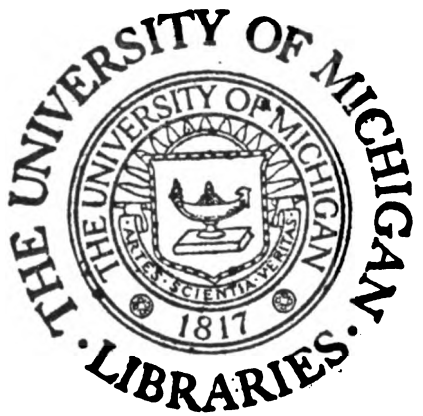

AN OUTLINE

OF THE

LAW OF INSURANCE

BY

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AN OUTLINE

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TITLE I.

DEFINITIONS.

§ 1. INSURANCE DEFINED.

Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against loss or damage on a certain subject-matter by certain contemplated perils.

Insurance is a contract whereby one, for a consideration, undertakes to compensate another, if he shall suffer loss. "This," says May (section 1), "is substantially the definition given by Roccus, and is recommended alike by its brevity and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve."

In Lucena v. Craufurd, 2 Bos. & P. N. R. 300, 6 Rev. Reports, 685, insurance is defined as "a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things, which may be exposed to them."

Cooke (section 1) defines insurance as "a contract to make compensation (or pay) on the happening of any injury to life or property."

In Com. v. Wetherbee, 105 Mass. 149, 160, the contract of life insurance is defined as "an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest."

Biddle (volume 1, § 1) says that the general term "insurance" "is applied to two species of contract,—insurance in respect of property, and insurance in respect of life,—which are not analogous in their elements, and which proceed upon different principles."

Insurance in respect of property he defines as "an agreement by the insurer, for a consideration, to indemnify the insured against loss, damage, or prejudice to certain property that may be during a certain period sustained, by reason of specified perils to which the property may be exposed."

Insurance in respect of life, "which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer to pay to the insured or his nominee a specified sum of money, either at the death of the designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended."

Bunyon (page 1) defines life insurance as "a contract in which one party agrees to pay a given sum upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain periodical payments by another."

Insurance other than life includes the common forms of fire and marine insurance.

Fire insurance is a contract to indemnify the insured for loss or damage occasioned by fire during the specified period.

Wood's Flanders, §§ 1, 2, 5.

"Marine insurance," says Phillips (volume 1, § 1), "is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all of these risks, during a certain period or voyage."

Duer (volume 1, p. 1) says simply that it is "a contract of indemnity against the perils of the sea."

Arnould (volume 1, p. 16) says: "Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks, to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time."

For other definitions, see:
Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765.
Supreme Commandery v. Ainsworth, 71 Ala. 436.
State v. Farmers' Ben. Ass'n, 18 Neb. 276, 25 N. W. 81.
Bolton v. Bolton, 73 Me. 299.
Paterson v. Powell, 9 Bing. 320.
Wilson v. Jones, L. R. 2 Exch. 150.
Dalby v. India & L. L. Assur. Co., 15 C. B. 365.
Elliott's Appeal, 50 Pa. St. 75.
Park, c. 22.
1 Couteau, Traite des Assurance sur la Vie, § 31, p. 28.
1 Cauvet, Assurances Maritime, p. 1.

§ 2. TERMS IN COMMON USE.

The party undertaking to indemnify the assured is called the "insurer" or "underwriter."

The party to be indemnified is called the "insured" or "assured." There is no difference between the words.

Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949.

The agreed consideration is called the "premium." The written instrument evidencing the contract is called the "policy."

The events and causes insured against are known as "risks" or "perils."

The interest of the insured in the life or property is the subject-matter of the contract of insurance.

§ 3. REINSURANCE.

A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of the original insurance. The original insurer has no interest in the contract of reinsurance. "The original contract," says Emerigon, "subsists precisely as it was made, without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the insurer has assumed constitute between him and the reinsurer the subject-matter of the contract of reinsurance, which is a new contract totally distinct from the first."

Emerigon, Traite des Assurance, c. 8, § 14:

"A contract of reinsurance is where the insurer, in order to lessen his own liability on the contract of insurance, reinsures or transfers the insurance he has agreed to carry, in whole or in part, to a new insurer, who thereupon occupies the same position as the original insurer does to the original insured, which latter is not a privy, however, to the new contract."

1 Biddle, §§ 7, 378.

New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359.

Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 573, 11 Sup. Ct. 909.

Travelers' Ins. Co. v. California Ins. Co., 1 N. D. 151, 45 N. W. 703.

Strong v. Phoenix Ins. Co., 62 Mo. 289.

See "Statute of Frauds," infra, § 12.

As to the extent of reinsurer's liability, see:

Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant's Cas. (Pa.) 71.

Strong v. American Cent. Ins. Co., 4 Mo. App. 7.

Hovey v. Home Ins. Co., 3 Ins. Law J. 815, Fed. Cas. No. 6,743.

Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364.

In re Athenaeum Life Assur. Co., 1 Johns. Eng. Ch. 633.

TITLE II.

THE CONTRACT OF INSURANCE.

A.

The Nature of the Contract.

§ 4. IN GENERAL.

The contract of insurance had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its wants, and to cover its ever-widening fields; and under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage."

1 May, § 2.

§ 5. THE PRINCIPLE OF INDEMNITY.

Indemnity is the fundamental principle which lies at the basis of every contract of insurance with respect to property.

The general principle stated above excludes insurance on lives, which, in this respect, is governed by other principles. The contract of insurance protects the interest of the insured, and is hence one of indemnity. But "it is not, strictly speaking, intended necessarily to be an absolute indemnification of the insured, nor to place him in precisely the same position he occupied before the loss. But the indemnity intended is simply the repayment to the insured of so much of the insured subject-matter as is lost at an estimated value, or at its then market value."

1 Biddle, § 2.
1 Phillips, § 3.
Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 208.
Wilson v. Hill, 3 Metc. (Mass.) 66.

The principle is, in practice, subject to certain other limitations. Thus the parties may agree in advance upon the value of the interest, and, in the absence of fraud, this will be the measure of the recovery, although in fact the stipulated value is erroneous.

Irving v. Manning, 6 C. B. 391.
Richards, § 20.

So insurance does not always grant full indemnity, as only such damages as are caused proximately by the specified perils may be recovered.

(a) INDEMNITY AGAINST NEGLIGENCE.

A contract of insurance covers a loss occasioned by the negligence of the insured. If the loss is caused proximately by the peril insured against, "the insured has the right to look to the company for indemnity, nothwithstanding any amount of carelessness in occasioning the loss, provided it does not involve an element of evil design, or illegality, or a violation of some contract obligation on his part."

Richards, § 22.
Matthews v. Howard Ins. Co., 11 N. Y. 21.

Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534.
Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934.

(b) THE DOCTRINE OF SUBROGATION.

"In fire insurance as in marine insurance, the insurer, upon paying to the insured the amount of a loss of the property insured, is doubtless subrogated in corresponding amount to the insured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the insured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the insured. In a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the insured, and, if the insured has no rights of action, none passes to the insurer."

St. Louis, etc., Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 235, 11 Sup. Ct. 554.
Castellain v. Preston, 11 Q. B. Div. 380, Richards, p. 282.
Sheld. Subr. c. 7.

When the loss is occasioned by the negligence of one other than the insured, the wrongdoer must not be released without the consent of the insurer.

Newcomb v. Insurance Co., 22 Ohio St. 382.

A release without the consent of the insurer will bar the right of action upon the policy.

Dilling v. Draemel, 9 N. Y. Supp. 497.
Hall v. Railroad Co., 13 Wall. 367.

So, if the wrongdoer pays the insured with the knowledge of the fact that the insurer has made a payment under the policy, it is a fraud upon the insurer, and will not protect the wrongdoer.

Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399.

(c) LIFE INSURANCE NOT A CONTRACT OF INDEMNITY.

The contract of life insurance is a mere contract to pay a certain sum of money on the death of a certain person. It is not a contract of indemnity.

It may now be considered as settled that the contract of life insurance is not one of indemnity. In the early case of Godsall v. Boldero, 9 East, 72, Lord Ellenborough held to the contrary, but, after being generally condemned, that case was overruled by Dalby v. India & L. Life Assur. Co. (1854) 15 C. B. 365. Baron Parke said, with reference to Godsall v. Boldero, that: "It is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was in point of law founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought; and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burrows, 1198. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an 'assurance for life.' It really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the statute 14 Geo. III. c. 48."

Cousins v. Nantes, 3 Taunt. 513.

Craufurd v. Hunter, 8 Term R. 13, 4 Rev. Reports, 576.

Lucena v. Craufurd, 3 Bos. & P. 75, 2 Bos. & P. N. R. 269, 6 Rev. Reports, 623.

Law v. London, etc., Co., 1 Kay & J. 223.

Warnock v. Davis, 104 U. S. 775.

Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.

1 Biddle, § 185.

1 May, § 8.

See "Insurable Interest," infra.

May (volume 1, §§ 116, 117) contends that the contract of life insurance is one of indemnity, and, after reviewing the English and American cases, says that: "The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is a contract of indemnity; but that that form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that with the possibility of something more. It can never, therefore, properly be entered into except for the purpose of security or indemnity, though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it if entered into in conformity with the principles which underlie it; but, so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance, and ingrafts upon that contract a purpose foreign to its nature."

§ 6. A CONDITIONAL CONTRACT.

The contract is also conditional upon the risk attaching. "Where the risk has not been run," said Lord Mansfield, "whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." Thus, in marine insurance, the premium must be refunded if the ship is never dispatched

on the voyage. The risks "are the occasion of the contract being made, and, without exposure to them, it never applies."

1 Arnould, p. 10.
Tyrie v. Fletcher, Cowp. 666.
Richards, 265.

§ 7. A PERSONAL CONTRACT.

The contract of insurance protects the person, and not the thing in which he is interested. It is strictly a contract with a person to indemnify him against loss if his interest suffers a diminution in value from certain specified causes.

1 May, § 6.
Rayner v. Preston, 18 Ch. Div. 1.
In Sadlers Co. v. Badcock, 2 Atk. 554, Lord Hardwicke said: "To whom, or for what loss, are the insurers to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called 'insuring the thing,' for there is no possibility of doing it. It therefore must mean insuring the person from damage."

Being a personal contract, it does not run with the land.
Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505.

§ 8. AN ALEATORY CONTRACT.

The French writers use the word "aleatory" (from alea, a die) to describe one of the characteristics of the contract of insurance. In an ordinary contract, the thing given or done by one party is considered the equivalent of the thing given or act done by the other. But in the contract of insurance each party assumes a certain risk. If no loss happens, the insurer gains the amount of the premium. If a loss occurs, the insured receives a sum much larger than the premium.

Defrénois, Assurance sur. la Vie, c. 3, § 79.

B.

Of the Parties to the Contract.

§ 9. WHO MAY BE PARTIES.

Any one sui juris, and under no legal disability to contract generally, may be insured or may insure another against a specified peril, unless prevented by statute.

(a) THE INSURED.

An infant cannot make a valid contract of insurance upon a stock of goods owned by him. Whatever relates to his property is the business of his guardian, and, if transacted by the infant, may be avoided at his option.

New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345.

2 Biddle, §§ 15, 60.

With reference to a contract of life insurance, the supreme court of Minnesota said: "Life insurance in a solvent company at the ordinary and usual rates for an amount reasonably commensurate with the infant's estate or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and, if such should appear to be the character of this contract, the plaintiff could not recover the premiums which he has

paid in, so far as they were intended to cover the current annual risk assumed by the company under the policy."

Johnson v. Northwestern Mut. Life Ins. Co. (1894, Minn.) 59 N. W. 992; Id., 57 N. W. 934.

As to the right of married women to make contracts of insurance, see 2 Biddle, § 16.

Mutual Ben. Life Ins. Co. v. Wayne Co. Sav. Bank, 68 Mich. 116, 35 N. W. 853.

McQuitty v. Continental Life Ins. Co., 15 R. I. 573, 10 Atl. 635.

(b) THE INSURER.

The business of insurance is principally carried on by corporations organized for that purpose, but when there is no prohibitory statute, it may be done by individuals or partnerships.

Porter, 361.

1 Biddle, §§ 9, 29, 34.

(c) TEMPORARY DISABILITY.

Parties having general power to contract may be disqualified for a time by reason of the existence of some special condition. Thus the subjects of two hostile nations cannot make a valid contract of insurance.

The Hoop, 1 C. Rob. Adm. 196.

Griswold v. Waddington, 16 Johns. 438.

New York Life Ins. Co. v. Stathan, 93 U. S. 24.

1 Biddle, § 487.

The occurrence of hostility has the effect of suspending existing valid contracts between the citizens of the hostile states.

Brandon v. Curling, 4 East, 410.

Ex parte Boussmaker, 13 Ves. 71.

For the effect of Civil War, see Kershaw v. Kelsey, 100 Mass. 561.

New York Life Ins. Co. v. Clayton, 7 Bush (Ky.) 179.

Hamilton v. Mutual Life Ins. Co., 9 Blatchf. 234, Fed. Cas. No. 5,986.

Effect of existence of war as an excuse for nonpayment of premiums, see Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543.

Hillyard v. Mutual Ben. Life Ins. Co., 35 N. J. Law, 415.

New York Life Ins. Co. v. Stathan, 93 U. S. 24.

Dillard v. Manhattan Life Ins. Co., 44 Ga. 119.

(14)

C.

The Form of the Contract.

§ 10. STATUTORY REQUIREMENTS.

No particular form is necessary to a valid contract of insurance unless one is prescribed by statute. "Policies of insurance," said Chief Justice Marshall, "are generally the most informal instruments which are brought into courts of justice." It is sufficient if the scope and meaning of the language used import a contract of insurance.

The contract which finally came into use was described by Mr. Justice Buller as an "absurd and incoherent instrument." The "absurdity" from the standpoint of the insured was increased by the manifold conditions, exceptions, and limitations which were gradually added to the written contract by the insurance companies, and which rendered recovery practically impossible in the face of a contest. This practice has induced many states to prescribe a form of contract which shall be used, and the conditions which it shall contain.

Gen. Laws Minn. 1889, c. 217 (Rev. St. 1894, § 3200).
Gen. Laws Minn. 1891, c. 94 (Rev. St. 1894, § 3157).

In Anderson v. Manchester Fire Ins. Co. (Minn.; May 15, 1895) 63 N. W. 241, Gen. Laws 1889, c. 217 (Rev. St. 1894, § 3200) which provides for the preparation and adoption by the insurance commissioner of the "Minnesota Standard

Policy," was held unconstitutional as an attempted delegation of legislative powers to the insurance commissioner.

A new form is provided for by
Gen. Laws Minn. 1895, c. 2.
Richards, Append.
1 Duer, p. 61.

Such statutes have been in force in European countries for many years. Thus, it was provided by 35 Geo. III. c. 63, that every contract or agreement for any insurance liable to a duty by the terms of the act should be engrossed, printed, and written, and that the writing should be called a "policy of insurance." In France the Code requires that the contract shall be written, and specifies with minute particularity the facts and conditions which it must contain. It is said by Boulay du Patty (volume 3, c. 246) that, notwithstanding these provisions of the Code, an unwritten agreement will be executed by the courts; and, according to Valin (volume 2, c. 20) and Pothier (Traite du Contrait d'Assurance, note 96), the same construction was formerly given to similar provisions under the Ordinance of the Marine. Most of the foreign ordinances are imperative in requiring that the contract shall be in writing, and shall specify certain enumerated facts; and some of them prescribe the form of the policy or policies that can alone be used. 1 Duer, p. 62.

§ 11. ORAL CONTRACTS.

In the absence of any such provisions, a parol contract of insurance, as well as a parol contract to insure, is valid and binding when all the elements of a contract are present.

Thompson v. Adams, 23 Q. B. Div. 361, Richards, 295.
Relief Fire Ins. Co. v. Shaw, 94 U. S. 574.
Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318.

Ide v. Phoenix Ins. Co., 2 Biss. 333, Fed. Cas. No. 7,001.

Fish v. Cottenet, 44 N. Y. 538.

Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402.

Angell v. Hartford Fire Ins. Co., 59 N. Y. 171.

Heiman v. Phoenix Mut. Ins. Co., 17 Minn. 153 (Gil. 127).

Wiebeler v. Milwaukee M. Mut. Ins. Co., 30 Minn. 462, 16 N. W. 363.

Salisbury v. Hekla Fire Ins. Co., 32 Minn. 458, 21 N. W. 552.

Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Id., 38 Minn. 74, 35 N. W. 584.

1 Wood, § 4.

1 Phillips, c. 9.

1 Biddle, § 138.

The following requisites must concur before there can be a valid parol contract of insurance:

1. The subject-matter to which the policy is to attach must exist.

2. The risk insured against.

3. The amount of indemnity must be definitely fixed.

4. The duration of the risk.

5. The premium or consideration to be paid must be agreed upon or paid, or exist as a valid and legal charge against the party insured where payment in advance is not a part of the conditions upon which the policy shall attach.

1 Wood, § 5.

First Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153.

When a contract is closed by parol or binding slip, and the issuance of a policy is contemplated, the contract is subject to the terms of the usual policy.

Lipman v. Niagara Fire Ins. Co., 121 N. Y. 456, 24 N. E. 699.

Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373.

Green v. Liverpool & London & Globe Ins. Co. (Iowa) 60 N. W. 189.

§ 12. THE STATUTE OF FRAUDS.

The contract of insurance is not within that provision of the statute of frauds which requires "every agreement that by its terms is not to be performed within one year from the making thereof" to be in writing. In a contract of insurance the thing to be done depends on a contingency that may happen within a year.

Wiebeler v. Milwaukee M. Mut. Ins. Co., 30 Minn. 464, 16 N. W. 363.

Fish v. Cottenet, 44 N. Y. 538.

Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601.

Walker v. Metropolitan Ins. Co., 56 Me. 371.

Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448.

Phoenix Ins. Co. v. Spiers, 87 Ky. 286, 8 S. W. 453.

Alabama G. L. Ins. Co. v. Mayes, 61 Ala. 163.

Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318.

1 Biddle, § 138.

1 May, § 12A.

A contract of reinsurance is not within the statute.

Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601.

Contra:

Egan v. Fireman's Ins. Co., 27 La. Ann. 368.

An agreement to renew a policy from year to year is not within the statute of frauds.

Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305.

§ 13. VARIOUS KINDS OF POLICIES.

(a) VALUED AND OPEN.

A valued policy is one in which the amount of indemnity to be paid in the event of loss is fixed by the terms of the contract. An open policy is one in which the sum to be paid is not fixed, but is left to be determined by the parties in the event of loss. This determination is called the adjustment of the loss.

Under a valued policy, the actual value of the subject-matter need not be proved, as the sum agreed upon is taken as conclusive except in case of fraud or such excessive valuation as raises a presumption of fraud.

Alsop v. Commercial Ins. Co., 1 Sumn. 451, Fed. Cas. No. 262.

Cushman v. Northwestern Ins. Co., 34 Me. 487.

Borden v. Hingham Ins. Co., 18 Pick. (Mass.) 523.

Overvaluation must be "grossly enormous," to admit of dispute.

Miner v. Taggert, 3 Bin. (Pa.) 205.

It is sometimes difficult to determine whether a policy is valued or open.

Harris v. Eagle Fire Ins. Co., 5 Johns. (N. Y.) 368.

Phoenix Ins. Co. v. McLoon, 100 Mass. 475.

Some policies may be open as to one article, and valued as to another.

Post v. Hampshire Ins. Co., 12 Metc. (Mass.) 555.

(b) WAGER AND INTEREST.

A wager policy is one in which it appears by its terms that the insured has no interest in the subject-matter of the insurance. It is a mere bet. Such policies are now generally prohibited, and it is a disputed question whether or not a wager policy was valid at common law.

Alsop v. Commercial Ins. Co., 1 Sumn. 467, Fed. Cas. No. 262.

An interest policy is one in which it appears by its terms that the insured has an interest in the thing insured. He has something at stake, and, in the event of loss, something for which to be indemnified.

Williams v. Smith, 2 Caines (N. Y.) 13.
1 May, § 33.

(c) TIME AND VOYAGE.

A time policy is one in which the duration of the risk is fixed for a definite period of time. A voyage policy is one in which the duration of the risk is fixed by geographical limits. It is applicable to transportation by land or water.

Boehm v. Combe, 2 Maule & S. 172.

D.

Consummation of the Contract.

§ 14. WHEN CONTRACT CONSUMMATED.

A contract of insurance is completed when the terms thereof have been agreed upon between the parties. The reciprocal rights and obligations of the parties date from that time, without reference to the execution and delivery of the policy, unless these elements are embraced within the terms agreed upon, or the statute makes such delivery a condition precedent to its validity.

(a) IN GENERAL.

There is a contract of insurance and an agreement to insure. The latter may exist prior to the drawing of and delivery of the policy, and contemplate the delivery of the policy, as the consummation of the contract. It is sometimes difficult to determine at what point in the negotiations for insurance the insurer becomes liable for the loss where no policy has in fact been issued. The courts will usually compel the issue of a policy and the indemnification of the insured when the negotiation had reached a point where nothing remained for either party but to execute what had been agreed upon.

If there has been no payment of the premium and no delivery of the policy, the contract is prima facie incomplete,

and he who claims under such a policy must show that it was the intention of the parties that it should be operative, notwithstanding these facts.

Faunce v. State Mut. Life Assur. Co., 101 Mass. 279.
Heiman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127).
Lightbody v. Insurance Co., 23 Wend. (N. Y.) 18.

(b) NEGOTIATIONS BY CORRESPONDENCE.

Contracts of insurance are very commonly made by correspondence. The making of contracts in this manner is governed by the following rules:

1. When an offer has been made, and a letter of acceptance mailed within a reasonable time, the contract is complete.

2. The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before the acceptance is mailed.

3. The acceptance, in order to complete the contract, must be unconditional, and in accordance with the terms of the offer.

Adams v. Lindsell, 1 Barn. & Ald. 681.
Mactier v. Frith, 6 Wend. (N. Y.) 103.
Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390.
McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278.
Thayer v. Middlesex Ins. Co., 10 Pick. (Mass.) 326.
West. Jur. May, 1882, p. 339.
Bish. Cont. § 328.

The acceptance need not be by letter, but may be by any other method which amounts to a manifestation of a formal determination to accept, communicated or put in a way to be communicated to the party making the offer. A mere mental assent not communicated is not sufficient, nor is mere silence or neglect to respond, although the applicant

has done all that is required of him. Changes or modifications made by either party after the terms of the contract are agreed upon must be accepted by the other party. Thus, if an agent agrees with the applicant upon terms of insurance, subject to the approval of the principal, and the principal returns the policy with certain modifications, the contract is not consummated till the new terms are accepted by the applicant.

Myers v. Keystone Ins. Co., 27 Pa. St. 268.
Sandford v. Trust Fire Ins. Co., 11 Paige (N. Y.) 547.
Wallingford v. Home Mut. Fire Ins. Co., 30 Mo. 46.

(c) DELIVERY OF THE POLICY.

It is ordinarily necessary that the policy should be delivered before the contract is binding upon the insurance company, but this does not require an actual manual delivery. Thus, an agreement upon all the terms, and the issue and transmission to the agent of the insurer for delivery without conditions, are equivalent to a delivery to the insured.

New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536.
Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312.
Insurance Co. v. Colt, 20 Wall. (U. S.) 560.
1 May, § 55.

Delivery may be by any act intended to signify that the instrument shall have present validity.

Commercial Ins. Co. v. Hallock, 27 N. J. Law, 645.
Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.
Lightbody v. Insurance Co., 23 Wend. (N. Y.) 18.
Heiman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127).

Delivery obtained by misrepresentation will not give effect to the contract. The possession of the policy by the insured makes a prima facie case, which may be overturned

by evidence that it was never actually delivered, or that it was obtained by fraud.

McKay v. Mutual Ins. Co., 103 Mass. 78.
Collins v. Insurance Co. of Philadelphia, 7 Phila. (Pa.) 201.
Faunce v. State Mut. Life Assur. Co., 101 Mass. 279.

(d) COUNTERSIGNING THE POLICY.

When a policy provides that it shall not be binding until countersigned by a certain agent, the policy is invalid without such signature.

Badger v. American Popular Ins. Co., 103 Mass. 244.
Peoria Ins. Co. v. Walser, 22 Ind. 73.
Hardie v. St. Louis Mut. Life Ins. Co., 26 La. Ann. 242.
Noyes v. Phoenix Life Ins. Co., 1 Mo. App. 584.
Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400.
Contra:
Norton v. Phoenix Mut. Life Ins. Co., 36 Conn. 503.
In Myers v. Keystone Mut. Life Ins. Co., 27 Pa. St. 268, it was said that such a provision in the policy could be waived by the agent.
1 May, § 65.
1 Biddle, § 134.

TITLE III.

THE SUBJECT-MATTER OF INSURANCE.

§ 15. GENERAL RULE.

Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against.

Whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or that he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance, subject to the limitation that—

(a) LIMITATIONS.

Whatever the law discourages and disapproves of, whether by special statute or on general principles enforced by the common law, in the interest of good morals, good order, and general public policy, will not be encouraged by insurance.

1 May, § 71.
1 Duer, § 3 et seq.
Barber, art. 2, p. 27.
1 Pardessus, Cours de Droit Com. § 589.

Properly, the subject-matter of the insurance is the interest of the insured, and not the life or property out of which

the interest arises. The contract attaches to the interest, and not the property. The interest must be in a species of property which the law permits one to own, or in a business or enterprise which is lawful and consistent with the policy of the law. Thus, a valid contract cannot be made for the protection of an interest in a lottery or other gambling enterprise.

(b) ON AN ILLEGAL BUSINESS.

Policies insuring an illegal traffic are void. Thus, a contract insuring a person engaged in selling liquor against fine or forfeiture would be invalid. But a contract of insurance upon a stock of intoxicating liquors illegally kept for sale against loss by fire has been held valid. "By insuring his property, the insurance company has no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters are not affected by an illegal transaction with which they may be remotely connected."

Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.
People's Ins. Co. v. Spencer, 53 Pa. St. 353.
Black, Intox. Liq. § 247.
1 Biddle, § 483.
1 May, § 246.

This rule was applied where the liquor was kept by a druggist as a part of his stock, and it was left for the jury to say whether the insurance was collateral to or in aid of the violation of law.

Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418.

In Massachusetts an insurance upon liquors illegally kept for sale is void.

Kelly v. Worcester Ins. Co., 97 Mass. 284.
Johnson v. Union Ins. Co., 127 Mass. 557, note.

Lawrence v. National Ins. Co., 127 Mass. 557.

Sales during brief expiration of license will not invalidate a policy. Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. 737.

The risks which may be insured against are innumerable, and include such as arise from fire, perils of the sea, accident to persons, death of persons or animals, fidelity of servants and employés, the solvency of a debtor, nonpayment of a note at maturity, loss of expected profits, injury to growing crops, the nonpayment of rents, the invalidity of titles, etc.

TITLE IV.

INSURABLE INTEREST.

§ 16. DEFINITION OF INSURABLE INTEREST.

Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

Every person has an insurable interest in the life and health of himself, of any person on whom he depends wholly or in part for education or support, of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance, and of any person upon whose life any estate or interest vested in him depends.

§ 17. INSURABLE INTEREST IN PROPERTY.

(a) GENERAL STATEMENT.

In Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 12, 25 N. E. 1058, Mr. Justice Andrews said: "It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation which may be frustrated by the happening of some event is not an insurable interest."

Williams v. Roger Williams Ins. Co., 107 Mass. 377.
Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 12, 25 N. E. 1058.
Warnock v. Davis, 104 U. S. 775.
Lucena v. Craufurd, 3 Bos. & P. 75.
Loomis v. Eagle Ins. Co., 6 Gray (Mass.) 396.
1 Biddle, § 156.
Cooke, § 59.

An insurable interest may be:

1. An existing interest.
2. An inchoate interest founded on an existing interest.
3. An expectancy coupled with an existing interest in that out of which the expectancy arises.

Different parties may have an insurable interest in the same subject-matter.

Strong v. Manufacturers' Ins. Co., 10 Pick. 40.
Columbian Ins. Co. v. Lawrence, 2 Pet. (U .S.) 25.
Sadlers Co. v. Badcock, 2 Atk. 554.

Harris v. York Mut. Ins. Co., 50 Pa. St. 341.
Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176.
New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.
Mitchell v. Home Ins. Co., 32 Iowa, 421.
Mayor, etc., of New York v. Brooklyn Fire Ins. Co., 41 Barb. (N. Y.) 231.
Warren v. Davenport Fire Ins. Co., 31 Iowa, 464.
Herkimer v. Rice, 27 N. Y. 163.
Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151.
Lazarus v. Commonwealth Ins. Co., 19 Pick. 81, 2 Am. Lead. Cas. (5th Ed.) 806.
Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229.
1 May, §§ 76–117.
1 Wood, c. 8.
1 Duer, p. 313.
1 Arnould, p. 229.
3 Kent, Comm. 262–278.

(b) ILLUSTRATIONS OF INSURABLE INTEREST IN PROPERTY.

A mortgagee in the property covered by his mortgage, Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495.
The holder of a mortgage as collateral security, Sussex Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541.
Successive mortgagees holding claims on the same property, Fox v. Phoenix Fire Ins. Co., 52 Me. 333.
Executors or administrators in the property of the testator, Phelps v. Gebhard Fire Ins. Co., 9 Bosw. (N. Y.) 404; Herkimer v. Rice, 27 N. Y. 163.
Sheriffs in property attached, White v. Madison, 26 N. Y. 117.
Landlord in goods of tenant, Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

A stockholder in the property of a corporation, see Warren v. Davenport Fire Ins. Co., 31 Iowa, 464; Seaman v. Enterprise Ins. Co., 18 Fed. 250; Riggs v. Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 466.

The holder of an equitable title, Coursin v. Pennsylvania Ins. Co., 46 Pa. St. 323; Fenn v. New Orleans Mut. Ins. Co., 53 Ga. 578; Cross v. National Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390.

A trustee, Dick v. Franklin Ins. Co., 81 Mo. 103.

A cestui que trust, Gordon v. Massachusetts Ins. Co., 2 Pick. 249.

A husband in his wife's property, Cohn v. Virginia Ins. Co., 3 Hughes, 272, Fed. Cas. No. 2,970.

A partner in the partnership property, Manhattan Ins. Co. v. Webster, 59 Pa. St. 227.

Common carrier, The Sidney, 23 Fed. 88; Savage v. Corn Exch. Ins. Co., 36 N. Y. 655.

Creditor in property of debtor, Foster v. Van Reed, 5 Hun (N. Y.) 321; Spare v. Home Mut. Ins. Co., 15 Fed. 707; Grevemeyer v. Southern Mut. Fire Ins. Co., 62 Pa. St. 340.

The owner of an interest in the profits of a voyage or enterprise, Sawyer v. Dodge Co. Mut. Ins. Co., 37 Wis. 503.

An interest in the freight of a vessel, McGaw v. Ocean Ins. Co., 23 Pick. 405.

The holder of a mechanic's lien, Longhurst v. Star Ins. Co., 19 Iowa, 364.

Railway companies in property along their line for the loss of which by fire communicated from engines they are made responsible, Eastern Ry. Co. v. Relief Ins. Co., 98 Mass. 425.

A party in possession under a defective title, Travis v. Continental Ins. Co., 32 Mo. App. 198.

(c) TIME OF INTEREST.

It was formerly held that the interest must exist at the time the contract is made, and at the time of the loss.

Lynch v. Dalzell, 4 Brown, Parl. Cas. 431.
Sadlers Co. v. Badcock, 2 Atk. 554.
Fowler v. New York Indemnity Ins. Co., 26 N. Y. 422.
Folsom v. Merchants' Marine Ins. Co., 38 Me. 414.
"An interest must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime." Civ. Code Cal. § 2552.

But this rule no longer prevails unless invoked by the conditions of the policy. "The interest that shall entitle the insured to recover," says Arnould (volume 1, p. 59), "must be a subsisting interest during some period of the pendency of the risk, and at the time of the loss. Formerly the rule was so laid down as to extend also to the time of effecting the policy (Lucena v. Craufurd, 2 Bos. & P. (N. R.) 295, 6 Rev. Rep. 623; but it is now established that an insurable interest while the risk is still pending, and at the time of loss, is sufficient."

This statement is quoted with approval in Hooper v. Robinson (Md.) 8 Ins. Law J. 497, and by 1 Biddle, § 157.

In Omaha Fire Ins. Co. v. Dierks (Neb.; 1895) 61 N. W. 740, it was held that, where the insured incumbered his personal property contrary to the provisions of the policy, he was, nevertheless, entitled to recover if the lien had been removed at the time of the loss.

But see Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379.

(d) CONTINUITY OF INTEREST.

It has been held that the interest must be uninterrupted and continuous from the date of the contract to the time of the loss, and that if the insured at any time parts with his interest, although afterwards and before the loss he regains it, the policy will not attach.

Cockerill v. Cincinnati Ins. Co., 16 Ohio, 148.

But the rule is that, in the absence of a condition against alienation, the contract is merely suspended during the time the interest is gone, and revives to secure the new interest acquired before the loss.

Worthington v. Bearse, 12 Allen (Mass.) 382.
Power v. Ocean Ins. Co., 19 La. 21.
Civ. Code Cal. § 2553; Civ. Code N. Y. § 1373.
See Phoenix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616.
Valton v. National Loan Fund Assur. Co., 22 Barb. 9.
St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.
Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.
Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576.

If the policy contains a provision that any alienation of the property or change of title shall work a forfeiture, a violation of the condition will terminate the policy.

Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.

The condition against alienation is generally held to refer only to an entire and absolute divestiture of interest, and must be strictly construed.

Jackson v. Massachusetts Ins. Co., 23 Pick. 418.
Cowan v. Iowa State Ins. Co., 40 Iowa, 551.
Kitts v. Massasoit Ins. Co., 56 Barb. 177.
Dolliver v. St. Joseph F. & M. Ins. Co., 9 Ins. Law J. 293, and note on "alienation."

§ 18. INSURABLE INTEREST IN LIVES.

(a) AT COMMON LAW.

At common law, a contract of life insurance was a wager, and hence required no interest. Such contracts were sustained by the courts before the enactment of Stat. 14 Geo. III. c. 48, which made an interest in the life essential. The common-law rule was declared in Dalby v. India & L. Life Assur. Co. (1854) 15 C. B. 365, and in Trenton Mutual L. & F. Ins. Co. v. Johnson, 24 N. J. Law, 576. By some writers and courts it was held that, while the contract is not one of indemnity, an interest was always required, and that the statute of 14 Geo. III. was simply declaratory of the common law.

Bunyon, p. 6.
Cooke, § 58.
1 Biddle, § 184.
Emerigon (Meredith) p. 157.
Roebuck v. Hammerton, Cowp. 737.
Mowry v. Home Life Ins. Co., 9 R. I. 354.
Arnould (page 123) says: "Whether such policies were legal at common-law is now a question of no moment. It will be sufficient to say that long prior to the 19 Geo. II. c. 37, and contrary to the older determinations, they had been held by our courts to be valid contracts of insurance."
Assevedo v. Cambridge (1710) 10 Mod. 77.
De Paba v. Ludlow (1721) 1 Comyn, 361.
Dean v. Dicker (1746) 2 Strange, 1250.

(b) MODERN RULE.

The rule is now settled that an interest is necessary to support a life policy.

Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 12 Sup. Ct. 745.

Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862.

United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439.

Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S. W. 495.

Amick v. Butler, 111 Ind. 578, 12 N. E. 518.

Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35.

1 Biddle, § 185.

1 May, § 75B.

Cooke, § 8.

(c) INTEREST OF BENEFICIARY DESIGNATED BY INSURED.

The reason ordinarily given for requiring an interest in a life notwithstanding the fact that the contract is not one of indemnity is that it is contrary to public policy "that one person should have an expectation of a benefit conditioned on the happening of the death of another; that the temptation to destroy the life of such other, in order to obtain such benefit, must be balanced, or counteracted, as it were, by the existence of an insurable interest in that life."

Cooke, § 58.

But this reason is assumed to have no application where the contract is made by the insured; and accordingly the rule is that "one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured."

Olmstead v. Keyes, 85 N. Y. 593.

Mallory v. Travellers' Ins. Co., 47 N. Y. 52.

Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746.
Vivar v. Knights of Pythias, 52 N. J. Law, 455, 20 Atl. 36.
Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 613.
Scott v. Dickson, 108 Pa. St. 6.
Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331.

This is true although the beneficiary so designated by the insured pays the premium.

Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 613.
Langdon v. Union Mut. Life Ins. Co., 14 Fed. 272.

(d) THE INTEREST OF ASSIGNEE.

The rule stated in the preceding section has not been extended to the case of the assignee of a policy, and the prevailing rule is that an assignment of a policy to one having no insurable interest in the life insured is invalid, as contrary to public policy.[1] There are many cases, however, holding the contrary,[2] and Mr. Cooke says[3] "that the doctrine of the necessity of an insurable interest to support an assignment has been so frequently dissented from that it can scarcely be said to be sustained by the weight of authority."

[1] Warnock v. Davis, 104 U. S. 775.
Michigan Mut. Ben. Ass'n v. Rolfe, 76 Mich. 146, 42 N. W. 1094.
Price v. Supreme Lodge, 68 Tex. 361, 4 S. W. 633.

[2] St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.
Valton v. National Fund Life Assur. Co., 20 N. Y. 32.
Olmstead v. Keyes, 85 N. Y. 593.
Eckel v. Renner, 41 Ohio St. 232.
Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657.
Rittler v. Smith, 70 Md. 261, 16 Atl. 890.

Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290.

Richards, § 29.

Bliss, § 30.

[2]Cooke, § 73.

(e) CONTINUANCE OF INTEREST IN LIFE.

In fire and marine insurance, the interest should exist when the contract is made, and at the time of the loss; but in life insurance it is sufficient if there is an insurable interest at the time the contract is made. Hence the contract may be enforced though the interest has entirely ceased at the time of the death of the insured.

Phoenix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616.

Mutual Ins. Co. v. Allen, 138 Mass. 24.

Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

McKee v. Phoenix Ins. Co., 28 Mo. 383.

Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.

Scott v. Dickson, 108 Pa. St. 6.

Rittler v. Smith, 70 Md. 261, 16 Atl. 890.

Cooke, § 64.

1 May, §§ 100A, 108, 117. See § 17, c, supra.

"If obtained as security for a debt, it remains valid for the full amount after the debt is paid, so that the creditor may really be paid twice over,—once by his debtor, and once by the insurance company. Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282. And it is of no importance, so far as the company is concerned, what the assignee paid as a consideration for the assignment."

Bliss, § 30.

(f) VALUE OF CREDITOR'S INTEREST.

The amount of the insurance which a creditor may lawfully take on the life of his debtor must bear some relation to the amount of the debt. If it is grossly disproportionate, the contract will be treated as a wager.

Cammack v. Lewis, 15 Wall. 643.
Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35.
Mowry v. Home Life Ins. Co., 9 R. I. 346.
Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213.
Amick v. Butler, 111 Ind. 578, 12 N. E. 518.
Rittler v. Smith, 70 Md. 261, 16 Atl. 890.
Cooper v. Schaeffer (Pa. Sup.) 11 Atl. 548.

(g) INTEREST FOUNDED ON RELATIONSHIP.

Some confusion has grown out of an attempt to found insurable interest on relationship without pecuniary interest. It is now settled:

1. Ties of affection or kinship do not of themselves constitute an insurable interest.

2. An element of dependency, coupled with the relationship, will furnish the basis for an insurable interest.

Richards, § 27.

(h) ILLUSTRATIONS OF INSURABLE INTEREST AND NO INTEREST.

Parent in life of child, Grattan v. National Life Ins. Co., 15 Hun (N. Y.) 74; Mitchell v. Union Life Ins. Co., 45 Me. 104.

Child in life of parent, Reserve Mut. Ins. Co. v. Kane, 81 Pa. St. 154; Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35; Loomis v. Eagle Ins. Co., 6 Gray, 396.

Sister in life of brother, Lord v. Dall, 12 Mass. 115.

Uncle in life of nephew, Singleton v. St. Louis Mut. Life Ins. Co., 66 Mo. 63.

Partner in life of copartner, Valton v. National Fund Life Assur. Co., 20 N. Y. 32.

The relation of husband and wife, McKee v. Phoenix Ins. Co., 28 Mo. 383; Currier v. Continental Life Ins. Co., 57 Vt. 496; Watson v. Centennial Mut. Life Ass'n, 21 Fed. 698; Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338.

Creditor in life of debtor, Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Morrell v. Trenton Ins. Co., 10 Cush. 282; American Life & Health Ins. Co. v. Robertshaw, 26 Pa. St. 189; Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

Employer and employé, Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Hebdon v. West, 3 Best & S. 579.

Insurable interest of a trustee, Moore v. Woolsey, 28 Eng. Law & Eq. 248, s. c. 4 El. & Bl. 243.

"The interest which one has in his own life, being incapable of exact pecuniary estimate, may be valued at any amount which the parties agree upon; and so, generally, of all insurable interests which are founded on relationship."

Richards, § 27.

Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

TITLE V.

THE CONSIDERATION OR PREMIUM.

§ 19. GENERALLY.

The premium paid is the consideration received by the insurers for the risk which they undertake. Ordinarily, therefore, and in the absence of a special stipulation to the contrary, the delivery of the policy, and consequent assumption of the risk, and the payment of the premium, are coincident. They are two acts on the part of the respective parties which perfect the contract and give it validity. (May.)

The last essential element to the formation of the contract of insurance is the price, or, as it is usually termed, the "premium." The price may be cash, or, in mutual companies, the formation of the contract may be completed by the insured paying partly in cash and giving a note for the balance, or giving a note and paying no cash at all, though even in mutual companies the price may be wholly in cash. But it is not necessary that the price should be actually paid, unless especially made a condition precedent.

1 Biddle, § 198.

Dwelling-House Ins. Co. v. Hardie, 37 Kan. 674, 16 Pac. 92.

Blanchard v. Waite, 28 Me. 58.

Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661.

§ 20. SPECIAL PROVISION IN POLICY.

But if the policy contains a provision that it shall not be binding until the premium is paid, notwithstanding the delivery of the policy, there can be no recovery, unless the premium is actually paid, or the provision is waived by the insurer.

Klein v. New York Ins. Co., 104 U. S. 88.

Schwartz v. Germania Life Ins. Co., 18 Minn. 448 (Gil. 404).

Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203, 10 N. W. 605.

Mattoon Manuf'g Co. v. Oshkosh Mut. Fire Ins. Co., 69 Wis. 564, 35 N. W. 12.

In Hoyt v. Mutual Benefit Ins. Co., 98 Mass. 539, it appeared that when the agent tendered the policy and demanded the premium he was referred to a third person, who would pay the premium. The agent promised to call on such person and collect the premium, but retained the policy, and never did so. It was held that there was no contract.

§ 21. MANNER OF PAYMENT.

A premium need not necessarily be paid in money, but an agent cannot, without express or implied authority, accept payment in any other medium.

Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545.

Hoffman v. John Hancock Mut. Life Ins. Co., 92 U. S. 161.

Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390.

National Ben. Ass'n v. Jackson, 114 Ill. 533, 2 N. E. 414.

Girard Life Insurance, Annuity & Trust Co. v. Mutual Life Ins. Co., 97 Pa. St. 15.

1 Biddle, § 201.

2 May, § 345b.

"A premium, as well as an assessment, is, in the absence of provision to the contrary, payable in cash. So well is this understood, that a local agent, at least, has no implied authority to receive payment otherwise than in cash. Raub v. N. Y. Co., 14 N. Y. St. Rep. 573. But it is obvious that by agreement the payment may be made otherwise, as by check (Kenyon v. Knights Templar Ass'n, 122 N. Y. 262, 25 N. E. 299), draft (Piedmont & A. Life Ins. Co. v. Ray, 50 Tex. 511), or charging in account (Missouri Valley Ins. Co. v. Dunklee, 16 Kan. 158)."

Cooke, § 90.

§ 22. ACCEPTANCE OF NOTE FOR PREMIUM.

Where a promissory note is accepted by the insurer as payment of a premium, it has the same effect as though payment had been made in cash. The policy is not affected by the failure to pay the note at maturity.

Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543.
McAllister v. New England Ins. Co., 101 Mass. 558.
Pitt v. Berkshire Ins. Co., 100 Mass. 500.
Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275.
New York Life Ins. Co. v. McGowan, 18 Kan. 300.
National Ben. Ass'n v. Jackson, 114 Ill. 533, 2 N. E. 414.

But when the note or the policy contains a provision that, if it is not paid at maturity, the policy shall be void, it is a written admission that the recital of payment in the policy is not to have the effect of an actual payment.

Kerns v. New Jersey Mut. Life Ins. Co., 86 Pa. St. 171.
Pitt v. Berkshire Life Ins. Co., 100 Mass. 500.
2 May, § 340.

§ 23. EXCUSES FOR NONPAYMENT.

The insurer is not bound to give notice of the day upon which a note will be due; and its failure to do so, though its usage has been to the contrary, will not excuse nonpayment.

Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252.

Smith v. National Life Ins. Co., 103 Pa. St. 177.

There may be excuses for nonpayment of the premium at the stipulated time.

See Cohn v. New York Mut. Life Ins. Co., 50 N. Y. 610.

Attorney General v. Guardian Mut. Life Ins. Co., 82 N. Y. 336.

Southern Life Ins. Co. v. McCain, 96 U. S. 84.

Seamans v. Northwestern Mut. Life Ins. Co., 3 Fed. 325.

People v. Empire Mutual Life Ins. Co., 92 N. Y. 105.

McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Nonpayment according to the terms of the policy is not excused by the fact that the insured was in such a condition, by reason of sickness or mental inability, that he was unable to attend to business.

Carpenter v. Centennial Mut. Life Ass'n, 68 Iowa, 453, 27 N. W. 456.

Klein v. New York Life Ins. Co., 104 U. S. 88.

Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543.

§ 24. WAIVER.

Payment of the premium at the time agreed upon may be waived by the insurer after the policy takes effect, expressly or impliedly, by parol or in writing.

Miesell v. Globe Mut. Life Ins. Co., 76 N. Y. 115.
Smith v. St. Paul Fire & Marine Ins. Co., 3 Dak. 80, 13 N. W. 355.
Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314.

"The circumstances sufficient to produce a waiver are so infinite in number and variety that it is impracticable to lay down a more specific rule than that, as forfeitures are regarded as odious, a waiver will be found on slight evidence."

Cooke, § 99.
Lyon v. Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829.

TITLE VI.

WARRANTIES.

§ 25. WARRANTY DEFINED.

A warranty is a stipulation or statement inserted or referred to in, and made a part of, an insurance policy, upon the truth or performance of which the validity of the contract depends.

1 May, § 156.
1 Biddle, § 523.
Bliss, § 45.
Flanders, p. 226.
Angell, § 139.
1 Phillips, p. 413.
2 Arnould, p. 599.
Cooke, § 12.
Marshall, p. 248.
Richards, §§ 45–52.
Fox, Warranties in Fire Insurance.
See the above references for general discussions of the law of warranty and representation.

In Aetna Ins. Co. v. Grube, 6 Minn. 84 (Gil. 32), the court said: "'An express warranty * * * in the law of insurance is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered

to be on the face of the policy, although it may be written in the margin, or transversely, or on a subjoined paper referred to in the policy.' Angell, Ins. § 140. A representation, as distinguished from a warranty, in the law of insurance, 'is a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the writer more readily to assume the risk by diminishing the estimate he would otherwise have formed of it.' Angell, § 147. In the law of insurance, a warranty is always a part of the contract; a condition precedent, upon the fulfillment of which its validity depends. A representation, on the other hand, is not part of the contract, but is collateral to it. The essential difference between a warranty and a representation is that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty is material, and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still, if it is not material to the risk, the contract is not avoided."

Burritt v. Saratoga Co. Mut. Ins. Co., 5 Hill (N. Y.) 188.

§ 26. MUST BE IN POLICY.

A warranty must be contained in the policy, or referred to in, and made a part of, the policy. Thus it is not a warranty where by-laws are printed on the back of the policy, and not expressly referred to in the policy.

Kingsley v. New England Ins. Co., 8 Cush. (Mass.) 393.
Standard Life & Acc. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105.

But a mere reference to another paper is not sufficient to make such paper a part of the policy, unless the intention is clearly expressed.

Houghton v. Manufacturers' Mut. Ins. Co., 8 Metc. (Mass.) 114.
Aetna Ins. Co. v. Grube, 6 Minn. 82 (Gil. 32).

Statements contained in the application are not warranties, unless referred to in and made a part of the policy.

Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.
Gen. Laws Minn. 1895, c. 2.

A statement written on the margin of the policy is a warranty.

Patch v. Phoenix Ins. Co., 44 Vt. 481.
McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 170.
1 Biddle, § 544.
1 Wood, c. 3, p. 348.

§ 27. KINDS OF WARRANTIES.

Warranties may be express or implied, affirmative or promissory.

(a) EXPRESS WARRANTIES.

An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the contract depends.

1 Arnould, § 577.
1 May, § 179.

(b) IMPLIED WARRANTIES.

In a contract of marine insurance it is impliedly warranted—

1. That the vessel is seaworthy for the service in respect to which she is insured.

2. That the goods are not exposed to extra risk by an unusual mode of storage.

3. That there will be no deviation.

4. That the risk is to commence within a reasonable time.

5. That the subject-matter of the insurance is neutral, when material to the risk.

1 Phillips, c. 8.
2 Arnould, c. 4.

Gibson v. Small, 4 H. L. Cas. 353.
Merchants' Ins. Co. v. Algeo, 31 Pa. St. 446.
Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100.

(c) AFFIRMATIVE WARRANTIES.

An affirmative warranty is one which affirms the existence of certain facts at the time of the insurance.

(d) PROMISSORY WARRANTIES.

A promissory warranty is one which requires the performance or omission of certain things, or the existence of certain facts after the taking out of the insurance.

11 Am. & Eng. Enc. Law, p. 293.
Stout v. City Fire Ins. Co., 12 Iowa, 371.

§ 28. EFFECT OF BREACH OF WARRANTY.

The effect of a warranty is to make void the policy if the statements made are not literally true, or the stipulations not fully observed, without regard to their materiality, the willfulness of the falsity or nonobservance, or the cause of the loss.

Campbell v. New England Ins. Co., 98 Mass. 381.
Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. St. 335; Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.
Thomas v. Fame Ins. Co., 108 Ill. 91.
Fisher v. Crescent Ins. Co., 33 Fed. 544.
Alabama Gold Life Ins. Co. v. Garner, 77 Ala. 210.
Phoenix Ins. Co. v. Benton, 87 Ind. 132.
McClure v. Watertown Fire Ins. Co., 90 Pa. St. 277.
Price v. Phoenix Mut. Ins. Co., 17 Minn. 497 (Gil. 473).
1 Biddle, § 557.
1 May, § 156.
Bliss, § 36.
Cooke, § 12.

In Ripley v. Aetna Ins. Co., 30 N. Y. 136, the court quotes from Marshall on Insurance (page 347) as follows: "A warranty, being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But, being once inserted in the policy, it becomes a binding condition on the insured, and, unless he can show that it has been literally fulfilled, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question 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."

In Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473), the court said: "Warranties are, then, conditions precedent, so that their truth must be pleaded by the insured, upon whom, of course, the burden of proving the same rests, whereas the falsity of representations is matter of defense, to be pleaded and proved by the insurer."

McLoon v. Commercial Mut. Ins. Co., 100 Mass. 478.
Wilson v. Hampden Fire Ins. Co., 4 R. I. 159.

In some states there are found statutes to the effect that immaterial representations, not fraudulent, although "warranted," shall not avoid the contract.

1 May, § 180a.

§ 29. CONSTRUCTION.

The mere fact that the word warranty is used with reference to statements made by the insured is not conclusive that the statements are to be considered as warranties in the strict legal sense. If the context shows that such was not the intention of the parties, the statement will not be so regarded.

Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.

If the language be ambiguous, it will be held not a warranty.

First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673.

The terms and conditions of the policy are to be construed strongly against the insurer.

Anderson v. Fitzgerald, 4 H. L. Cas. 483.
Bartlett v. Union Mut. Life Ins. Co., 46 Me. 500.
Everett v. Continental Ins. Co., 21 Minn. 76.

In Daniels v. Hudson River Ins. Co., 12 Cush. (Mass.) 424, Chief Justice Shaw said that "the leaning of all courts is to hold such a stipulation to be a representation, rather than a warranty, in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract."

TITLE VII.

REPRESENTATIONS.

§ 30. REPRESENTATION DEFINED.

A representation is a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. If false and material to the risk, the contract is avoided. (May.)

In Daniels v. Hudson River Ins. Co., 12 Cush. 416, Chief Justice Shaw said: "If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy. If it be construed a representation, and is untrue, it does not avoid the policy, if not willful, or if not material. To illustrate this: The application, in answer to an interrogatory, states: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence that ashes were taken up and removed in copper hods, perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but, if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially

because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract, or in fixing its terms."

Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381.
1 May, § 181.
1 Biddle, § 531.
Richards, § 48.

§ 31. AFFIRMATIVE AND PROMISSORY.

Representations are either affirmative or promissory.

They are affirmative when they affirm the present existence of certain facts pertaining to the risk.

They are promissory when made concerning what is to happen during the term of the insurance.

The one is an affirmation, the other is a promise.

1 May, § 182.

§ 32. ORAL REPRESENTATIONS.

A representation may be oral or written; but, if the application is in writing, it will be conclusively presumed to contain all the representations which were made.

Dolliver v. St. Joseph Ins. Co., 131 Mass. 39.
Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544.
Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.
"If a written application be made, it will be presumed to contain the representations which induce the contract, and proof of prior or subsequent verbal statements is inadmissible."
1 May, § 192.
Boggs v. American Ins. Co., 30 Mo. 63.
Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.

§ 33. WRITTEN AND ORAL PROMISSORY REPRESENTATIONS.

An important distinction has been made between the effect of affirmative and oral promissory warranties. May, citing the decision of Judge Gray in Kimball v. Aetna Ins. Co., 9 Allen (Mass.) 540, says: "Upon this distinction follows the important consequence that, while material falsity in an affirmative representation will be a complete defense to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defense whatever. And the reason of the distinction is this: The falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make, and therefore, in contemplation of law, because misled and deceived, does not make. He may therefore set up the fact that he was misled or deceived, as proof that no agreement was ever made, since there was no concurrence of consent upon the same facts. But an oral promissory representation, being an agreement prior in date to the actual contract of insurance, and in its nature such that it cannot be performed until after the contract of insurance has taken effect, cannot be set up to defeat the later contract; for this would be to violate a fundamental rule of evidence, and make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral promise be made mala fide, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made bona fide, and without intention to mislead and deceive, it cannot be set up to avoid a contract. Only those promissory representations are available for such a purpose which are reduced to writing, and made part of the contract; thus becoming substantially, if not formally, warranties."

Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544.
Murdock v. Chenango Co. Mut. Ins. Co., 2 N. Y. 210.

Alston v. Mechanics' Mut. Ins. Co., 4 Hill (N. Y.) 329.
1 Arnould, p. 498.
Bliss, § 47.

Other courts and writers have held that there is no such a thing as a promissory representation, and, according to a recent writer, the distinction above stated is opposed to the great majority of decided cases.

1 Biddle, § 533 et seq.
2 Duer, p. 716.
Bliss, § 47.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.

§ 34. REPRESENTATION OF BELIEF OR EXPECTATION.

There is a distinction between a promissory representation of a fact and a mere opinion or expectation. The former, when false and material, avoids the policy, while the latter has no effect.

Dennistoun v. Lillie, 3 Bligh, 202.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.
1 Arnould, p. 524.
Richards, § 49.

§ 35. CONTINUING CONDITIONS.

A representation that a certain condition exists at the time the representation is made is not a warranty that it will continue so to exist. Subsequent changes will not defeat the insurance.

Davenport v. Peoria Mut. Fire Ins. Co., 17 Iowa, 276.
Blumer v. Phoenix Ins. Co., 45 Wis. 622.
Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 8 Sup. Ct. 1199.

§ 36. MATERIALITY OF REPRESENTATION.

When there is no moral fraud, a representation, although false, does not avoid the policy unless material.

Every representation is material which is of such a nature as would probably induce the insurer to take the risk, or to take it at a lower premium than he otherwise would. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the insurer.

1 Arnould, p. 530.
1 Phillips, 524.
2 Duer, 707.
Bliss, § 48.
Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).
Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98).
Wood v. Firemen's Ins. Co., 126 Mass. 316.
Campbell v. New England Ins. Co., 98 Mass. 381.
1 May, § 184.

The materiality of the facts is a question for the jury.

Caplis v. American Fire Ins. Co. (1895; Minn.), 62 N. W. 440.
Keeler v. Niagara Falls Ins. Co., 16 Wis. 523.
Washington Life Ins. Co. v. Harney, 10 Kan. 525.
Armour v. Transatlantic Ins. Co., 90 N. Y. 450.

§ 37. ANSWERS TO QUESTIONS MATERIAL.

But, when the representation is made in the form of an answer to a specific question by the insurer, the fact is conclusively held to be material, as "the inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by a jury."

1 May, § 185.
Cuthbertson v. Insurance Co., 96 N. C. 480, 2 S. E. 258.
Wilson v. Conway Ins. Co., 4 R. I. 141.
Campbell v. New England Ins. Co., 98 Mass. 381.
Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.
Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).
See Gerhauser v. North British Ins. Co., 6 Nev. 15.

In Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, Mr. Justice Gray said: "Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant."

Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466.
Campbell v. New England Ins. Co., 98 Mass. 381.
Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurer to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such in-

surance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495.

Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. (U. S.) 47.

Anderson v. Fitzgerald, 4 H. L. Cas. 484.

McDonald v. Law Union Fire & Life Ins. Co., L. R. 9 Q. B. 328.

Edington v. Aetna Life Ins. Co., 77 N. Y. 564; Id., 100 N. Y. 536, 3 N. E. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application.

Cazenove v. British Equitable Assur. Co., 29 Law J. C. P. 160; affirming s. c. 6 C. B. (N. S.) 437.

But where, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.

Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949.

Hall v. People's Ins. Co., 6 Gray, 185.

American Life Ins. Co. v. Mahone, 56 Miss. 180.

Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 44 N. J. Law, 210.

Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurer, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life

insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage when in fact there are two, the policy issued thereon is avoided.

Towne v. Fitchburg Ins. Co., 7 Allen, 51.

But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount.

Nichols v. Fayette Ins. Co., 1 Allen, 63.

§ 38. POLICY COVERING VARIOUS ITEMS.

When a policy covers different classes of property, and a false representation is made as to a material fact affecting one class only, one line of cases holds that the policy is valid as to the other class.

Schuster v. Dutchess Co. Ins. Co., 102 N. Y. 260, 6 N. E. 406.

Merrill v. Agricultural Ins. Co., 73 N. Y. 452.

Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164.

But in most of the states the rule is that where the premium is single, and the subject is substantially one risk, though the policy covers several items separately enumerated, the contract is entire, and a forfeiture as to one item will forfeit the entire contract.

1 Biddle, § 573.

Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137.

Plath v. Minnesota Farmers' Mut. Fire Ins. Co., 23 Minn. 479.

Day v. Charter Oak Fire & Marine Ins. Co., 51 Me. 91.

§ 39. CONSTRUCTION OF MATERIAL REPRESENTATIONS.

Representations as to material matters are less strictly construed than warranties. Substantial compliance only is required.

Horn v. Amicable Mut. Life Ins. Co., 64 Barb. 81.
Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019.
1 May, § 186.

§ 40. STATUTES.

In many states there are statutes providing that:

"No oral or written misrepresentation made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss."

Acts Mass. 1887, c. 214, § 21.
Gen. Laws Minn. 1895, c. 2.
Richards, Append.

TITLE VIII.

CONCEALMENT.

§ 41. CONCEALMENT DEFINED.

A concealment is the intentional withholding by the insured from the insurer of facts material and prejudicial to the risk, which ought in good faith to have been made known. It is the opposite of a representation.

Concealment is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know.

Bliss, § 65; 1 May, § 200; 1 Wood, c. 6.
1 Arnould, p. 549.
Washington Mills Manuf'g Co. v. Weymouth Ins. Co., 135 Mass. 503.

§ 42. TIME OF CONCEALMENT.

In order that a concealment should have the effect of avoiding a policy, it must have taken place at the time of making the contract. Anything coming to the knowledge of either party thereafter, however material it may be, need not be communicated to the other, although the policy has not yet been executed in accordance with the agreement.

Cory v. Patton, L. R. 7 Q. B. 304.
1 Arnould, p. 548.

§ 43. WHAT MUST BE COMMUNICATED.

Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty. If specific information be required by the insurer on any point he deems material, it must be truly and fully communicated by the applicant.

Chaffee v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 376.

Valton v. National Fund Life Assur. Soc., 20 N. Y. 32.

Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442.

In fire and life policies, it seems that the applicant, if without fraudulent intent, need not communicate even material matters, about which no inquiry is made.

Washington Mills Manuf'g Co. v. Weymouth Ins. Co., 135 Mass. 503.

Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.

But see 1 Wood, § 211.

An answer clearly false to an unambiguous inquiry will vitiate a policy.

Jeffries v. Economical Life Ins. Co., 22 Wall. 47.

Campbell v. New England Ins. Co., 98 Mass. 381.

Bliss, § 72.

§ 44. WHAT NEED NOT BE COMMUNICATED.

Neither party is bound to communicate information, except in answer to inquiries, of—

(a) Matters which the other knows.

(b) Matters of which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.

Carter v. Boehm, 3 Burrows, 1905.
De Longuemere v. New York Fire Ins. Co., 10 Johns. 119.
Green v. Merchants' Ins. Co., 10 Pick. 402.
3 Kent, Comm. *373.
Bliss, § 76.
1 Wood, c. 6, § 212.

(c) Matters of which communication is waived.

2 Duer, p. 522.
Bliss, § 75.

(d) Those matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.

De Wolf v. New York Firemen's Ins. Co., 20 Johns. (N. Y.) 214.
2 Duer, p. 436.

(e) Matters which relate to a risk excepted from the policy and not otherwise material.

§ 45. CONCEALMENT OR MISREPRESENTATION BY AN AGENT.

An innocent principal cannot take advantage of the fraud of his agent, and hence is responsible for the concealment or misrepresentations of his agent authorized to effect insurance.

1 May, § 213.
1 Biddle, § 542.
2 Duer, p. 418.
Hamblet v. City Ins. Co., 36 Fed. 118.
National Life Ins. Co. v. Minch, 53 N. Y. 145.

In Fitzherbert v. Mather, 1 Term R. 12, an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent, who was employed to effect an insurance. The omission of the former agent to inform the latter of the loss of the ship was held fatal to the insurance. Ashurst, J., said: "On general principles of policy, the act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows; and there is no hardship on the plaintiff, for, if the fact had been known, the policy could not have been effected."

In Gladstone v. King, 1 Maule & S. 35, which was an action on a policy on a ship "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock. The owners, in ignorance of the accident, effected the insurance. It was held that the captain was bound to communicate the fact, and, for want of such communication, there could be no recovery for the loss, although there was no fraud. The policy was valid but did not cover the particular loss. To the same effect is Stribley v. Imperial M. Ins. Co., 1 Q. B. Div. 507.

In Proudfoot v. Montefiore, L. R. 2 Q. B. 511, it appeared that at the time of the insurance the agent had knowledge

of the loss. The court said: "The question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defense to the underwriter on a claim to enforce the policy." It was held that there could be no recovery. Chief Justice Cockburn said "that if an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the commercial world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriters, and through such ignorance fails to disclose it." To the same effect is Blackburn v. Vigors (1887) L. R. 12 App. Cas. 531.

See 1 Arnould, p. 550.

In Ruggles v. General Interest Ins. Co., 4 Mason, 74, Fed. Cas. No. 12,119, Judge Story held that there could be a recovery where the owner effected the insurance while ignorant of the loss, although the knowledge had been fraudulently withheld by his agent, in order that the insurance might be

effected. The case was affirmed by the supreme court (12 Wheat. 408) on other grounds.

In Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450, it was held that a material misrepresentation made in applying for a policy, although honestly made, avoids the policy. The court said: "A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself. Carpenter v. American Ins. Co., 1 Story, 57, Fed. Cas. No. 2,428. In this case (which was a case of fire insurance) Story, J., said: 'A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design.' * * * The rules as to misrepresentations and concealments, or omissions to state facts material to the risk, are more strict in cases of marine than of fire insurance. But the distinctions are founded on the differences in the character of the property, and the greater facility the insurers possess of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat, and the distinctions are applied, ordinarily, in cases where the insurer sets up the omission of the insured to state material facts. In those cases there is a difference between the rules applicable to marine insurance and those applicable to fire insurance. But where the defense is a material affirmative misrepresentation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance."

Mr. Arnould (Volume 1, p. 559) says: "If an agent, in ignorance of a loss, effects insurance for his principal, who knew of the loss, but not in time to countermand the policy,

it is not void by reason of the noncommunication. If a principal, knowing of the loss, effects insurance through an agent who was ignorant of it, this concealment of the fact of loss vitiates the policy."

Valin, liv. 3, t. 6, art. 40, p. 45.

(66)

TITLE IX.

INSURANCE AGENT.

§ 46. GENERAL STATEMENTS.

The transactions of insurance agents are subject to the general principles of the law of agency.

The policy of the law requires that the authority of agents of insurance companies be construed liberally.

If an insurance company holds out its agents to the public as authorized to do a particular act, or to transact a particular kind of business, this carries with it an authority to adopt the ordinary means, and to do and say the appropriate things to accomplish the object for which the agent is employed. (Richards.)

Whether one is the agent of the insurer or the insured is a question of fact to be determined by the circumstances of each case.

Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222.

Abraham v. Insurance Co., 40 Fed. 717.

Eastern R. Co. v. Relief Ins. Co., 105 Mass. 570.

Southern Life Ins. Co. v. McCain, 96 U. S. 84.

§ 47. GENERAL AGENTS.

An agent authorized to issue and renew policies and to transact the business of the company in a particular locality is a general agent.

Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77.

Possession of blank policies as evidence, Carroll v. Charter Oak Ins. Co., 40 Barb. 292.

Power of general agents to appoint subagents, Krumm v. Jefferson Fire Ins. Co., 40 Ohio St. 225.

Such an agent may generally make the contract which the insurer is empowered to make.

1 Biddle, §§ 116, 121.

A "local agent" is one not authorized to make a contract of insurance, but possessing certain limited and special powers.

Haden v. Farmers' & Mechanics' Fire Ass'n, 80 Va. 683.

Murphy v. Southern Life Ins. Co., 3 Baxt. (Tenn.) 440.

1 Biddle, § 122.

Cooke, § 9.

The authority of a general agent may be limited to a single state.

Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606.

Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r, 90 Ky. 39, 13 S. W. 585.

§ 48. SECRET LIMITATIONS UPON AGENT'S AUTHORITY.

A general agent may bind his principals by any act within the scope of his authority, although it may be contrary to his special instructions.

Story, Ag. § 733.
Ruggles v. American Cent. Ins. Co., 114 N. Y. 421, 21 N. E. 1000.
Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5.

Thus a policy upon subject-matter beyond the territory in which the agent is authorized to act is valid, unless the want of authority is brought home to the insured.

Lightbody v. North American Ins. Co., 23 Wend. 18.

§ 49. LIMITATIONS CONTAINED IN POLICY.

The provisions of the policy relative to the authority of agents, of which the assured had knowledge, are held binding upon him. He is bound to know what is in the policy which is delivered to him.

In Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1, the court said: "It is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly relies. There are two provisions in the policy to which he refers in support of his contention. The first is that 'no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon.' Following Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, which is abundantly supported by the authorities. This contains no limitation upon

the authority of any class of agents, prohibiting them from waiving any of the terms or conditions of the policy. It applies alike to all representatives of the company,—executive or general officers as well as others; and, so far as it assumes to be a limitation at all, it is upon the company itself, to the effect that it can only waive the conditions of the policy in a certain way, or, rather, it assumes to provide what shall be the exclusive evidence of such waiver. This provision, therefore, will not support defendant's contention, but the other or second one does. It is as follows: 'This policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing, signed by the secretary of the company.' The words 'policy' and 'contract' are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff."

In Anderson v. Manchester Fire Assurance Co. (Minn.) 60 N. W. 1095, the doctrine of Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, was held not applicable to the provision inserted in the standard policy by the insurance commissioner. On reargument the statute was held unconstitutional, and that, by delivering the policy with knowledge of other insurance, the condition was waived, notwithstanding the fact that such waiver was not indorsed on the policy.

§ 50. STIPULATIONS IN THE POLICY AS TO WHO ARE AGENTS OF THE INSURER.

Insurance policies often contain a provision that any person who may have procured the insurance to be taken shall be deemed to be the agent of the insured, and not of the company; or that in any matter relating to the insurance, no person, unless duly authorized in writing, shall be deemed the agent of the insurer. Life insurance policies often contain a provision that no agent is authorized to change or waive any of the provisions of the policy.

The courts have found these provisions very difficult to deal with.

"These stipulations," says Richards (section 89), "are not illegal, or against public policy, and are held to be of some binding force upon the assured, and at least prima facie true. Consequently, if true, they are absolutely binding.

Mersereau v. Phoenix Mut. Life Ins. Co., 66 N. Y. 274.
Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309.
Whited v. Germania Fire Ins. Co., 76 N. Y. 415.

"They have the practical advantage of restricting what otherwise might be a broader ostensible power in the agent; but, by the weight of authority, they are not conclusively binding unless true, because the relation of agency is one existing between the company and its agent, and ought to be primarily determined by what has passed between them extrinsic to the policy, inasmuch as the policy is in respect to that relation, res inter alios acta."

In Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 31 Minn. 17, 16 N. W. 430, Mr. Justice Mitchell said:

"The parties who are induced by these agents to make application for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application; and, in view of the apparent authority with which

the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured.

American Ins. Co. v. Mahone, 21 Wall. 152.
Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222.
Malleable Iron Works v. Phoenix Ins. Co., 25 Conn. 465.
Hough v. City Fire Ins. Co., 29 Conn. 10.
Woodbury Sav. Bank v. Charter Oak Ins. Co., 31 Conn. 517.
Miner v. Phoenix Ins. Co., 27 Wis. 693.
Winans v. Allemania Fire Ins. Co., 38 Wis. 342.
Rowley v. Empire Ins. Co., 36 N. Y. 550.
Brandup v. St. Paul Fire & Marine Ins. Co., 27 Minn. 393, 7 N. W. 735.
2 Wood, c. 12.
1 May, § 120.

"After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured, and not of the insurer. But, as has been well remarked by another court, 'there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.' If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principle to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the

party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence, we think that, if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through his agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts; but the conclusion we have reached is not without authority to sustain it, and is, we believe, sound in principle and in accordance with public policy."

Commercial Ins. Co. v. Ives, 56 Ill. 402.

Sullivan v. Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112.

Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108.

Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207.

Boetcher v. Hawkeye Ins. Co., 47 Iowa, 253.

Masters v. Madison Co. Mut. Ins. Co., 11 Barb. 624, 3 Benn. Fire Ins. Cas. 398.

See Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128.

2 Wood, § 409.

1 May, § 140.

1 Biddle, § 469 et seq., where the conflicting cases are reviewed in detail.

In a number of states there will be found laws to the effect that:

"Whoever solicits, procures, or receives in or transmits from the state any application other than his own for membership or insurance in any corporation or association * * * shall be deemed and held to be an agent of such corporation or association."

The statutes of various states are collected in the appendix to Richards on Insurance.

§ 51. WAIVER BY AGENT.

Unless expressly forbidden by the policy, or the want of authority is otherwise brought to the knowledge of the insured, an agent acting within the scope of his employment may waive provisions of the policy.

Silverberg v. Phoenix Ins. Co., 67 Cal. 36, 7 Pac. 38.
Niagara Fire Ins. Co. v. Brown, 123 Ill. 356, 15 N. E. 166.
Wing v. Harvey, 23 Law J. Ch. (N. S.) 511.
Miner v. Phoenix Ins. Co., 27 Wis. 693.
Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98).
Guernsey v. American Ins. Co., 17 Minn. 104 (Gil. 83).
Eastern R. Co. v. Relief Ins. Co., 105 Mass. 570.
But see Kyte v. Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518.
See § 49, supra.

The limitation in a policy upon the agent's power to waive provisions of the policy is binding, unless overcome by proof of actual or ostensible authority emanating from the principal.

Messelback v. Norman, 122 N. Y. 578, 26 N. E. 34.
Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234.

§ 52. NOTICE TO AGENT.

Notice to a general agent of the insurance company is notice to the company.

North British M. Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458.

Brandup v. St. Paul Fire & Marine Ins. Co., 27 Minn. 393, 7 N. W. 735.

Quigley v. St. Paul Title-Insurance & Trust Co. (Minn.; 1895) 62 N. W. 287.

2 Biddle, § 989.

As to the effect of notice to a local agent, see Hartford Fire Ins. Co. v. Smith, 3 Colo. 422.

Watertown Fire Ins. Co. v. Grover & Baker S. M. Co., 41 Mich. 131, 1 N. W. 961.

Phoenix Ins. Co. v. Spiers (Ky.) 8 S. W. 453.

Donnelly v. Cedar Rapids Ins. Co., 70 Iowa, 693, 28 N. W. 607.

In Home Fire Ins. Co. v. Hammang (Neb.; 1895) 62 N. W. 883, the court said:

"Here, then, was actual knowledge of the additional insurance complained of in the possession of the insurance company's agent when he solicited and wrote the insurance policy in suit. This knowledge of the agent was the knowledge of the company. Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company.

Gans v. Insurance Co., 43 Wis. 108.

Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948.

"This precise question was before this court in Phoenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12. Ryan, C., writing the opinion of the court, said that 'where an insurance agent, with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of

concurrent insurance on the premises, the company is estopped, after a loss, to insist that the policy is void, because consent to such concurrent insurance was not given in writing.' This case is decisive of the question under consideration. We are satisfied with the rule as there announced, and adhere to it. That it states the rule correctly we have no doubt, and that it is sustained by the authorities, see, among others, the following cases:

State Ins. Co. v. Jordan, 29 Neb. 514, 45 N. W. 792.
Billings v. Insurance Co., 34 Neb. 502, 52 N. W. 397.
German Ins. Co. v. Penrod, 35 Neb. 273, 53 N. W. 74.
German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660.
McEwen v. Insurance Co., 5 Hill, 101.
American Ins. Co. v. Gallatin, 48 Wis. 36, 3 N. W. 772.
Oshkosh Gaslight Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819.
Renier v. Insurance Co., 74 Wis. 89, 42 N. W. 208.
Vankirk v. Insurance Co., 79 Wis. 627, 48 N. W. 798.
Kitchen v. Insurance Co., 57 Mich. 135, 23 N. W. 616.

"In this last case the court said: 'An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of the premises, take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein.'

Crouse v. Insurance Co., 79 Mich. 249, 44 N. W. 496.
Gristock v. Insurance Co., 84 Mich. 161, 47 N. W. 549.
Cleaver v. Insurance Co., 71 Mich. 414, 39 N. W. 571.
Temmink v. Insurance Co., 72 Mich. 388, 40 N. W. 469.
Copeland v. Insurance Co., 77 Mich. 554, 43 N. W. 991.

Tubbs v. Insurance Co., 84 Mich. 646, 48 N. W. 296.
Brandup v. Insurance Co., 27 Minn. 393, 7 N. W. 735.
Kausal v. Association, 31 Minn. 17, 16 N. W. 430.
Eggleston v. Insurance Co., 65 Iowa, 308, 21 N. W. 652.
Donnelly v. Insurance Co., 70 Iowa, 693, 28 N. W. 607.
Miller v. Insurance Co., 70 Iowa, 704, 29 N. W. 411.
Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948.
Mattocks v. Insurance Co., 74 Iowa, 233, 37 N. W. 174.
Brown v. Insurance Co., 74 Iowa, 428, 38 N. W. 135.
Barnes v. Insurance Co., 75 Iowa, 11, 39 N. W. 122.
Reynolds v. Insurance Co., 80 Iowa, 563, 46 N. W. 659.
Hamilton v. Insurance Co., 94 Mo. 353, 7 S. W. 261.
Brumfield v. Insurance Co., 87 Ky. 122, 7 S. W. 893."
See, also, Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222.
New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837.
McCoy v. Metropolitan Ins. Co., 133 Mass. 82.
McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 16 Atl. 263.

TITLE X.

SPECIAL PROVISIONS OF THE CONTRACT.

The tendency is towards the adoption of a standard fire policy. This policy originated in Massachusetts, and has now been adopted in many states.

For statutes, see Appendix to Richards on Insurance.

Form of policy, Gen. Laws Minn. 1895.

§ 53. CLASSIFICATION OF SPECIAL PROVISIONS.

"In proceeding," says May, "to consider the scope and effect of the various conditions and stipulations in which the modern contract of insurance abounds, it is of first importance to determine whether they are in the nature of warranties or representations, and, if so, whether they are affirmative or promissory, and also whether they are themselves controlled by accessory stipulations as to their truth, fullness, and materiality."

There are two general classes of these stipulations:

(a) Those relating to matters and things prior to the loss, and having for their object to define and determine the limits of the risk.

(b) Those which relate to matters and things occurring after the loss, and having for their object to determine the mode in which an occurred loss is to be established, adjusted, and recovered.

1 May, § 216.

§ 54. INSURANCE ON PROPERTY.

(a) TITLE.

When the insured makes no written application and no representations as to ownership, the policy is not affected by a provision in the policy that it shall be void "if the interest of the assured be other than unconditional and sole ownership."

Knop v. National Fire Ins. Co., (Mich.) 59 N. W. 653.
Dupreau v. Insurance Co., 76 Mich. 615, 43 N. W. 585.

The answer to inquiries contained in an application respecting the applicant's title, which are made a part of the policy, become warranties, the falsity of which vitiates the policy.

Leonard v. American Ins. Co., 97 Ind. 299.

Unless more particularly inquired about, or there is fraudulent concealment or misrepresentation, a statement by the applicant that he is the owner of the property, or that it is his, does not invalidate the policy if it is true in some substantial sense, although he has not a perfect and absolute estate.

Walsh v. Philadelphia Fire Ass'n, 127 Mass. 383.
Morrison v. Tennessee Ins. Co., 18 Mo. 262.
See Columbian Ins. Co. v. Lawrence, 2 Pet. 25.
Davis v. Quincy Ins. Co., 10 Allen, 113.
Insurance Co. of North America v. Bachler (Neb.) 62 N. W. 911.

But if more exact information as to title is called for, as where "the true title is called for," or where it is provided that "if the interest of the insured be any other than the entire unconditional and sole ownership of the property for the use and benefit of the insured," the true interest must be represented to the company, and expressed in the policy.

Philips v. Knox Co. Mut. Ins. Co., 20 Ohio, 174.
Pinkham v. Morang, 40 Me. 587.
Hough v. City Fire Ins. Co., 29 Conn. 10.
Hope Mut. Ins. Co. v. Brolaskey, 35 Pa. St. 282.

A statement that the insured has "a clear title" is not sustained by an executory contract.

Wooliver v. Boylston Ins. Co. (Mich.) 62 N. W. 149.
Hall v. Insurance Co., 93 Mich. 184, 53 N. W. 727.

There may be a waiver of this provision.

Union Ins. Co. v. Clipp, 93 Ill. 96.

(b) ALIENATION (CHANGE OF INTEREST).

A provision prohibiting alienation without the consent of the company is valid.

J. B. Ehrsam Mach. Co. v. Phenix Ins. Co. (Neb.) 61 N. W. 722.
Smith v. Union Ins. Co., 120 Mass. 90.
Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 123.

A void sale is not an alienation.

School Dist. v. Aetna Ins. Co., 62 Me. 330.
Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

Such a provision does not extend to every change of interest.

In Gibb v. Fire Ins. Co. of Phila. (Minn.) 61 N. W. 137, it was held that an executory agreement to convey the premises and change of possession was a breach of the condition against change of interest.

The court said: "It is held by the great weight of authority that, when the condition is against any change in the title, there is no breach unless there is a change in the legal title; that, as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous. The word 'interest' is broader than the word 'title,' and includes both legal and equitable rights."

Power v. Ocean Ins. Co., 19 La. 28.
Hooper v. Hudson River Ins. Co., 17 N. Y. 424.

If the insured sells only a portion of his interest, the policy will protect his remaining interest.

Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385.
Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176.

It does not comprehend a mortgage, nor a contract to convey, nor the levy of an execution.

Bryan v. Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454.
Kempton v. State Ins. Co., 62 Iowa, 83, 17 N. W. 194.
Clark v. New England Ins. Co., 6 Cush. 342.

Where a policy provides that the mortgagee to whom the insurance is payable shall notify the company of any change of ownership of the property, a foreclosure of the mortgage does not work such an alienation as to defeat the policy before the expiration of the time for redemption.

Washburn Mill Co. v. Fire Ass'n (Minn.) 61 N. W. 828.

The provision in most policies extends to any change of title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, and also to mortgages, proceedings to foreclose a lien, contracts of sale, and the levy of an execution.

Foote v. Hartford Ins. Co., 119 Mass. 259.
Barnes v. Union Mut. Fire Ins. Co., 51 Me. 110.
Loy v. Home Ins. Co., 24 Minn. 315.
Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.
Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.
Meadows v. Hawkeye Ins. Co., 62 Iowa, 387, 17 N. W. 600.
Hill v. Cumberland Val. Mut. Protection Co., 59 Pa. St. 474.
Seybert v. Pennsylvania Mut. Fire Ins. Co., 103 Pa. St. 282.

A provision against alienation may be waived without a written indorsement on the policy.

McFetridge v. American Fire Ins. Co. (Wis.) 62 N. W. 938.
Stanhilber v. Insurance Co., 76 Wis. 285, 45 N. W. 221.

(c) ALTERATION.

A common provision of the policy is one intended to guard against an increase of risk by alteration. It may take place in the building, or in the mode of use or occupation, or in its situation with reference to other buildings, or in any other circumstances tending to change the character of the risk. But it is not every alteration that is material; and whether, in any particular case, an alteration will avoid the policy, depends, as a general rule, upon its materiality, and this is determined by the question whether it increases the risk, which is a question of fact to be determined by a jury.

Curry v. Commonwealth Ins. Co., 10 Pick. 535.

The question of materiality does not depend upon whether the loss is or is not caused by the alteration.

It is competent for the parties to agree that a certain change or alteration shall work a forfeiture, although the risk is not thereby increased.

Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379.

Frost's Detroit Lumber, etc., Works v. Millers', etc., Ins. Co., 37 Minn. 300, 34 N. W. 35.

Mack v. Rochester Ins. Co., 106 N. Y. 560, 13 N. E. 343.

Unless stipulated to the contrary, the insured may use, protect, and enjoy his property as such property is customarily used, enjoyed, and protected. He may make such ordinary changes and repairs as are customary.

Jolly's Adm'rs v. Baltimore Equitable Soc., 1 Har. & G. (Md.) 296.

Any change in the situation of the property insured with reference to other property within the limits of fair and

honest dealing is permissible, although the change cause the destruction of the property.

Joyce v. Maine Ins. Co., 45 Me. 168.

"Contiguous building," Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432, 29 N. W. 125.

If the policy provides against an alteration and increase of risk, an alteration not incidental to the use of the property will avoid the policy if it increase the risk during the alteration.

Lyman v. State Mut. Fire Ins. Co., 14 Allen, 329.

The insured is responsible for the alteration made by his tenant without his knowledge.

Grosvenor v. Atlantic Ins. Co., 17 N. Y. 391.

Fire Ass'n of Philadelphia v. Williamson, 26 Pa. St. 196.

(d) OTHER INSURANCE.

A provision forbidding other or subsequent insurance is valid without regard to the motive or intention of the party in obtaining the additional insurance.

Pennsylvania Fire Ins. Co. v. Kittle, 39 Mich. 51.

Colby v. Cedar Rapids Ins. Co., 66 Iowa, 577, 24 N. W. 54.

Moulthrop v. Insurance Co., 52 Vt. 123.

Zinck v. Phoenix Ins. Co., 60 Iowa, 266, 14 N. W. 792.

Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112.

The object is to limit the amount of insurance, so that the insured will continue to have an interest in the preservation of the property.

Funke v. Minnesota Farmers' Ins. Ass'n, 29 Minn. 347, 13 N. W. 164.

Church of St. George v. Sun Fire Office Ins. Co., 54 Minn. 167, 55 N. W. 909.

Other insurance in violation of such a provision renders the policy voidable, not void. It may be confirmed and made valid by the acts of the company.

Schreiber v. German-American Ins. Co., 43 Minn. 367, 45 N. W. 708.

Turner v. Meridan Ins. Co., 16 Fed. 454.

Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325.

See New York Cent. Ins. Co. v. Watson, 23 Mich. 486.

In Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, the court said: "An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests, and since there is a provision that in case of an increase of risk which is not assented to or known by the assured, and not disclosed, and the assent of the insurer obtained, the policy should be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such risk."

The provision applies to an assignee of the policy as well as to the party originally insured.

Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433.

If the other insurance is invalid, the stipulation will have no effect on the policy.

Emery v. Mutual, etc., Ins. Co., 51 Mich. 469, 16 N. W. 816.

Knight v. Eureka Fire Ins. Co., 26 Ohio St. 664.

Kennedy v. Insurance Co., 10 Barb. 285.

Allison v. Phoenix Ins. Co., 3 Dill. 480, Fed. Cas. No. 252.

Sutherland v. Old Dominion Ins. Co., 31 Grat. 176.

Funke v. Minnesota Farmers' Ins. Ass'n, 29 Minn. 347, 13 N. W. 164.

To avoid the policy, it is sufficient if the other insurance covers some part of the property.

Mussey v. Atlas Mut. Ins. Co., 14 N. Y. 79.
Sloat v. Royal Ins. Co., 49 Pa. St. 14.

The interests of different persons in the same property may be insured without violating a condition against other insurance.

Acer v. Merchants' Ins. Co., 57 Barb. 68.
Titus v. Glen's Falls Ins. Co., 81 N. Y. 410.

A condition against other insurance is for the benefit of the insurer, and may be waived.

Home Fire Ins. Co. v. Hammang (Neb.) 62 N. W. 883.
Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112.
If the agent knows of the existence of concurrent insurance, the company is estopped to insist that the policy is thereby void.
Phoenix Ins. Co. v. Covey (Neb.) 60 N. W. 12.

Thus, the condition is not broken by a mortgagee's insurance of his interest.

Church of St. George v. Sun Fire Office Ins. Co., 54 Minn. 162, 55 N. W. 909.

(e) USE AND OCCUPATION.

A provision that the premises shall not be occupied so as to increase the risk without the consent of the company is valid, and in the event of its breach the policy becomes void, without regard to the cause or origin of the fire.

Mack v. Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. 343.

In the absence of such a provision, a use and occupation increasing the risk bars recovery only when it was the cause of the loss.

Pim v. Reid, 6 Man. & G. 1.

Loehner v. Home Mut. Ins. Co., 19 Mo. 628.
Breuner v. Insurance Co., 51 Cal. 101.

What change increases the risk is a question for the jury, unless the policy contains a list of hazards which are prohibited.

Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306.

The following have been held not to constitute such change in the use or occupation as to avoid the policy: The making of repairs on a dwelling house; shutting down a factory temporarily; running the engine and certain shafting at night, when the policy recites, "Run by day only;" changing from a dwelling to a boarding house; changing occupants; ceasing to occupy the premises; lighting temporarily with gasoline; mortgaging the insured property.

Brighton Manuf'g Co. v. Reading Fire Ins. Co., 33 Fed. 232.
Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.

(f) USE OF GASOLINE.

Where a policy permits the use of a building for "mercantile purposes" and forbids the use of gasoline, it is avoided by the use of gasoline although necessary to the conduct of business.

Garretson v. Merchants' & Bankers' Ins. Co. (Iowa) 60 N. W. 540.

(g) VACANCY.

A stipulation that if the premises become vacant or unoccupied without the consent of the company indorsed on the policy is valid, and its violation renders the policy voidable without regard to the increase of risk.

Insurance Co. of North America v. Garland, 108 Ill. 220.

Dennison v. Phoenix Ins. Co., 52 Iowa, 457, 3 N. W. 500.

McClure v. Watertown Fire Ins. Co., 90 Pa. St. 277.

Galveston Ins. Co. v. Long, 51 Tex. 89.

Such a provision is waived if the property was vacant when the policy was issued.

Rochester Loan & Banking Co. v. Liberty Ins. Co. (Neb.) 62 N. W. 877.

Anderson v. Manchester Fire Ins. Co. (Minn.) 63 N. W. 241.

A policy on a house and barn, conditioned to be void if the premises become vacant, is void only on the vacancy of both.

German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

A vacancy of three days, incident to a change of tenants, will not avoid policy.

Worley v. State Ins. Co. (Iowa) 59 N. W. 16

Liverpool, etc., Ins. Co. v. Buckstaff, 38 Neb. 146, 56 N. W. 695.

Construction of clause "if the insured building become vacant and unoccupied."

Moriarty v. Home Ins. Co., 53 Minn. 549, 55 N. W. 740.

A policy not containing such a provision is not affected by the vacancy of the building.

Somerset Co. Mut. Fire Ins. Co. v. Usaw, 112 Pa. St. 80, 4 Atl. 355.

Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610, 12 N. W. 874.

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

(h) BUILDER'S RISK.

Provisions regulating the working of mechanics in and about a building, see:

Frost's Detroit Lumber & W. W. Works v. Millers' Mut. Ins. Co., 37 Minn. 300, 34 N. W. 35.

Stetson v. Massachusetts Mut. Ins. Co., 4 Mass. 330.

(i) AGAINST INCUMBRANCE—CHATTEL MORTGAGE.

The violation of a condition avoiding the policy if it be or become incumbered by a chattel mortgage renders the contract void.

First Nat. Bank v. American Cent. Ins. Co. (Minn.) 60 N. W. 345.

In Caplis v. American Fire Ins. Co. (Minn.) 62 N. W. 440, it was held that a lease containing a clause "that said lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes" did not amount to a chattel mortgage within the meaning of a stipulation in the policy that it should "be void if the building become encumbered by a chattel mortgage."

A judgment against the insured is not an "incumbrance" within the meaning of a clause avoiding the policy "if an incumbrance be placed" on the property.

Lodge v. Capital Ins. Co. (Iowa) 58 N. W. 1089.

Hosford v. Insurance Co., 127 U. S. 404, 8 Sup. Ct. 1202.

Green v. Insurance Co., 82 N. Y. 517.

(j) ARBITRATION.

A provision for arbitration of special matters is valid.

Chapman v. Rockford Ins. Co. (Wis.) 62 N. W. 423.
Scott v. Avery, 5 H. L. Cas. 811.
2 May, § 492.

§ 55. INSURANCE UPON LIVES.

(a) HEALTH.

A warranty that the insured is in "good health" means that he is free from any conscious derangement of organic functions.

Goucher v. North Western, etc., Ass'n, 20 Fed. 596.
Morrison v. Wisconsin, etc., Ins. Co., 59 Wis. 162, 18 N. W. 13.
Ross v. Bradshaw (1760) 1 W. Bl. 312.

Such words are to be given their common meaning. Whether the party was in "good health" is a question of fact for the jury.

Swick v. Home Ins. Co., 2 Dill. 160, Fed Cas. No. 13,692.
Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274.
Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119.
Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466.
Continental Life Ins. Co. v. Yung, 113 Ind. 159, 15 N. E. 220.

"Disorder tending to shorten life."

See Watson v. Mainwaring, 4 Taunt. 763; World Mut. Life Ins. Co. v. Schultz, 73 Ill. 586.

(b) OCCUPATION.

The occupation if called for, must be correctly stated.

Dwight v. Germania Life Ins. Co., 103 N. Y. 341, 8 N. E. 654.

United Brethren M. A. Soc. v. White, 100 Pa. St. 12.

A change of occupation, when forbidden by the policy, defeats the insurance.

Stone's Adm'rs v. United States Casualty Co., 34 N. J. Law, 371.

Summers v. United States Ins. Co., 13 La. Ann. 504.

(c) TEMPERATE HABITS.

Provision that the policy shall be void if the insured shall become intemperate, or be guilty of the excessive use of intoxicating liquors, or shall die from the habitual use of intoxicating liquors, or shall die by reason of intemperance in the use of intoxicating liquors, or death shall be caused by the use of intoxicating drinks or opium, will have the stipulated effect.

Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216.

Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582.

Odd Fellows Mut. Life Ins. Co. v. Rohkopp, 94 Pa. St. 59.

Davey v. Aetna Life Ins. Co., 38 Fed. 650.

Bloom v. Franklin Life Ins. Co., 97 Ind. 478.

The burden of proof is on the company to show a violation of such stipulation.

Boisblanc v. Louisiana Equitable Life Ins. Co., 34 La. Ann. 1167.

A warranty of correct and temperate habits by an applicant for life insurance refers to the habits of the assured, and not to occasional practices.

Union Mut. Life Ins. Co. v. Reif, 36 Ohio St. 596.
Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350.

(d) AGE.

The misrepresentation of the age of an applicant will defeat the insurance.

Attorney General v. Ray, 9 Ch. App. 397.
Hartford Life & Annuity Ins. Co. v. Gray, 91 Ill. 159.
Linz v. Massachusetts Ins. Co., 8 Mo. App. 363.

(e) OTHER APPLICATION.

A false answer stating that the applicant has never been rejected as an applicant for insurance avoids the policy.

Edington v. Aetna Life Ins. Co., 100 N. Y. 536, 3 N. E. 315.

(f) MARRIED OR SINGLE.

A warranty that the insured is single when he is married avoids the policy.

Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. 47.
United Brethren M. A. Soc. v. White, 100 Pa. St. 12.

(g) FAMILY PHYSICIAN.

An untrue statement that the applicant has had no medical attendance avoids the policy.

Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 766.

A "family physician" means the physician who usually attends and is consulted by the members of the family in the capacity of physician.

Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (Gil. 473).

(h) SUICIDE.

In the absence of any provision in the policy, suicide will not avoid the policy.

Richards, § 184.
Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.
Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312.
Contra, Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

Death resulting from poison taken by accident or mistake is not within the contemplation of a provision that the policy shall be void if the insured "die by his own hand."

Penfold v. Universal Life Ins. Co., 85 N. Y. 317.
Northwestern Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582.
This is true although the accident was due to intoxication.
Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338.

A policy containing a clause that it shall be avoided if the insured "die by his own hand" is not avoided by self-destruction while insane.

Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224.
Schaffer v. National Life Ins. Co., 25 Minn. 534.
Schultze v. Insurance Co., 40 Ohio St. 217.
Contra, if the act be knowingly and intentionally committed.
Dean v. American Mut. Life Ins. Co., 4 Allen, 96.
Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169.
American Life Ins. Co. v. Isett, 74 Pa. St. 176.
Borradaile v. Hunter, 5 Man. & G. 639.
Clift v. Schwabe, 3 Man., G. & S. 437.

In New York Mut. Life Ins. Co. v. Terry, 15 Wall. 580, Mr. Justice Hunt stated the rule as follows:

"If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the re-

sult of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not with the contemplation of the parties to the contract, and the insurer is liable."

In Massachusetts a policy to be void if the insured shall "die by suicide" is vitiated by such act, although the insured was insane, if it be the result of his will and intention.

Cooper v. Mutual Life Ins. Co., 102 Mass. 227.

Gay v. Union Mut. Life Ins. Co., 9 Blatchf. 142, Fed. Cas. No. 5,282.

Contra, Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. St. 92.

There is no presumption of law that self-destruction arises from insanity. Insanity must be proved by the plaintiff.

Connecticut Mut. Life Ins. Co. v. Akens, 14 Sup. Ct. 155.

Mutual Life Ins. Co. v. Hayward (Tex. Civ. App.) 27 S. W. 36.

Mallory v. Insurance Co., 47 N. Y. 52.

Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731.

Terry v. Life Ins. Co., 1 Dill. 403, Fed. Cas. No. 13,839.

Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414.

Hale v. Life Ind. & Inv. Co. (Minn. Dist. Ct.) 2 Minn. Law J. 316.

A provision that the policy shall be void if the insured commits suicide, "whether sane or insane," is valid.

Pierce v. Travelers' Life Ins. Co., 34 Wis. 389.

Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284.

But the company is still liable if the death was accidental.

Phillips v. Louisiana Equitable Life Ins. Co., 26 La. Ann. 404.

For a general discussion, see 21 Cent. Law J. 378.

(i) MILITARY OR NAVAL SERVICE.

If the insured enters the military or naval service without the consent of the company, and contrary to the provisions of the policy, the policy is avoided.

Welts v. Connecticut Mut. Life Ins. Co., 46 Barb. 412, 48 N. Y. 34.

Ayer v. New England Mut. Life Ins. Co., 109 Mass. 430.

(j) RESIDENCE AND TRAVEL.

Provisions limiting residence and travel within certain limits are valid.

Rainsford v. Royal Ins. Co., 33 N. Y. Super. Ct. 453.

A provision that the assured shall not "pass beyond the settled limits of the United States" means beyond the territorial limits of the nation.

Casler v. Connecticut Mut. Life Ins. Co., 22 N. Y. 427.

How waived, Home Life Ins. Co. v. Pierce, 75 Ill. 426.

Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

Where the permission is granted to go without the fixed limits by a fixed course, such course cannot be departed from without violating the stipulation, even though the course taken be both shorter and safer.

Hathaway v. Trenton Ins. Co., 11 Cush. 448.

(k) DEATH IN VIOLATION OF LAW.

To render this provision binding, the insured must die while engaged in the perpetration of the unlawful act, or as the direct result thereof. Death from some other cause, although following indirectly therefrom, will not come within its meaning.

Cluff v. Mutual Ben. Life Ins. Co., 13 Allen, 308.

Bradley v. Mutual Ben. Life Ins. Co., 45 N. Y. 422.

Bloom v. Franklin Ins. Co., 97 Ind. 478.

TITLE XI.

WAIVER AND ESTOPPEL.

§ 56. DEFINITIONS.

Waiver is the voluntary relinquishment of a known right.

When one party has, by his representations or conduct, induced the other party to a contract to give him an advantage which it would be against equity and good conscience for him to assert, the courts will not permit him to avail himself of that advantage.

Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520.
Union Mutual Ins. Co. v. Wilkinson, 13 Wall. 222.
Bigelow, Estop.

§ 57. WAIVER REQUIRES KNOWLEDGE.

Waiver implies knowledge, and the insured, to claim a waiver, must be able to show "knowledge on the part of the insurer of the act or omission on the part of the insured which he is claimed to have dispensed with or waived. The knowledge on a waiver need not be expressly shown, but may be implied, when the act of commission or omission is of such a character as fairly to preclude the idea of ignorance."

2 Biddle, § 1053.
Miller v. Union Cent. Life Ins. Co., 110 Ill. 102.

McMartin v. Continental Ins. Co., 41 Minn. 198, 42 N. W. 934.

Stevens v. Queen Ins. Co., 81 Wis. 335, 51 N. W. 555.

Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326.

Mershon v. National Ins. Co., 34 Iowa, 87.

Illustrations—Delivery of policy, without requiring prepayment of premium, Dilleber v. Life Ins. Co., 76 N. Y. 567; Elkins v. Susquehanna M. F. Ins. Co., 113 Pa. St. 386, 6 Atl. 224.

When it is known that the risk is prohibited by the by-laws, Merchants' & Manufacturers' Ins. Co. v. Curran, 45 Mo. 142.

That the premises are vacant, Haight v. Continental Ins. Co., 92 N. Y. 51.

Accepting premises after notice of the infirmity, Clapp v. Massachusetts Ben. Ass'n, 146 Mass. 519, 16 N. E. 433.

§ 58. LIMITATIONS IN POLICY.

The various provisions which insurance companies have placed in their policies for the purpose of limiting or altogether taking away the power of agents to waive conditions in the policy may be classified as follows:

1. Those forbidding agents to waive except in a specified manner; as, for example, by writing indorsed on the policy. The courts are divided as to the validity of such provisions.

Held valid in:

Carlin v. West Assur. Co., 57 Md. 515.

Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353.

Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731.

Held invalid in:

Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408.

Stevens v. Citizens' Ins. Co., 69 Iowa, 658, 29 N. W. 769.

Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

2. Those forbidding agents to waive except subject to the approval of certain officers of the company, and prescribing the manner in which such waiver may be made.

McCormick v. Springfield F. & M. Ins. Co., 66 Cal. 361, 5 Pac. 617.

Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

This provision is valid in:

McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 21 Atl. 80.

Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34.

Van Allen v. Farmers' Joint-Stock Ins. Co., 64 N. Y. 469.

3. Those placing an absolute prohibition upon the power of agents to waive. Such a provision is binding, but the insurer may be estopped from asserting it by a course of conduct manifestly inconsistent with such an intention to observe it.

Franklin Ins. Co. v. Sefton, 53 Ind. 380.

Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61, 18 N. E. 601.

A provision that "agents are not authorized to make, alter, or discharge contracts" has been held not to apply to a general agent.

Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y. 625.

In Ruthven v. American Fire Ins. Co. (Iowa) 60 N. W. 663, the court said:

"The policy provides, in substance, that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto. There is some conflict in the authorities as to whether this kind of an agree-

ment or provision is valid or not. But we think the decided weight is in favor of the proposition that it is.

Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010.
Weidert v. Insurance Co., 19 Or. 261, 24 Pac. 242.
Cleaver v. Insurance Co., 71 Mich. 414, 39 N. W. 571.
Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31.
Smith v. Insurance Co., 60 Vt. 682, 15 Atl. 353.
Walsh v. Insurance Co., 73 N. Y. 5.
Hankins v. Insurance Co., 70 Wis. 1, 35 N. W. 34.
Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455.
Clevenger v. Insurance Co., 2 Dak. 114, 3 N. W. 313.
Enos v. Insurance Co., 67 Cal. 621, 8 Pac. 379.
Kyte v. Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518.
And many other cases cited in the authorities.

"Whether this is the correct rule or not, it is the one adopted by this court in the recent case of Kirkman v. Insurance Co. (Iowa) 57 N. W. 953, decided since this cause was tried in the lower court. The principle was also recognized in Zimmermann v. Insurance Co., 77 Iowa, 691, 42 N. W. 462; Wood Mowing Mach. Co. v. Crow, 70 Iowa, 340, 30 N. W. 609. We do not mean to be understood as holding that the company could not itself, through its general agents, waive these provisions of the policy. What we do hold is that the provisions we have quoted are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had or are presumed to have had knowledge, and that any agreement or waiver which they attempted to make would not be binding upon the company, because not authorized."

A provision that no waiver shall be binding except it be in writing, plainly expressed in the policy, and the like, has been held, like the other clauses, not to prevent a parol waiver by the insurer, as the power to insert such a stipulation cannot be greater than the power to disregard it.

2 Biddle, 1081.

Gans v. St. Paul Fire & Marine Ins. Co., 43 Wis. 108.
McFarland v. Kittanning Ins. Co., 134 Pa. St. 590, 19 Atl. 796.
Anderson v. Manchester Fire Ins. Co. (Minn.) 63 N. W. 241.

A local agent, who is simply authorized to fix rates of insurance, and countersign and deliver policies, subject to the approval of the company, has no authority to waive a provision of the policy that, when a loss occurs, "the assured shall forthwith give notice of said loss to the company," etc.

Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.
Edwards v. Lycoming Co. Mut. Ins. Co., 75 Pa. St. 378.
2 Biddle, § 988.

§ 59. ESTOPPEL BY CONDUCT AFTER LOSS.

The insurer may be estopped to deny liability, by its acts after the loss.

(a) GENERAL DENIAL OF LIABILITY.

Thus, a general denial of liability waives notice and proof of loss.

2 Biddle, § 1136.
2 May, § 464.
Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.
Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325, 30 N. W. 585.
Protective Union v. Whitt, 36 Kan. 760, 14 Pac. 275.

A provision in the policy relating to waiver may be waived.

Haight v. Continental Ins. Co., 92 N. Y. 51.
See Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326.

In Dwelling House Ins. Co. v. Brewster (Neb.) 61 N. W. 746, the court said: "One of the defenses relied on by the

company was the fact that the insured had not furnished the proofs of the loss required by the terms of the policy of insurance. Whether this was true or not was immaterial, as the company denied that it was bound to pay the loss, claiming that the policy was not in force at the time of the destruction of the property. This was a waiver of the requirements of the proofs of loss."

(b) REFUSAL ON SPECIFIC GROUNDS.

Where an insurance company puts its refusal to pay a loss on another ground, it is a waiver of objections to insufficiency in the proofs of loss required by the policy.

Hand v. Insurance Co. (Minn.) 59 N. W. 538.
Newman v. Insurance Co., 17 Minn. 123 (Gil. 98).
Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393).
The authorities are collected in Omaha Fire Ins. Co. v. Dierks (Neb.; 1895) 61 N. W. 740.
German Ins. & Sav. Inst. v. Kline (Neb.; 1895) 62 N. W. 857.

(c) REFUSAL TO SEND BLANKS FOR PROOFS.

A refusal to send to the insured the customary blanks has been held a waiver of proofs.

Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281.
Effect of conduct subsequent to the loss. See:
Allemania Fire Ins. Co. v. Pitts Exposition Soc. (Pa. Sup.) 11 Atl. 572.
Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.
Fisher v. Crescent Ins. Co., 33 Fed. 544.
Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325, 30 N. W. 585.
Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149, 4 Atl. 8.

Continental Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242.

Niagara Fire Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385.

The condition of a policy requiring proofs of loss within a specified time is waived where, after notice of the loss, the company's adjuster examines the circumstances of the fire, takes possession of the books of insured, and, with his help, makes an estimate of the amount of the loss.

Home Fire Ins. Co. v. Hammang (Neb.) 62 N. W. 883.

TITLE XII.

ASSIGNMENT, RIGHTS OF BENEFICIARY.

There is a difference at common law between life and fire and marine insurance contracts with respect to their assignability. This difference grows out of the common-law rule regarding the assignability of causes of action, and is also affected by the peculiar nature of marine insurance and life insurance.

§ 60. FIRE INSURANCE.

(a) NOT ASSIGNABLE.

Fire insurance contracts are not assignable without the consent of the insurer. Policies ordinarily contain a provision for their assignment with the written consent of the company.

As said in White v. Robbins, 21 Minn. 370: "Policies of insurance are not in their nature assignable, and unless made assignable at the pleasure of the insured, and by him assigned, or unless his assignment is assented to by the insurer, the effect of a sale by the insured of the property insured is to put an end to the contract of insurance. The vendor of the property cannot recover on the policy if the property is burnt, because he has sustained no loss. The

purchaser cannot recover because he has no contract with the insurer."

1 Biddle, § 261.
2 May, c. 19.
2 Wood, c. 10, § 361.

(b) EFFECT OF ASSIGNMENT WITH CONSENT.

When the contract is assigned with the consent of the insurer, there is a complete novation. A new contract arises, which cannot be defeated by the subsequent acts of the assignor or by any acts before the assignment of which the insurer had notice.

Breckinridge v. American Cent. Ins. Co., 87 Mo. 62.
Continental Ins. Co. v. Munns, 120 Ind. 30, 22 N. E. 78.
Ellis v. State Ins. Co., 68 Iowa, 578, 27 N. W. 762.
2 May, § 378A.
1 Biddle, § 321.

But, where the contract or policy is assigned to a mortgagee as collateral security, it will be avoided by a subsequent breach by the assignor. No new contract is created.

Buffalo Steam-Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 401.
Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151.
Newman v. Home Ins. Co., 20 Minn. 422 (Gil. 378).
State Mut. Fire Ins. Co. v. Roberts, 31 Pa. St. 438.
Lycoming Fire Ins. Co. v. Storrs, 97 Pa. St. 354.
Hazard v. Franklin Mut. Fire Ins. Co., 7 R. I. 429.
Swensen v. Sun Fire Office, 68 Tex. 461, 5 S. W. 60.
Pupke v. Resolute Fire Ins. Co., 17 Wis. 378.
Carpenter v. Providence Washington Ins. Co., 16 Pet. 495.
Contra:
Pollard v. Somerset Mut. Fire Ins. Co., 42 Me. 221.
Barnes v. Union Mut. Fire Ins. Co., 45 N. H. 21.
Charlestown Ins. & Trust Co. v. Neve, 2 McMul. (S. C.) 237.

The mortgagee may protect himself by a stipulation in the policy.

Hartford Fire Ins. Co. v. Olcott, 97 Ill. 441.

Davis v. German-American Ins. Co., 135 Mass. 251.

See a discussion in 1 Biddle, § 321.

(c) ASSIGNMENT AFTER LOSS.

After loss the debt may be assigned without the consent of the insurer. The assignee will, however, take it subject to all offsets and equities which existed against the assignor.

Benefant v. Insurance Co., 76 Mich. 654, 43 N. W. 682.

2 May, § 386.

§ 61. LIFE AND MARINE POLICIES.

(a) ASSIGNABLE.

Life and marine contracts are assignable without the consent of the insurer.

Bliss, § 328.

1 Biddle, § 268.

1 Arnould, p. 107.

(b) INTEREST OF ASSIGNEE.

As to the necessity for an insurable interest in the assignee, see

"Insurable Interest," tit. IV. § 18d.

(c) VESTED INTEREST OF BENEFICIARY.

When the insured is not also the beneficiary, there cannot be an assignment without the consent of the beneficiary.

As said in Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41:

"It is the general rule that a policy and the money due under it belong, the moment it is issued, to the person or

persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named."

Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771.
Allis v. Ware, 28 Minn. 166, 9 N. W. 666.
Pingrey v. National Life Ins. Co., 144 Mass. 374, 11 N. E. 562.
Holland v. Taylor, 111 Ind. 121, 12 N. E. 116.
Splawn v. Chew, 60 Tex. 532.
Weisert v. Muehl, 81 Ky. 336.
Fowler v. Butterly, 78 N. Y. 68.
Aetna Ins. Co. v. Mason, 14 R. I. 583.
Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919.
Cooke, § 74.
2 May, § 399L.
Right of an insolvent debtor to insure his life for the benefit of his wife. See:
Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, and article in 25 Am. Law. Rev. 185.
Cooke, § 74.

(d) RESERVATION OF RIGHT TO ASSIGN.

The right to assign the policy or change the beneficiary without the consent of the beneficiary may be reserved by statute, by law, or by a provision in the policy.

Weisert v. Muehl, 81 Ky. 336.
Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657.
Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094.
Union Mut. Life Ass'n of Battle Creek v. Montgomery, 70 Mich. 587, 38 N. W. 588.
Cooke, § 75.
2 May, § 399M.

APPENDIX.

THE STANDARD POLICY.

The Minnesota Law of 1895, contains the following provisions relative to the form and conditions of a fire policy:

No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form herein set forth except as follows, to wit:

First—A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at ——."

Second—A company may print or use in its policies printed forms of description and specification of the property insured.

Third—A company insuring against damage by lightning may print, in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance the words "whether by fire, lightning, or both."

Fourth—A company incorporated or formed in this state may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this state, provided that the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such a way as to affect the question of loss to be appended to the policy by a slip or rider, as hereinafter provided.

Fifth—The blanks in said standard form may be filled in print or in writing.

Sixth—A company may print upon policies issued in compliance with the preceding provisions of this section the words "Minnesota standard policy."

Seventh—A company may write upon the margin or across the face of the policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; provided, that no provision shall be attached to or included in said policy limiting the amount to be paid in case of total loss on buildings to less than the amount of insurance on the same, and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to-wit:

[*Minnesota Standard Policy.*]

No. ——. $——.

(Corporate name of the company or association: its principal place or places of business.)

In consideration of —— dollars to be paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure —— and —— legal representatives against loss or damage by fire, to the amount of —— dollars.

(Description of property insured.)

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of ——, beginning on the —— day of ——, in the year eighteen hundred and ——, at noon, and continuing until the —— day of ——, in the year eighteen hundred and ——, at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except in case of total loss on buildings, but not to include loss or damage caused by explosion of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if the assured now has or shall hereafter make any other insurance on the said property without the assent of the company, or if without such assent the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, or if, without such assent, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the property shall be sold or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment running in whole or in part extra

time, except that such establishment may run in whole or in part extra hours not later than nine o'clock p. m., or if such establishment shall cease operation for more than thirty days without permission in writing endorsed hereon, or if the insured shall make any attempt to defraud the company, either before or after the loss, or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, or if camphene, benzine, naphtha or other chemical oils or burning fluids shall be kept or issued by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes, to be filled when cold, by daylight, and with oil of lawful fire test only.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, except in case of total loss on buildings the value of said buildings need not be stated, the interest of the insured therein, all other insurance thereon in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided, or replace the property with other of the same kind and goodness, or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition.

It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater premium of loss, except in case of total loss on buildings, sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it to the extent of the amount so paid all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss

on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured. And whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgagee, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debts thereby secured.

This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this state unless commenced within two years from the time the loss occurs.

In witness whereof, the said —— company has caused this policy to be signed by the president and attested by its secretary (or by such proper officers as may be designated), at their office in ——.

Date, ——.

When two or more companies (each having previously complied with the laws of this state) unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premium to be paid to each company, and the proportion of liability which each company agrees to assume. And in the printed conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to the companies issuing such policy.

The law also contains the following provisions and restrictions:

[1.] No fire or fire and marine insurance company shall make any conditions or stipulations in its insurance contract concerning the

court of jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than one year after the cause of action accrues.

[2.] Any provision, contract or stipulation contained in any contract or policy of insurance issued or made by any fire insurance company, association, syndicate or corporation, insuring any property within this state, except risks equipped by automatic sprinklers, whereby it is provided or stipulated that the assured shall maintain insurance on any property covered by the policy to the extent of eighty per cent on the value thereof, or to any extent whatever, and any provision or stipulation in any contract or policy of insurance, that the insured shall be an insurer of the property insured to any extent, and any provision or stipulation in any such contract or policy to the effect that the insured shall bear any portion of the loss on the property insured, are hereby declared to be null and void, and the liability of the company, syndicate, association or corporation issuing the policy shall be the same as if no such agreement, stipulation or contract were contained in such policy.

[3.] Nor shall any such insurance company insert any condition, stipulation or agreement in any policy of insurance requiring a certificate from any notary public, justice of the peace, or other magistrate or person, as to anything whatever connected with such insurance or loss, and any such condition or stipulation shall be void.

[4.] Any person, company or association hereafter insuring any building or structure against loss or damage by fire, lightning or other hazard by a renewal of a policy heretofore issued or otherwise, shall cause such building or structure to be examined by the insurer or his agent, and a full description thereof to be made, and the insurable value thereof to be fixed by the insurer or his agent, the amount of which shall be stated in the policy of insurance.

[5.] In the absence of any change increasing the risk, without the consent of the insurer, and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid; and in case of a partial loss the full amount of the partial loss shall be paid, and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy, but in no case shall the insurer be required to pay more than the amount mentioned in the policy;

[6.] Provided, that, in the absence of fraud, the burden of proof to show an increase of risk by any change in the ownership or con-

dition of the structure or building upon which insurance is effected, either before or after loss arises, shall be upon the insurer, anything in the application or the policy of insurance to the contrary notwithstanding.

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