future state of rewards and punishments, and his testimony could not be received under the law as it stands.

These are the six cases of hardship stated. The pamphlet, it may be observed, is written in an interesting style, and the points are easily apprehended. Now, although it is exasperating, and sometimes mortifying, to lose one's money through oversight or ignorance, that result is the usual one everywhere. Riches take to themselves wings; any fool can earn money, but it needs a wise man to keep it, are proverbial sayings. As to case No. 1, the law (43-44 Vict. c. 25) specially provides that a register for the addresses of hypothecary creditors must be kept in each registry office, and a notice must be sent by the registrar, by registered letter, to each hypothecary creditor, informing him that the immovable hypothecated to him is under seizure, and of the time when it will be sold. This disposes of case No. 1, because F. omits all reference to this provision. No. 2 is so peculiar that it hardly requires notice. After filing his opposition on the proceeds of the first sale, F.'s lawyer should have been on the look-out for his money, and should have been aware of the re-sale. Case No. 3, sale for taxes, is simply a case of want of vigilance. F. lends his money and allows the interest to fall three years in arrear. A person who embarks in a money-lending business ought certainly to know the law, or else act under advice of competent counsel. No. 4 is a very improbable case. A man who sold a mortgaged property would not be likely to go on paying interest for ten years on the loan, in order to avoid enquiry by the mortgagee. No. 5 is merely a case of imprudence in making a loan without sufficient margin. A person who makes a small loan must not imagine that the margin may be proportionately cut down. No. 6 presents a question of admissibility of evidence. We do not propose to enter into this question, but it may be observed that if it were left to the judge or jury to admit all evidence, and appreciate the value of it, we might have different judges acting upon

widely differing principles, and great uncertainty would result. It is probably safer to have a fixed rule in these cases, than to be subject to the caprice of the judge.

Upon the whole we do not see that "Victim" has made a very strong case. He says, "Why does not the sheriff sell what the defendant really owns, which is the property, *subject to the mortgages*, instead of selling the property itself which practically belongs to another person?" But the mortgages frequently exceed the selling value, and in that case no buyer could be found. A property is likely, other things being equal, to sell to better advantage, if the buyer can get a clear title, than if sold subject to a variety of claims, some bearing interest, and some not, necessitating a long calculation before the bidder knows what he is assuming.

SUPERIOR COURT—MONTREAL. *

Cour de Magistrat pour la cité de Montréal—Juridiction—Action hypothécaire.

Jugé:—Que la Cour de Magistrat pour la cité de Montréal a juridiction dans toutes les poursuites, jusqu'à concurrence de $50, pour cotisations pour la construction et la réparation des églises, presbytères et cimetières, même dans les actions hypothécaires.—*Guillemette* v. *La Cour de Magistrat*, Gill, J., 17 mars 1890.

Vente—Meubles—Livraison—Reméré—En bloc.

Jugé:—1o. Que la vente de meubles réelle et de bonne foi, par un vendeur solvable, peut se faire et être parfaite, sans livraison, ni déplacement des meubles, mais par le seul consentement des parties, même dans le cas où le vendeur se réserve un droit de réméré;

2o. Que lorsque l'acte mentionne la vente "de tous les meubles garnissant mon hôtel, comprenant, etc.," la vente n'est pas en bloc, et ne comprend que les objets détaillés à l'acte.—*Bury* v. *Gagnon*, Bélanger, J., 28 avril 1890.

Judicatum solvi—Société commerciale.

Jugé:—Qu'une société commerciale, faisant des affaires à Montréal, dont un membre est absent du Canada, et n'y a pas de domicile, peut poursuivre sans être tenu de fournir un cautionnement pour les frais.—*Beaudoin et al.* v. *Desmarais*, Taschereau, J., 5 mai 1890.

Capias—Affidavit—Suffisance des allégations.

Jugé:—Qu'il n'est pas nécessaire dans un affidavit pour *capias* alléguant que le défendeur ce cachait, recelait et avait recelé ses biens dans le but de frauder ses créanciers, d'indiquer la manière dont le demandeur a été informé des faits de recel, ni de donner les noms des personnes qui auraient donné les informations, comme il est nécessaire au demandeur de le faire dans l'affidavit pour l'émanation d'un *capias* pour cause de départ frauduleux de la province du Canada.—*Lachance* v. *Gauthier*, Taschereau, J., 19 mai 1890.

Substitution—Vente—Remploi—Eviction—Crainte de trouble.

Jugé:—1o. Que l'acheteur d'un immeuble sujet à une substitution, mais dont le grevé a, par l'acte créant la substitution, le droit de vendre en faisant le remploi du prix de vente pour les fins de la substitution, a droit de retenir le prix de vente jusqu'à ce que le vendeur se soit conformé aux conditions de l'acte en faisant le remploi.

2o. Qu'il ne suffit pas qu'il établisse avoir acheté une autre propriété, laquelle il entend payer avec l'argent provenant des biens substitués, il faut de plus qu'il fasse les déclarations nécessaires pour que les titres aux nouvelles propriétés ainsi achetées constituent un remploi en faveur des appelés à la substitution.

3o. Que la dite substitution avec faculté de vente aux conditions de remploi constituent pour l'acheteur un juste sujet de crainte d'éviction ou de trouble pour l'avenir.—*Desjardins* v. *Dagenais*, Gill, J., 10 mai 1890.

Capias—Affidavit—Allégations insuffisantes.

Jugé:—Que pour l'émanation d'un *capias*, une déposition alléguant que le demandeur recelait ses biens et était sur le point de quitter la province de Québec est insuffisante,

* To appear in Montreal Law Reports, 6 S. C.

et tel *capias* peut être cassé sur requête.—*Blondin* v. *Desjardins*, Wurtele, J., 10 juin 1890.

Lettre de change—Juridiction—Acceptation.

Jugé:—1o. Qu'une lettre de change, faite et datée à Montréal, payable à Montréal, mais acceptée par les défendeurs à Coaticook, ne peut être recouvrée en justice à Montréal, la Cour n'ayant pas de juridiction; l'action doit être intentée au lieu où la lettre de change a été acceptée, ce dernier endroit étant le lieu où a pris naissance le droit d'action.

2o. Qu'une lettre de change acceptée sans que rien n'indique à quel endroit elle a été acceptée, est censée l'être au domicile de celui qui l'accepte.—*Lockerby* v. *Weir*, Mathieu, J., 22 mai 1890.

Défense en droit—Réponse—Faits et droit—Motion.

Jugé:—1o. Que l'on ne peut dans une réponse à une défense en droit alléguer des questions de faits.

2o. Que l'on ne peut non plus dans une réponse à une défense en droit faire des allégations qui tendent à expliquer ou compléter la déclaration de manière à rendre sans effet la défense en droit.

3o. Que ce qu'il y a d'illégal dans une pareille réponse, pourra être rejeté sur motion. —*Bourbonnais* v. *Dufresne*, Mathieu, J., 8 oct. 1889.

Constitutional Law—Executive power—Commission of Inquiry—R. S. Q. 596, 598.

Held:—1. An inquiry into an alleged attempt to influence and corrupt members of the Provincial Legislature is not a "matter connected with the good government of the province," within the meaning of R. S. Q. 596.

2. A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section is not a judicial tribunal, and does not possess any inherent power to commit for contempt.

3. The Provincial Legislature, for enforcing a law made by it, must enact a specific fine, penalty or imprisonment, and cannot confer the power upon any person or body of persons of determining what punishment shall be incurred by a violation of such law, and it has no power to confer the jurisdiction of a Superior Court, or the authority of a judge thereof, on any officer appointed by the Provincial Government; and therefore R. S. Q. 598 is unconstitutional.—*Tarte* v. *Beique*, & *Turcotte*, intervenant, Wurtele, J., July 25, 1890.

Insolvable—Commerçant—Hypothèque.

Jugé:—Qu'un commerçant insolvable ne peut valablement accorder d'hypothèque sur ses biens au détriment de ses créanciers en général, quand même celui en faveur de qui l'hypothèque est donnée ignorerait l'insolvabilité du débiteur. —*Stevenson* v. *Lallemand*, Jetté, J., 30 nov. 1889.

Traverses des rues—Cheval et voiture—Vitesse—Dommages—Responsabilité.

Jugé:—1o. Que la prudence la plus ordinaire, ainsi que les règlements municipaux, obligent tous ceux qui conduisent des voitures à modérer l'allure de leurs chevaux en traversant les rues.

2e. Qu'en vertu de ce devoir, une personne dont la voiture et le cheval sont conduits avec une assez grande vitesse, et qui frappe un enfant qui traverse la rue, assez gravement pour amener la mort de cet enfant, sera responsable au père de ce dernier du dommage qui lui en résultera.—*Kennedy* v. *Courville*, Mathieu, J., 28 mai 1890.

Femme commune en biens— Cautionnement du mari—Communauté.

Jugé:—1o. Qu'une femme commune en biens ne peut valablement s'obliger avec son mari qu'en qualité de commune; mais qu'une dette contractée par elle, du consentement de son mari, devient dette de la communauté et, par conséquent, une dette personnelle du mari, et peut être poursuivie tant sur les biens de la communauté que sur ceux du mari;

2o. Que la femme commune en biens ne peut pas être poursuivie pour une dette de la communauté pendant sa durée;

3o. Que l'obligation que contracte le mari en cautionnant la dette de sa femme com-

mune en biens, n'est pas un cautionnement, mais un véritable engagement personnel, la femme n'ayant pu s'engager que comme commune, et le consentement du mari en faisant une dette de la communauté et du mari.—*Perrault* v. *Charlebois*, en révision, Johnson, J. C., Davidson, DeLorimier, JJ., 28 juin 1889.

Cité de Montréal—Règles du Conseil—Reconsidération des questions.

Jugé:—Que pour appliquer la 26e Règle du Conseil-de-Ville de la cité de Montréal qui défend de reconsidérer à la même séance une question plus d'une fois, il faut que la question soit identiquement la même; qu'ainsi la Règle ne s'applique pas lorsque le Conseil a nommé un employé, puis a reconsidéré son vote pour en nommer un autre, et qu'elle reconsidère de nouveau son vote pour renommer le premier; dans ce cas, la première reconsidération s'appliquait au premier nommé, tandis que la seconde reconsidération s'applique au second nommé.—*Vannier* v. *Cité de Montréal*, Taschereau, J., 28 juin 1889.

Servitude—Vue—Tolérance—Dommages—Assaut.

Jugé:—Que bien qu'un voisin n'ait pas le droit de pratiquer des vues dans son mur, du côté de son voisin, en dedans de la distance voulue par la loi, néanmoins celui qui souffre et tolère cette servitude sans se plaindre, ni protester, durant plusieurs années, ne sera pas reçu ensuite à réclamer des dommages, si ce n'est une somme nominale pour violation du droit que, dans l'espèce, la Cour a fixé à $5.

2o. Qu'une personne assaillie qui a porté une plainte pour assaut devant le juge de paix, ne peut, lorsqu'il y a eu ainsi procès, poursuivre ensuite en dommage devant les cours civiles.—*Langevin dit Lacroix* v. *Bourbonnais*, Tellier, J., 12 nov. 1889.

DECISIONS AT QUEBEC.[1]

Action hypothécaire—Exception de subrogation—Art. 2071, *C. C.*

Jugé:—Que le cessionnaire du prix d'une première vente, qui a accordé à un subséquent acquéreur de la même propriété pour un prix moindre, un délai plus long que celui stipulé par la première vente, et s'est obligé envers ce second acquéreur de décharger l'hypothèque affectant sa propriété pour le paiement du prix de la première vente, n'a pas d'action contre son cédant, qui s'est obligé de fournir et faire valoir, ni contre le détenteur de la propriété affectée à cette garantie par son cédant, avant l'expiration du délai qu'il a ainsi accordé, ni pour l'excédant du prix de la première vente sur celui de la seconde.—*Gagnon* v. *Brochu*, en révision, Casault, Caron, Andrews, JJ., 31 janvier 1890.

Vente d'immeuble—Privilège du vendeur—Enregistrement—Arts. 2014, 2015, 2094, 2098 et 2168, *C. C.*

Jugé:—1o. L'enregistrement, près de cinq ans après la mise en force du cadastre officiel, d'un acte de vente immobilière passé avant cette mise en force et ne contenant la désignation de l'immeuble vendu que par tenants et aboutissants, conserve le privilège pour le prix de vente, lors même que cet enregistrement n'est pas accompagné d'un avis au régistrateur du numéro sous lequel l'immeuble en question est designé au plan et livre de renvoi du dit cadastre;

2o. Entre les créanciers les privilèges ne produisent d'effet à l'égard des immeubles qu'autant qu'ils sont enregistrés, mais le privilège du vendeur d'un immeuble est effectif à l'encontre des créanciers dont les titres de créance ne sont pas enregistrés;

3o. L'enregistrement d'un acte de vente, ou d'une obligation déguisée sous forme de vente, est sans effet, si le titre d'acquisition du vendeur, ou du débiteur, ne parait pas avoir été enregistré.—*Bernard* v. *Bernard*, en révision, Casault, Routhier, Caron, JJ., 31 mars 1890.

Injonction—Chemin de fer—Règlement d'une corporation de ville accordant un bonus—Pouvoirs en vertu de sa charte—Fausses représentations — Non-accomplissement des conditions—Illégalités et nullités.

Jugé:—Que, dans les circonstances de la cause, il n'y avait pas lieu au bref d'injonc-

[1] 16 Q. L. R.

tion pour empêcher la ville de Fraserville de remettre à la Compagnie du Chemin de Fer de Témiscouata, comme *bonus*, des débentures au montant de $25,000, accordées en vertu d'un règlement du conseil municipal de la dite ville, dûment passé, et approuvé par un vote des contribuables.—*Bélanger & Cie. du Chemin de Fer de Témiscouata*, en appel, Dorion, J. C., Cross, Church, Bossé, JJ., 5 oct. 1889.

Locateur et locataire—Réparations.

Jugé:—Que le locataire n'a pas le droit de poursuivre pour réparations faites à la maison, avant d'avoir mis le propriétaire en demeure de faire les dites réparations.—*Gincheareau* v. *Lachance*, C. C., Routhier, J., 17 fév. 1890.

Contrat de vente—Droits de l'acheteur—Paiement du prix différé—Péril d'éviction—Cautionnement—Intérêts—Prescription décennale—Bonne foi—Plaidoyer au fond—Déclarations à l'audition—Signification de transport à un absent—Arts. 1535, 1571, 2251, *C. C., et* 5814 *S. R. Q.*

Jugé:—1o. L'acheteur d'un immeuble qui a juste sujet de craindre d'être troublé au pétitoire, peut différer le paiement du prix jusqu'à ce que le vendeur lui fournisse caution de le rembourser, à moins d'une stipulation contraire;

2o. Il peut invoquer ce moyen par une défense au fond à une action intentée pour le prix, et, sur des conclusions simplement au renvoi de l'action, le tribunal peut permettre au demandeur de fournir le cautionnement.

3o. L'acheteur, quoiqu'il puisse différer le paiement du prix pour cause de péril d'éviction, est néanmoins tenu d'en servir les intérêts;

4o. L'acheteur d'un immeuble qui sait que son vendeur n'en est pas propriétaire avec titre valable au moment de la vente, n'est pas dans les conditions de bonne foi voulues pour acquérir par la prescription de dix ans.

5. Le défendeur qui invoque plusieurs moyens dans ses plaidoyers écrits, et qui déclare à l'audition de la cause n'insister que sur un d'eux, renonce, par là même, aux autres, et le tribunal ne peut en tenir compte en adjugeant sur le litige;

Semble:—La signification d'un transport à un absent en en laissant une copie à son procureur est insuffisante, la loi en prescrivant un autre mode à l'art. 5814 S. R. Q.—*Dessert* v. *Robidoux*, en révision, Casault, Routhier, Andrews, JJ., 5 avril 1890.

FIRE INSURANCE.

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

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 280.]

The clauses at the head of this section cannot be interpreted to prevent any person from having oil or liquor stored in his house for his own use.

Mere alterations in a building insured do not always increase the risk; immaterial alterations may be made; the insured may alter the fire places in his house, even make new ones; such alterations of themselves do not or may not increase the risk, but the *using* may. In such cases, it is not sufficient for the insurer to prove the alteration, he must also show that its use followed, and that the risk was thereby increased. Where after insurance of a building, the insured changed the position of two boilers from the outside to the inside of the building, and the judge directed the jury to consider whether the alteration increased the risk, it was held a misdirection, the question being whether the *use* of the boilers after the alteration increased the risk.[1]

Would mere using *once* avoid the policy? *Shaw* v. *Robberds*, and *Pim* v. *Reid* go to require the use to be of a permanent character. But the use *at all* may be prohibited; and, under certain condition, the mere using once will avoid the policy. If a policy prohibit the introduction of any description of fire heat into a building, and an engine be, afterwards, placed in it, and tried, with fire heat, and after some days

[1] *Barrett* v. *Jermy*, 3 Wels. Hurl. & Gordon, 535 (A.D. 1849.)

the building be burned down, the policy will be avoided. The length of time of user of fire heat is of no importance in such a case. Let the clause read, "so long as etc." and the policy may be saved, but policy words must always work. The mere introduction of the steam engine, of course, could not have been fatal.[1] The Chief Baron at the trial of this case charged that, if the use of fire was merely temporary and by way of experiment, the policy was not avoided. On motion of defendant, afterwards, this ruling was declared bad.

Using a steam engine for grinding, the jury finding no increase of risk (and in most cases there can be none) will not vitiate the policy—(a steam engine was mentioned in the policy). So gas burners may be multiplied, or candles.[2]

Alterations may suffice, in the absence of express condition, to avoid the insurance; *e. g.* where a description is given of premises, and such description is held a warranty; but if there be an express condition, say, if the risk be increased by any alterations or by the deposit of hazardous goods, then the policy to be vacated, it will not be vacated though these be introduced if the jury find "no increase of risk ever to have been." *Stokes* v. *Cox*[3] was a case of new erection of machinery, after an insurance. A boiler was in the building when insured. Afterwards an engine was added. There was a condition in the policy requiring notice "if the risk was increased." The jury found that there had been no increase of risk; and though no notice had been given, the policy was held not avoided, and the plaintiff finally recovered. Under the general law of insurance, the insured may be required to give notice of changes in buildings; under a policy with express condition on the subject he may be under obligation to do so only if the risk be increased. [Insurers sometimes fare worse by the extra precaution taken by them of making express condition, as in this case.]

[1] *Glen* v. *Lewis*, 17 Eng. Jurist; 8 W. H. & Gordon. A warranty, condition precedent, whether material or immaterial, must be observed. Flanders, p. 226.

[2] *Baxendale* v. *Harvey*, 4 Hurlst. & Norman.

[3] 1 Hurlstone & N., 3 Jur. A.D. 1856.

Under a plea of "alterations, and increased risk not notified to the insurer," the *onus probandi* is on the insurer,—*per* Parke, B., in *Barrett* v. *Jermy*. (The insurer affirms all that, so let him prove.) But if the insurer plead that material alterations were to avoid the policy unless notified, then, *semble*, he need only prove material alterations, and want of notice will be presumed; burden of proving notice is on the insured.[1]

Where a man builds on a lot of land adjoining my house insured, that does not avoid my insurance, unless a condition *casuelle* is in my policy for such a case. Duranton, Tom. xi., No. 17.

Is the insured bound to announce to the insurers the fact of another man's building alongside of him? Not, unless by a condition he has bound himself to do so.

A building insured under a policy avoiding the policy if the risk were rendered more hazardous by means within the control of the insured, described as contiguous, on one side only, to other buildings, may be made contiguous on both sides, and *non constat* that the risk is increased; it may be diminished.[2]

Angell, § 162, says that if there be no stipulation in respect of increase of risk by erecting adjacent buildings, a prohibition of so important a character is not to be implied, and the policy is not avoided by subsequent erection of buildings adjacent to the one insured. He cites *Stebbin's* case in 2 Hall.

In the absence of stipulation to that effect, the erection of a building adjacent to the one insured by the party holding the policy, though it might increase the risk, will not avoid the policy. But if such act of the assured was to cause loss to the company, the insurers would not be held liable, as he, the insured, caused the loss.[3]

Suppose a dwelling-house turned into a fireworks factory, and loss to happen after-

[1] See *Gardiner* v. *Piscataquis M. F. I. Co.* 38 Maine.

[2] *Stetson* v. *Massachusetts M. F. Ins. Co.*, 4 Mass. R. But one of the judges dissenting, said if such were caused by the insured's selling, it might vacate such a policy. Also that such contiguity of buildings extra necessarily increased the risk.

[3] *Howard* v. *Ky. & L. M. Ins. Co.*, 13 B. Monroe Ky. 282.

wards in a general conflagration? The insurer would be liable, *semble*.

Can a man insure, describing his house as bounded on one side by vacant land of his own, and afterwards build a cotton factory on that land, and say that he was not bound to say anything to insurance company unless bound to do so by express clause of his policy? Not *in foro conscientiæ*, and in France not, by law.

The use of a building, a shoe manufactory, for drawing a lottery does not vacate a policy insuring it; unless there be a connection between the fire and that use.[1]

Evidence as to an usage in New York that, upon risk increased, notice is to be given to the insurers; so that they may exercise the option of continuing, or annulling the policy, cannot be received to alter the legal effect of the policy.[2]

Under my system, usage would not be wanted to help the insurers, for where the risk is materially increased by the insured's acts, the insurers are discharged.

Increase, or not, of risk, or whether alterations increase the risk, is a question for the jury.[3]

§ 171. *Resemblances between Assurance and Suretyship.*

The surety runs risks and uncertain chances. The creditor wants to be assured against loss through the debtor's not paying or not being able to pay.

The difference is, insurance is a principal contract; suretyship an accessory.

The convention *del credere* makes a contract of insurance—Casaregis. Obligation of person assuming risk for *del credere* commission is a distinct separate obligation. (Contract of insurance.)

Gratuity is of the *nature* of suretyship, but not of its essence. No. 15, Troplong, *cautionnement*.

If the creditor pay the surety to guarantee him against insolvency of debtor, it is "véritable assurance," says Troplong, No. 16.

Scaccia says: "Contractus assecurationis in substantia est contractus fidejussionis." This is true where the surety is paid as by creditor above. But if it were the debtor who paid the surety to bind himself towards the creditor, this would not be a contract of insurance, says Troplong, (but *louage* probably.)

Ordinary *cautionnement* is a contract unilateral. The creditor binds himself to nothing, and so the contract is unilateral. But in insurance both contract expressly. *Semble, contrat synallagmatique.* Yes! says Troplong.

The insurer, a cautioner, must be freed often, where changes are made. *Cautionnement* cannot be extended from one thing or case to another. We are recommended "de ne pas étendre l'engagement de la caution au-delà des limites dans lesquelles il a éte contracté." No. 148, Troplong, Cautionnement.

An alteration in the obligation or contract in respect of which a person becomes surety, discharges him, unless he has consented to the contract so altered. Ch. viii., Suretyship.

Any subsequent addition to, or deviation or alteration from the contract, is such an alteration as discharges the surety—*Ib.*

The cautioner is freed by any essential change consented to by the creditor without the consent of the cautioner. (Bell's principles.)

If there be alteration in the constitution of an office it ceases to be that in respect of which the surety became bound for the principal, and the surety will be free, unless he authorize or consent to the change of constitution of the office.

If by act of the creditor or by Act of Parliament, the duties of an office are changed, so that the peril of the surety is increased, the surety is free.[1]

An insurance company insures A's dwelling house occupied by A, for £500, and outbuildings in rear, £250. A knocks down his dwelling to rebuild it. While it is down and the ground on which it stood is empty, A not using his outbuildings, these are burnt at night. The insurance company say they are free. Are they? If a condition ordered

[1] *Boardman* v. *Merrimack M. F. I. C.*, 8 Cushing. §154 *a*. Angell.

[2] 1 Hall R. 632.

[3] 10 Pick. 535.

[1] *Oswald* v. *Mayor of Berwick.*

vacancy of occupation to be announced to the insurance company it might be so; but in the absence of condition such as that, could it be said the risk was aggravated? Perhaps so, but this would be for the jury, I suppose.

§ 172. *Loss by fire happening by invasion, &c.*

"No loss or damage by fire happening by "any invasion, foreign enemy or *any military* "*or usurped* power whatsoever will be made "good by this company."

Such is a condition contained in many English policies; others add "civil commotion" to the excepted cases, and others "riot and tumult." The *historique* of these exceptions, and the meanings of these words can be gathered from the remarks of the judges in *Drinkwater* v. *Lond. Ass.*[1] and in *Langdale* v. *Mason*[2], to which so much space is given up in the early works on insurance.

The United States policies generally state this condition thus: "This company will not "be liable for any loss or damage by fire "happening by *means of any invasion*, insur- "rection, riot or civil commotion, or of *any* "*military or usurped* power." Are these words synonymous?

In 40 Connecticut Rep. is *Boon* v. *Ætna Ins. Co.*, where the U. S. Circuit Court held defendants liable though the fire was caused by the U. S. military orders.[3]

If, in an action on a policy which frees the insurer from loss arising from riot, civil commotion, etc.," the declaration sets forth the policy, and negatives that the loss arose from civil commotion, but be silent about *riot*, it is bad on general demurrer, for riot and civil commotion are not synonymous.[4]

In New York it has been held that the words "usurped power" mean an usurpation of the power of Government, and not a mere excess of jurisdiction by a lawful magistrate.[5]

Where the loss happens by war or invasion, the insurance company goes free, though the fire be caused by simple imprudence of the enemy established in a town or place. Clauses stipulating against losses by war or invasion are to read more largely than one that reads only of war. J. du Pal. of 1872, p. 198, C. de Cassn.

When there is a stipulation against war, *war* must be the cause direct and immediate of the loss. *Ib.*

§ 173. *Damage by Lightning.*

It is a condition in many American policies that "the company (insuring) will not be liable for damage to property by lightning aside from fire."

Of course, under such a condition the insurers could not be held liable for loss from the rending of the house without burning.[1]

Some companies say that they "will make good losses sustained by lightning." Some English policies read: "This company will make good losses on property burnt by lightning;" others read thus: "Losses by lightning will be made good."

Upon all these I would remark that under a policy against fire containing no exception of fire by lightning, loss from this last would have to be paid for. Under a fire policy not mentioning lightning, injuries caused by lightning without any combustion, I should say, would not be losses within the policy. Lightning may shiver masonry and scatter timbers without burning anything.

What of the clause, "losses by lightning will be made good?" Is this to be limited to losses from combustion, or would it cover loss from mere shivering of masonry, scattering of timbers and so forth? But for the body of some policies having that clause mentioning only losses by fire as to be made good by the insurers, the question would be easy to answer.

In France the clause is sometimes made very clear for the case of ruin or loss from lightning, though unaccompanied by combustion. 2 Alauzet, p. 354. Pardessus, vol. 2, p. 602, Dr. Comm., holds that, under ordinary policies, in the case of a thunderbolt injuring a house, the insurer is liable as if fire had done it. *Sed* query? At p. 51, Agnel says, lightning without combustion, yet insurance company to pay. Cour de Cassation.

[1] 2 Wils.

[2] 2 Park.

[3] See Albany Law Journal, Nov. 1875, p. 338.

[4] *Condlin* v. *Home D. M. F. I. Co.*, 2 U. C. Rep.

[5] 21 Wend. 367. Military power or usurped power in policy conditions means the same thing. Military and usurped power means rebellion conducted by authority. January, 1880, Virginia. *Portsmouth Ins. Co.* v. *Reynolds*, p. 499, Alb. L. J., of 1880, vol. 1.

[1] *Babcock* v. *Montgomery M. I. Co.*, 6 Barb. R.