

NEW JERSEY COURT OF ERRORS.

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SAMUEL F. WARE,	}	ON ERROR. PLAINTIFF'S POINTS.
Plaintiff,		
and		
THE MILLVILLE MUTUAL MARINE AND FIRE INSURANCE COMPANY,		
Defendant.	}	

D. J. PANCOAST,  
Atty of Plaintiff.

## FIRST.

No legal assessment was shown at the trial.

The Company relied upon the existence of a legal assessment to establish a forfeiture for non-payment, and the burden of proof was on the company to show such an assessment made within and according to the provisions of its charter and by-laws. Such proof was not made.

10 The charter or constitution of the Company was not offered in evidence, and is not before this court, and without it no determination can be had as to the power of the Company to make an assessment (*Kent vs. City of Charlestown*, 2 Grey, 281. *The American Insurance Company vs. Schmidt*, 19 Iowa, 502. *Pacific Mutual Insurance Company vs. Giese*, 49 Mo., 329. *Columbia Fire Insurance Company vs. Kenyon*, 8 V. page 38. *Wood on Fire Insurance*, 872, &c). The assessment was made according to a system of double rates—five per cent. on single and ten per cent. on double notes, page 4, line 21,  
2 page 6, lines 1 to 20; and unless the charter contains a provision for different rates, all notes should have been assessed at one rate. (*Bangs vs. Duckinfield*, 18 N. Y., 599.)

The Company, during the period covered by the assessment, relied upon, did a double business of two distinct kinds, one on the mutual plan and one on the usual non-mutual or stock plan (page 8, line 20 to line 20 page 9).

30 No authority is shown for such a mixed business, and no separate account was ever kept of each kind of business, so that what part of the losses the assessment of \$57,000 was made to pay arose upon mutual policies, and what part arose upon other policies on the stock plan is not ascertainable (page 9, lines 8 to 20). This double business brought the company into insolvency, and it has since abandoned its non-mutual business on the stock plan (page 16, line 6, &c., page 7, line 30 to line 5 page 9).

It assessed enough to pay all the losses on both kinds of policies and have a surplus of \$30,000 "to do a strictly mutual business with in the future," page 37, line 25, &c., page 39 lines 10 to 25. By section 15 of the Company's By-laws page 38, it was required to keep a separate and distinct account of the losses by fire on buildings, and that branch of its business was not to be affected in any way by marine losses on mutual policies and no assessment was ever to be made on building policies, to pay for losses on marine policies, which regulation does not appear to have been regarded at all. The facts are that the company made the assessment of \$57,000 to pay all sorts of losses suffered on both kinds of policies. The defendant being a holder of a mutual policy could only be assessed for losses on buildings insured on the same plan. 10

### SECOND.

The right of the Company to forfeit the policy for neglect to pay the assessment on the sixteenth day of August was waived and never exercised. 20

Its advertisement printed in twenty-five newspapers stated it would pay all honest losses without seeking to evade them on technical grounds, page 38, line 10; page 17, lines 20 to 30. Of three thousand policy holders assessed, three hundred failed to pay on the sixteenth of August, and were sued for the over due assessments, and only two of the number were forfeited by the Company, and they were forfeited simply because the risks were undesirable, page 10, line 33 and page 11.

The assessment on the plaintiff's policy was \$20, to be paid August 16th, 1880. 30

September 7th, 1880, N. Woolery, the agent of the Company, wrote plaintiff demanding payment of his assessment, page 40, line 20. September 11th he paid him \$10 on account. September 13th Woolery wrote him the balance must be paid soon, page 40 line 30, &c. October 21st Woolery wrote him demanding payment of the bal-

ance, to be made to him at Cape May, on the 23d, where he would be to receive it, page 41, line 8, &c. On the 23d plaintiff went to Cape May to pay the balance, but Woolery was not there to receive it according to his appointment, page 28, line 9, &c., page 33, lines 20 to 31. On the next day, Sunday, the 24th of October, 1880, the damage by fire occurred, page 34, line 9, &c., which it is admitted caused an honest loss of \$1,480, page 3. The next day after the fire, Monday, the 25th, he sent \$10,  
 10 the balance of the assessment, to the office of the Company, where it was received by Woolery, its agent, pages 20 and 21, page 25, line 28, &c. The Company has kept the money and refused to pay the loss, page 15, line 27, &c., page 16, &c.

These with other facts relied upon to establish a waiver were, to say the least, sufficient to carry the case to the jury, and the court below was clearly wrong in not submitting to the jury, with proper instructions, the two  
 20 questions of facts upon what the case turned, first, whether or not the assessment was legal, and second, whether or not the right of forfeiture for non-payment in time was not waived.

The following authorities are relied upon to sustain this point:

Farmers' Insurance Company vs. Bowen, 40 Mich., 149,  
 Knickerbocker Life Insurance Company vs. Norton.  
 Supreme Court U. S., 5 Reporter, 385.

30 Erdman vs. Mutual Insurance Company, &c., Supreme Court of Wis., 6 Reporter, 606.

The Cotton States Life Insurance Company vs. Lester,  
 Supreme Court of Ga., 8 Reporter, 141.

Robinson vs. Mutual Life Insurance, 7 Reporter, 358.

The Girard Life Insurance Company vs. Mutual Life,  
 11 Reporter, 412.

State Insurance Company vs. Maackins, 9 V. p. 569, &c.

## New Jersey Court of Errors and Appeals.

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SAMUEL F. WARE,	}	ON ERROR.	10
VS.			
THE MILLVILLE MUTUAL MARINE			
AND FIRE INSURANCE COMPANY.			

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### STATE OF THE CASE.

This suit was brought by Samuel F. Ware against the Millville Mutual Marine and Fire Insurance Company, to recover an admitted loss of fourteen hundred and eighty dollars on a policy of fire insurance, under seal dated the twenty-seventh day of March, A. D. eighteen hundred and seventy-eight, insuring him for ten years against loss by fire to the extent of two thousand dollars on property set out in the policy as follows: 20

Thirteen hundred dollars on frame dwelling house.  
One hundred and fifty dollars on household and kitchen  
furniture contained therein.

One hundred dollars on a frame shop.

One hundred dollars on carpenter's and farming tools  
in shop and barn.

Three hundred and fifty dollars on two barns and  
sheds to adjoin, situate on the road leading from Cape  
May City to Cape May Court House, in Lower Township,  
10 Cape May county, New Jersey.

The declaration is in covenant and sets out the  
terms of the policy in full.

There are two pleas to the declaration, *non est factum*  
and special plea as follows: "And for a further plea in  
this behalf the said defendants, by leave of the court here  
for this purpose first had and obtained, crave oyer of  
the said deed, poll or policy of insurance, and it is read  
to them, and they also crave oyer of the conditions upon  
which the said company made insurances, and of the  
20 charter of said company, and of the by-laws of said  
company, adopted in pursuance and by the authority of  
said charter, and they are severally read to them; and  
defendants thereupon say that the plaintiff ought not to  
have or maintain his aforesaid action against them, be-  
cause that in and by the printed conditions in said policy  
of insurance, and upon which the said defendants make  
insurances, it is expressed and declared in section thirteen  
of said conditions as follows: All persons insured in  
this company shall pay a ratable proportion of all  
30 assessments which may from time to time be ordered  
by the directors. And in case of failure so to do for  
thirty days after publication thereof the insured shall  
forfeit all rights which may have accrued to him as a  
member of the company, and the policy of insurance  
shall be void, and he will also forfeit the whole of the

premium note which may be forthwith sued for and recovered. But if the whole amount of said note is received by the company the policy will then stand renewed and remain in force until the end of the term limited therein.

And the said defendants aver and are ready to verify, that on the twenty-first day of June, eighteen hundred and eighty, the directors of the said Millville Mutual Marine and Fire Insurance Company, the defendant company herein, did order an assessment of five per cent. to be paid by all persons insured in said company upon the premium notes severally given by the insured to the company, pursuant to the seventh section of the charter thereof, and did make due publication thereof as required, and did give due notice of said assessment to the said plaintiff herein, and said plaintiff did not pay his ratable proportion of said assessment within thirty days after publication thereof, or at any other time before any loss on the policy, whereby the plaintiff forfeited all rights which may have accrued to him as a member of the company, and the said policy of insurance became void. 10 20

And the said defendants aver and are ready to verify that the whole amount of the premium note of the said plaintiff which thereby became forfeited has not been received by the said Millville Mutual Marine and Fire Insurance Company, nor the said policy thereby renewed and continued in force until the end of the term limited therein.

And the said defendants aver and are ready to verify, that the said plaintiff having neglected to pay his said assessments for thirty days after publication thereof and notice aforesaid, neither the Directors nor Executive Committee of the said Company, in their discretion as authorized by the twenty-second section of the by-laws of said 30

Company, before any loss on the policy, or at any other time permitted the assessment to be paid, with the addition of twenty per cent. within sixty days after the expiration of the thirty days aforesaid, and the further addition of ten per cent. for every thirty days more, or any part thereof, so that the said policy should stand renewed, and the same, together with the premium note, remain in force as if the said assessment had been paid in due time, nor have the Directors or Executive Committee of  
 10 the said Company, or any person or persons for them or in their behalf, or by the authority or with knowledge of the said Millville Mutual Marine and Fire Insurance Company, done or permitted to be done any act or thing to alter, waive, modify or avoid any of the terms and conditions of Insurance entered into between the said Millville Mutual Marine and Fire Insurance Company and the said plaintiff by the said policy of Insurance and the conditions thereof.

Wherefore the said The Millville Mutual Marine and  
 20 Fire Insurance Company pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

JAMES H. NIXON,  
 Attorney of Defendants.

To the special plea is a replication as follows: "And the said plaintiff as to the said plea of the said defendant by it secondly above pleaded in bar, says that he, by reason of anything by the said defendant in that plea  
 30 above alleged, ought not to be barred from having and maintaining his aforesaid action against it; because he says that the said plaintiff, after the making of the deed, poll or policy of insurance, did not avoid the same and forfeit all his rights thereunder in manner and form as the said defendant has in its said plea above alleged; and further says that the said defendant, of its own

wrong and without the cause alleged in its said plea, committed the said breach of covenant in manner and form as the plaintiff has in his said declaration alleged, and this the said plaintiff prays may be enquired of by the county, &c.

DAVID J. PANCOAST,  
Attorney of Plaintiff.

Following is the bill of exceptions which sets forth all the evidence of both parties at the trial upon which the court directed a verdict for the defendants. 10



# NEW JERSEY SUPREME COURT.

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SAMUEL F. WARE,

VS

THE MILLVILLE MUTUAL MARINE

AND FIRE INSURANCE COMPANY.

IN

COVENANT.

BILL OF

EXCEPTIONS.

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Be it remembered that on the twenty-seventh day of September, A. D. eighteen hundred and eighty-one, at our Circuit Court holden at Cape May Court House, in and for the county of Cape May, before the Honorable 20 Alfred Reed, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, the said cause came on, to be tried upon the issue joined between the parties, before a jury duly empanelled and sworn to try the same, and thereupon the said cause was opened by the plaintiff, and proceeded as follows:

R. L. HOWELL, sworn and examined.

By Mr. Pancoast :

Ques. Are you an officer of the Mutual Fire and Marine Insurance Company, of Millville?

Ans. I am.

Ques. What position do you hold?

Ans. Secretary of the company.

10 Ques. How long have you been Secretary?

Ans. Since the 10th of July, 1880.

Ques. Whose place did you fill?

Ans. Furman L. Mulford's.

Ques. Before you filled that position what other office did you occupy?

Ans. I was not connected with the company previous to that time except for about a month as Mr. Mulford's clerk.

20 Ques. Are you familiar with the policies of the company?

Ans. Yes, sir.

Ques. Are you familiar with the seal of the company?

Ans. Yes, sir.

Ques. Look at that and see if that is a policy of the company?

(Policy shown witness.)

Ans. Yes, sir.

Ques. Is that policy signed by the President and attested by the Secretary?

30 Ans. It is.

Ques. Is Mr. F. L. Mulford deceased?

Ans. He is dead.

Ques. Is that his signature?

Ans. Yes, sir.

Ques. It is a policy made in favor of Samuel F. Ware. State what the date of the policy is.

Ans. The date of the policy is March 27th, 1878,  
amount \$2,000.

Ques. For what term?

Ans. For a term of ten years.

Ques. Is the property insured described there?

Ans. Yes, sir. (The witness here read a description of  
the property.)

Ques. Has Mr. Ware had a loss under this policy?

Ans. I was so informed, and so believe.

Ques. Did he make his proofs and meet the require- 10  
ments of your company?

Ans. He did.

Ques. Have you those proofs?

Ans. Yes, sir.

Ques. Will you produce them?

Ans. Yes, sir. Those are the original proofs sent us.  
(Paper produced upon call.)

Ques. At the time did you make any objection?

Ans. No, sir.

Ques. They were produced upon call? 20

Ans. Yes, sir.

Ques. Was the property destroyed to the value of  
\$1,480?

Ans. So far as I was informed. I heard no objection  
made to the value.

Ques. As to the loss?

Ans. No, sir.

Ques. Has the company refused to pay it?

Ans. Yes, sir.

The policy is offered in evidence. 30

The amount of the loss is admitted and also that it was  
part of the property insured.

The plaintiff rests.

## DEFENDANT'S EVIDENCE.

R. L. HOWELL, recalled and examined on behalf of the defendant.

By Mr. Nixon :

Ques. You stated a moment ago that you are Secretary of the Company defendant.

Ans. Yes, sir.

10 Ques. Was there an assessment made by this company at any time last year ?

Ans. There was.

Ques. When was it made ?

Ans. It was declared on the 21st of June, 1880.

Ques. By a full board of directors ?

Ans. Yes, sir.

Ques. Have you a copy of the minutes with you ?

Ans. Yes, sir.

20 Ques. Please produce the minutes and turn to the resolution. What per cent. was it ?

Ans. It was an assessment of five per cent. on what we call double notes and ten per cent. on single notes, such as Mr. Ware's.

Ques. Read the resolution.

30 Ans. "*Resolved*, That an assessment of 10 per cent. on those premium notes held by the Millville Mutual Marine and Fire Insurance Company, in which the face of the note is ten times the cash premium paid, (exclusive of policy and survey,) which are known as single notes, and one of 5 per cent. on those in which the face of the note is twenty times the amount of cash premium paid, known as double notes, be and is hereby ordered by the Directors for the purpose of paying losses and re-insuring our outstanding annual risks in pursuance of the requirements of the Secretary of State, and the order of the Chancellor."

Ques. Are those the true minutes of the Company?

Ans. Yes, sir.

Ques. Is that the minute book of the Company?

Ans. Yes, sir.

Ques. Who was the Secretary of the Company?

Ans. F. L. Mulford, who is deceased, was, at that time.

Ques. Were you present when that minute was adopted?

Ans. Yes, sir.

Ques. Do you know those are true minutes? 10

Ans. Yes, sir.

Ques. Did you write them?

Ans. I drew the resolution; the minutes were copied in the hand of the assistant secretary.

Ques. Are the names of those who voted for the resolution given there?

Ans. N. Stratton, L. Mulford, Smith, Francis—

Ques. How many directors are there?

Ans. Nine.

Ques. Did the majority of the directors vote for that 20 resolution?

Ans. It was a unanimous vote.

Ques. Have you an official copy of the by-laws of the Company?

Ans. I have in the minute book.

Ques. Turn to them. Is that the original minute book of the Company? (Book produced.)

Ans. Yes, sir; these are the original by-laws adopted. There were no amendments made since.

Ques. Are the sections of the by-laws that I read a 30 moment ago found in the policy?

Ans. Yes.

Ques. After that assessment was there due publication of it?

Ans. There was.

It is agreed that due publication has been made.

By Mr. Nixon :

Ques. Explain what you mean by double notes and single notes as expressed in the resolution ?

10 Ans. At the commencement of the company doing business notes were taken twenty times as large as cash premiums. This made the notes very heavy and was an objection to some people in insuring. To avoid this cause I found a smaller amount of note would amply protect the policy holder, and in May, 1872, the directors passed a resolution that from and after that date that notes instead of being twenty times the amount of the premium should be only ten times, and directed in case of assessment those notes should be reduced to single notes which was also by this resolution.

Ques. What was the date of Mr. Ware's insurance ?  
When was it effected ?

Ans. In 1878.

Ques. His was one of the smaller notes ?

20 Ans. Yes, sir ; single notes ten per cent. assessment.

Ques. Was that assessment paid by Samuel F. Ware ?

Ans. Not prior to the loss ; not at the time it was due at all.

Ques. It was due when ?

Ans. On August 16th, or before.

Ques. When August 16th came around had Mr. Ware paid any of that assessment ?

Ans. No, sir.

Ques. For what was this assessment levied ?

30 Ans. To pay the losses of the company by fire.

Ques. State when these losses occurred and whether it was during the life of this policy of Samuel F. Ware.

Ans. During 1879 and 1880.

Ques. Was this assessment levied on Mr. Ware's note, in common with others, to pay any debts or liabilities existing before he gave his premium note to the company ?

Ans. No, sir.

Ques. Was there any excess raised by this assessment over and above what was required to meet the liabilities of the company?

Ans. No, sir; not any excess of the loss of the Fire Department.

Ques. Then the assessments made and asked of Mr. Ware were for liabilities which occurred while he was a member, and during the life of this policy, and was all used for the liabilities of the company? 10

Ans. Yes, sir.

Ques. When was the full amount of this assessment paid?

Ans. Mr. Ware paid \$10 on or about September 12th; it was received in the office September 13th. The balance was paid by a gentleman sent by him on the Monday morning after the fire; the fire, according to the proof of loss, occurred on Sunday. On the next morning Mr. Sawyer called at the office and paid the balance of Mr. Ware's assessment. 20

Ques. Had you or the company any notice of that fire when that payment was made?

Ans. Not the slightest.

Ques. All the loss claimed by Mr. Ware of the company had occurred before the assessment was paid?

Ans. Yes, sir.

A recess was then taken until 2.30 P. M.

Cross-examined: 30

By Mr. Pancoast:

Ques. State whether or not at the time this policy was issued by the company it was insolvent?

Ans. It was not, sir.

Ques. Was it before that time?

Ans. No, sir.

Ques. Was it afterwards?

Ans. It had not money to pay its liabilities.

Ques. When did it first reach that condition?

Ans. About the commencement of the year 1879; early in 1879.

Ques. At the date of the policy what was the amount of risks in the aggregate outstanding?

10 Ans. I don't know that I can give you that information in that shape. I can give you what probably will cover the same ground. I can give you the amount at the first of the year and in June, but not at the exact date of the policy.

Ques. I do not want that. At the date that policy was issued what amount of money had the company on hand to pay its losses with?

Ans. \$3,436.32 in the treasurer's hands in money.

By the Court:

20 Ques. What is the date of the policy?

Ans. The date of the policy is March 27, 1878.

By Mr. Pancoast:

Ques. What were the amounts of the losses of the company between the date of the policy and the date of Mr. Ware's loss?

Ans. In round numbers \$205,000.

Ques. That was the amount of these losses?

30 Ans. Yes, sir.

Ques. Did you admit liability for all these losses?

Ans. Those are losses paid; yes, sir.

Ques. What was the amount of loss from the date of the policy up to the date of the assessment?

Ans. \$190,000.

Ques. What was the ascertained loss which assessment was made to pay?

Ans. \$57,000.

Ques. Was this all loss upon Mutual policies?

Ans. No, sir.

Ques. What part of the \$57,000 were on policies that were not mutual?

Ans. That is a question I could not answer with any definiteness.

Ques. What was the gross amount of the assessment?

Ans. The gross amount of the assessment was \$57,000.

Ques. You cannot tell what fraction of that was to pay 10  
for losses not upon mutual policies?

Ans. I could not with anything that would be evidence.  
I can give an approximation.

Ques. You were doing a dual kind of business?

Ans. Yes, sir.

Ques. Part of the business was on the mutual plan  
and part on the stock plan?

Ans. Yes, sir. The accounts were not kept separate,  
except the tenth year the fire was kept by itself,—the  
accounts are not separated in that way. 20

Re-examined :

By Mr. Nixon :

Ques. You spoke of the company's having three thou-  
sand dollars on hand ; what did you mean ?

Ans. In money.

Ques. What other assets had the company with which  
to pay liabilities than the amount of your premium 30  
notes at that time ?

Ans. We had a great deal besides premium notes ; we  
had bills receivable, bonds and real estate. The other  
question was simply as to money.

By the Court :

Ques. Did you have the money difference between \$57,000 and \$90,000?

Ans. The question was at the time of his coming in. We had plenty of money at that time for all our liabilities, although I cannot give you the exact figures. At the time Mr. Ware came in was the question asked.

By Mr. Nixon :

10 Ques. State the condition of the company at the time this assessment was made, and the necessity of making it?

Ans. There were fire losses due \$57,000.

Cross-examined :

By Mr. Pancoast :

Ques. Was there any apportionment of this \$57,000 to the Mutual policies?

20 Ans. No, sir.

Ques. Or to the others?

Ans. No, sir.

Ques. There was nothing in the Mutual policies that referred to another kind of business done by the company?

Ans. Not that I know of. The policy will show for itself.

Ques. How much of that \$57,000 has been collected?

30 Ans. Net or gross?

Ques. Gross.

Ans. \$52,000 in round numbers gross.

Ques. Upon how many policies?

Ans. In the neighborhood of three thousand.

Ques. Was the most of that money collected with or without suit?

Ans. I presume about two-thirds without suit and one-third by suit; about that proportion, I should judge.

Ques. One-third of the policies that were sued on?

Ans. I should think about that; not one-third in number, one-third in amount. I think the number sued on was probably three hundred.

Ques. Were the suits brought on these three hundred policies for non-payment of assessments?

Ans. Yes, sir.

Ques. In how many of these three hundred policies did you sue out the full amount of the premium note? 10

Ans. In no case did we collect the amount; we had judgment against quite a number.

Ques. Then the suits were brought primarily for the recovery of the assessment?

Ans. Yes, sir.

Ques. And when assessments were collected by suit did you allow the policy to run on?

Ans. Yes, sir; unless there were special reasons why we wished the policy cancelled. 20

Ques. In all these three hundred policies were all the holders behind in the payment of assessments so the policies could be voided?

Ans. Yes, sir.

Ques. But did you treat any of them as void?

Ans. Yes, sir.

Ques. How many?

Ans. There were two large policies treated as void because it was undesirable for them to remain on the risks.

Ques. But you did not treat any other policy as void simply for the non-payment of assessments after you collected them? 30

Ans. After we collected the assessment, no, sir.

Ques. In all these three hundred policies that were made liable to be forfeited none have been forfeited except two and they because the risks were undesirable?

Ans. That's all.

Ques. Was it the business custom of the Company to declare the policy void because of the non-payment of an assessment?

Ans. Always.

Ques. And all these three hundred policies were declared void?

Ans. We always considered them void. It was our custom to so consider them void.

10 Ques. How was it your custom to consider them void? What was your course of business towards these three hundred policy holders? Did you notify them when they neglected to pay their assessment, that the policies would be good for nothing after that?

Ans. Yes, sir; we notified the majority of them. The letters of course varied. We generally wrote to the parties their assessments were unpaid and used arguments to make them pay up.

20 Ques. What was your business custom towards your policy holders before they paid their assessment?

Ans. To notify them the assessment was due and they would be sued unless the assessment was paid, and their policy too was void while the assessment remained unpaid.

Ques. Who was your attorney to collect these policies?

Ans. We had some thirty or forty.

Ques. Who was the principal one in this county?

Ans. Mr. Ross, at Cape May Court House.

30 Ques. What attorneys did you consult in relation to these policies?

Ans. Messrs. Nixon, Van Syckle, Marmaduke B. Taylor.

Ques. Did Mr. Nixon sue out some of those policies?

Ans. No, sir.

By Mr. Pancoast:

Ques. Does not the constitution and by-laws of your company provide that when a man has failed to pay his

assessment he shall forfeit the policy, and it shall not be revived until the full amount of the premium note is paid?

Ans. No, sir.

Ques. According to the constitution and by-laws the policy became forfeited, if the forfeiture was not waived, upon the failure to pay the assessment on the 16th of August?

Ans. Yes, sir.

Ques. What are the provisions of the constitution and by-laws in relation to restoring the policy? Are there one or more provisions? 16

Ans. There are two.

Ques. What are they?

Ans. The whole amount of premium note sued for may be collected, but if the whole amount be collected the policy shall stand from that time recognized until the expiration of the term.

Ques. That was one of the conditions in the charter and by-laws, that if the full amount of the premium note was collected the policy shall be revived, in what other way could it be revived? 20

Ans. For the whole life of the policy. In the second it was provided if default was made in payment for more than thirty days, it should be sued for and collected on a penalty of twenty per cent. additional, and ten per cent. each thirty days it remained unpaid, and might be reinstated by action of the directors.

Ques. Did the directors take any steps to reinstate any of these three hundred policies? 30

Ans. Yes, sir.

Ques. In what way?

Ans. We had a meeting of the executive committee.

Ques. Where is it recorded? Upon your minute book?

Ans. No, sir.

Ques. They have not done it by resolution?

Ans. Not by a resolution, for the minutes of the executive committee at that meeting were not copied.

Ques. How was it they were not copied?

Ans. Because that at our Tuesday meetings we met for the consideration of law suits, and for the transaction of various minor matters and many things which in the minutes are not officially recorded, and questions often come up for discussion. The secretary is not advised as to various cases that come up for examination.

10 Ques. Then, part of the proceedings have not been recorded?

Ans. No, sir.

Ques. Is it a large proportion?

Ans. There are none of the directors' meetings but what are recorded, but many of the meetings of the executive committee are not.

Ques. This was a meeting of the executive committee?

Ans. Yes, sir.

Ques. Who were present at this meeting?

20 Ans. Mr. Mulford, Francis Reeves, myself, George Laley, and I think Mr. Newlin.

Ques. What authority under the constitution and by-laws had you to act in that way?

Ans. I did not consider we were taking official action at all. We were considering the question whether any action was necessary.

Ques. You did not take any official action.

Ans. We decided policies were good after the assessment was paid, and we so considered them.

30 Ques. You passed that mental resolution and did not put it down on the minutes?

Ans. It was not exactly a mental resolution; it was a verbal one.

Ques. Did you collect of these three hundred policy holders any additional per cent., or twenty per cent.?

Ans. On many of them we did; on some we didn't?

Ques. Those you did not, you considered rehabilitated with life?

Ans. Yes, sir.

Ques. What official act did you enter on the minutes to show that?

Ans. None.

Ques. There was a little favoritism on account of some?

Ans. No, sir.

Ques. Some you put an extra percentage upon? 10

Ans. We did.

Ques. And some you did not?

Ans. We did not exact the full twenty per cent. from any man. We exacted six per cent. interest every time an assessment had been due.

Ques. How many of the three hundred policy holders did you allow to go by paying the additional twenty per cent., and how many did you allow to go without paying any additional percentage?

(Objected to. Objection sustained and exception noted 20 for plaintiff.)

Ques. Then your business custom was regulated by action of the executive committee?

Ans. Yes, sir.

Ques. No minute was made of their proceedings?

Ans. Not of that proceeding; no, sir.

Ques. The Company has from the plaintiff at this time all the premiums and all the assessments that he was required to pay, according to the constitution and by-laws upon his policy? 30

Ans. Yes, sir.

Ques. Look at the policy and different papers and see if they contain the different payments he has made?

Ans. That with the first premium makes \$51.

Ques. \$51 your Company has of his money on account of his policy?

Ans. Yes, sir.

Ques. Did you ever offer to return any part of his money to him?

Ans. No, sir; we made an offer of payment to him on account of his loss.

Ques. Was not it your business ventures outside of the business of the Mutual Company, which got you into financial embarrassment?

(Objected to. Objection overruled. Exception noted  
10 for defendant.)

Ans. If you mean by that business that was not mutual, I could answer.

Ques. Yes.

Ans. It was that partly, and partly the mutual business; both were equal losers. The mutual business lost as heavily in proportion to its amount as the non-mutual business.

Ques. Did the company ever take any action upon this policy?

20 Ans. Yes, sir.

Ques. After the receipt of the two premiums was there any action in relation to it, after the receipt of all this money?

Ans. As to re-instating it?

Ques. As to anything.

Ans. They agreed to pay the plaintiff \$750, and made him that offer; that was the action taken upon it.

Ques. That was after the loss?

Ans. Yes, sir; there was no other action whatever.

30 Ques. Look at letter under the date of October 8th, 1880. Is that your letter? (Letter shown witness.)

Ans. Yes, sir; that's my letter.

Ques. That was written by you as an officer of the company?

Ans. Yes, sir.

Ques. To the plaintiff in relation to this matter?

Ans. Yes, sir.

Ques. See if that is another of your letters to John McMakin?

Ans. It is a copy of a letter I wrote to Mr. McMakin.

Ques. Is it in relation to this matter?

Ans. Yes, sir.

Ques. You wrote that as an officer of the company defendant?

Ans. Yes, sir.

Ques. Did you write the letter of January 7th? 10

(Letter shown witness.)

Ans. That's my letter as secretary.

Ques. Is that a letter in relation to this matter?

Ans. Yes, sir.

Ques. Is that your letter?

(Letter of December 4th shown witness.)

Ans. That's mine, sir.

Ques. That was an official letter in relation to this matter?

Ans. Yes, sir. 20

Ques. Look at this advertisement. Is this an advertisement of the defendant company under your signature?

(Paper shown witness.)

Ans. Yes, sir.

Ques. How long had you this advertisement in the paper?

Ans. Since December 3d, 1880.

Ques. How many different papers has it been in?

Ans. Some twenty-five or thirty. 30

Re-examined:

By Mr. Nixon:

Ques. Did the plaintiff have other property insured?

Ans. Yes, sir.

Ques. What other property had the plaintiff insured by this same policy?

Ans. Under this same policy he had \$100 on a frame shop; \$100 on carpenter and farm tools; \$350 on two barns and assets adjoining.

Ques. Did the committee of directors consider the policy revived as to the other property?

Ans. Yes, sir.

Ques. It stands good on the other property?

10 Ans. From the time of the payment of the assessment; yes, sir.

Ques. Why was the money not returned?

Ans. For two reasons: one, because we considered it due on the liabilities, all accrued up to the time of assessment, and second because he had still property insured which we considered good for the balance of it at the time.

Ques. You returned what was paid on the policy by still keeping alive the property insured?

20 Ans. Yes, sir; he owed it to us on the twenty-first, independent of the life of the policy. On the same principle if the policy had expired before it was paid we still would have claimed it, although the policy would not have been of any value to him after it.

Ques. This amount of assessment you claimed because it helped to pay the liability while his policy was running?

Ans. Prior to June 21.

Ques. Without any reference to this liability?

Ans. Yes, sir; at all.

30 Ques. You were asked if the mutual policy holders paid less than those insured on the stock plan. State how they paid less and why paying less everything was equal?

Ans. For the reason that the rates of the mutual insurance are less than one-half, an average of probably one-third the amount of money paid on the stock plan;

they come forward at once. I would rather have it done all at once and pay more and have it done with. They had a right to take his payment in full, not only premiums but assessment, and his was taken in full, in lieu of all assessment paid in cash without rebate. While the mutual men pay one-half in money and gave his note for the amount subject to assessment that might or might not be needed, and also participated in any profits that were made on the mutual business or stock plan business. 10

Ques. In that way under your charter the mutual was kept up?

Ans. Yes, sir; clearly.

Ques. It was brought out you made a tender of \$750; was that by way of compromise?

Ans. Offered as a settlement of the case without any reference to legal rights; our letters will show.

Re-cross-examined:

By Mr. Pancoast: 20

Ques. Do you recollect the plaintiff writing you a letter asking you what view you took of his policy and whether it was dead or alive?

Ans. Yes, sir.

Ques. Was this letter, dated January 7th, written in relation to that?

Ans. Yes, sir.

Ques. Did you say there you considered it alive to cover the other property insured as you say now, or did 30 you refuse to give him any satisfactory answer at all?

Ans. I think the letter speaks for itself.

HENRY W. SAWYER, sworn and examined on behalf of the plaintiff.

By Mr. Pancoast :

Ques. Do you know the plaintiff, Samuel F. Ware ?

Ans. Yes, sir.

Ques. Do you recollect the occasion of his buildings being burned ?

Ans. I saw them after they were burned.

10 Ques. Did you ever pay for him an assessment to the defendant company upon his policy ?

Ans. I did.

Ques. When ?

Ans. I can't tell you.

Ques. Do you not recollect ?

Ans. It was on the Monday after the fire.

Ques. To whom did you pay it ?

Ans. I paid it in the office to the clerks of the company who were employed at the desk.

20 Ques. Was it on October 25th ?

Ans. I think so ; I can't swear to dates ; it was the Monday following the fire.

Ques. Do you remember whether it was paid to Mr. Woolery ?

Ans. Mr. Woolery was in the office.

Ques. Did you afterwards give a receipt to Mr. Ware ?

Ans. I did.

Ques. Was Mr. Woolery the agent of the company at that time ?

30 Ans. He was.

Ques. Did you have any conversation with him as to where he should receive pay for this ?

Ans. I did ; right in the office of The Millville Insurance Company.

Ques. Did you have any conversation previously ?

Ans. No, sir.

Ques. Do you know whether he was at Cape May the Saturday before the twenty-third?

Ans. He was not, but he told me personally he expected to have been and would have called upon Mr. Ware but he had extended Mr. Ware's time of payment upon that very assessment.

Ques. He was at Cape May?

Ans. The Saturday before and would have called but could not get off; he expected to come the following Saturday as he was detained the previous Saturday. He told me that he had extended Mr. Ware's time for the payment of that assessment. 10

Ques. Did he ask any questions as to the time of its receipt?

Ans. No, sir.

Ques. He just took the money and gave you this receipt at the office of the company?

Ans. Yes, sir; he told me he would be there the following Saturday, to get other assessments still unpaid.

Ques. The following Saturday? 20

Ans. Yes, sir.

Cross-examined:

By Mr. Nixon:

Ques. When did that fire take place?

Ans. Some time in October, I can't give you the date.

Ques. How long was it before you went up and paid this assessment?

Ans. The next day, on the following Monday. 30

Ques. This fire took place on Sunday?

Ans. Yes, sir.

Ques. You went up early on Monday morning?

Ans. Yes, sir.

Ques. Did you tell them there had been a fire?

Ans. I didn't.

Ques. They knew nothing about it?

Ans. Really, I can't say; I don't think they did.

Ques. About what time did you get there?

Ans. Within, I suppose, an hour of the arrival of the train.

Ques. What time did this train get there?

Ans. Usually about half-past eight.

Ques. Did you go directly to the office?

10 Ans. No, sir; not directly. I stopped on my way at several places. I suppose it was an hour before I went to the office.

Ques. Where did you stop?

Ans. At Brick's; at the hotel for another, and I stopped in a store for another, and I met people on the street I knew. I stopped and talked, I was not in a great deal of a hurry. I went on some business and transacted my own business first.

Ques. What time on the previous day of your going up there and paying this money did the fire take place?

20 Ans. I could only speak from heresay; I don't know. It was during the time just after church.

Ques. Was it evening or morning?

Ans. Morning.

Ques. To whom did you pay the money?

Ans. I paid it in the office of the Company. Mr. Woolery was there. I could not say whether I paid it to Mr. Woolery or some other gentleman.

Ques. By whom is the receipt signed?

Ans. It might refresh my memory to see it.

30 Ques. You do not know who receipted it?

Ans. The receipt will show. I didn't charge my memory with that, to whom I paid it. I know I paid it to the authorized agent.

Ques. Did you pay it to the person who signed that receipt? (Receipt dated October 25 produced.)

Ans. I think I did.

Ques. Who signed it?

Ans. Mr. Woolery.

Ques. He was in the office?

Ans. Yes, sir.

Ques. Did you have any conversation with anybody else while you were there?

Ans. A general conversation with the gentlemen in the office. I don't know them by name.

Ques. Do you know what anybody else said?

Ans. No, sir.

10

Ques. You do not remember that anybody else said anything but Mr. Woolery?

Ans. I was speaking of the general condition of the company, of their resumption of business.

Ques. You remembered distinctly what Mr. Woolery said. What did others say?

Ans. What Mr. Woolery said was pertaining to the case that took me there, and that I treasured in my memory, while matters in general I did not pay any attention to.

Ques. Did you ask him if he had given the plaintiff 20 any time?

Ans. I didn't. He said so on his own account.

Ques. He volunteered all these remarks you have related?

Ans. He did. He said he extended the time of Mr. Ware to the last Saturday; he expected to have been at Cape May but something detained him and he would be there next Saturday.

ISAAC H. SMITH, sworn and examined.

30

By Mr. Pancoast:

Ques. Are you insured in the Millville Company?

Ans. I was.

Ques. Were you insured at the time they made the assessment spoken of in this case?

Ans. Yes, sir.

Ques. When was the assessment on your policy payable?

Ans. The same date as Mr. Ware's.

Ques. Did you pay it on that day?

Ans. I paid one part of it, \$60 on the policy. Mr. Woolery was to come down in one or two weeks afterwards.

Ques. Did you pay him the balance?

10 Ans. Yes, sir.

Ques. What has become of the policy?

Ans. The policy is void. My policy ran out on the 10th of January.

Ques. It is void by its limits?

Ans. Yes, sir.

Ques. Did he take part of the pay after the time fixed?

Ans. Yes, sir.

Ques. He made that arrangement with you?

Ans. Yes, sir.

20 Ques. Where?

Ans. At Cape May City.

Ques. Was he acting as the agent of the company there at that time?

Ans. Yes, sir.

Cross-examined:

By Mr. Nixon:

30 Ques. He simply took the money due on the assessment, I suppose?

Ans. Yes, sir.

Ques. You simply paid him and he gave you a receipt?

Ans. Yes, sir.

Ques. That is all that passed between you?

Ans. That all that passed between me.

Ques. When did you make a final payment of your assessment?

Ans. Yesterday morning.

Ques. The assessment was due without any reference to the expiration of your policy last January, was it?

Ans. Yes, sir; I considered it so.

Ques. Did your policy run out last January?

Ans. Yes, sir.

Ques. You paid the last of your assessment yesterday?

Ans. Yes, sir.

10

The plaintiff rests.

NIMROD WOOLERY, sworn and examined.

By Mr. Nixon:

Ques. Where do you live?

Ans. At Millville.

Ques. What is your business?

Ans. Attorney.

Ques. Are you not an insurance agent?

20

Ans. No, sir; I never have been.

Ques. Did you do some work as attorney for the company defendant, in 1880.

Ans. I acted as their collector for assessments at Cape May.

Ques. Did you see the plaintiff during any of your trips to Cape May?

Ans. Yes, sir.

Ques. Did you sign that receipt of the 25th Mr. Sawyer spoke about? (The following receipt was shown 30 witness: "Oct. N. J., 10, 25, 1880. Received of Samuel F. Ware the sum of \$10 for payment of assessment under policy No. 11081 made by the Millville Mutual Marine Insurance Company, of Millville, N. J., as per resolution of the Board of Directors, passed June 21st, 1880. For the company, N. Woolery, Agent.")

Ans. Yes, sir.

Ques. Did you hear Captain Sawyer's evidence in regard to that conversation?

Ans. I did.

Ques. Did it take place?

Ans. It did not.

Ques. Did you tell him that you had agreed to be at Cape May or expected to be at Cape May on the Saturday afternoon before the fire?

10 Ans. On the 23rd of October?

Ques. Yes.

Ans. I did not.

Ques. You made no arrangement to be there?

Ans. No, sir.

Ques. You never told anybody you would be there?

Ans. No, sir; I never told anybody I would.

Ques. Did you sign that receipt on the 11th of September? ("Cape May, N. J., 9, 11, 1880. Received of S. F. Ware the sum of \$10 on account for payment of assessment under policy No. 11081 made by the Millville Mutual Marine and Fire Insurance Company, of Millville, N. J., as per resolution of the Board of Directors, passed June 21st, 1880. For the company, N. Woolery, att'y, agent.")

20

Ans. I did.

Ques. For \$10?

Ans. Yes, sir.

Ques. That was ten dollars on account?

Ans. Yes, sir; on account.

Ques. Your work in going down there was simply to

30 collect these assessments?

Ans. Yes, sir.

Ques. You signed that as attorney of the company?

Ans. Yes, sir.

Ques. And not as agent?

Ans. No, sir.

Ques. You had no powers ever given to you by the company except to collect these assessments?

Ans. My duty was simply to collect the assessments. When anything arose outside of that simple duty I put myself in communication with the management of the company, either in conversation or by letter.

Ques. Captain Sawyer has said you gave Mr. Ware an extension of his time. Did you ever say anything of that kind to Mr. Ware?

Ans. I didn't. 10

Ques. Did the plaintiff ever ask you to extend his time?

Ans. He didn't. I never had but a very few words with Mr. Ware. I was about to make a train one evening, the last train, and Mr. Ware came in, and our conversation was very short indeed.

Ques. Were you in a hurry to reach the train?

Ans. I was in a hurry to reach the train.

Ques. Did you ever see Mr. Ware except that one time?

Ans. Not to know him. 20

Ques. You never had any other conversation with him?

Ans. No, sir.

Cross-examined.

By Mr. Pancoast :

Ques. Did you not receipt that payment at the time receipted here?

(Paper shown witness.) 30

Ans. I did.

Ques. Did you do that by virtue of the authority of the company?

Ans. I was collector.

Ques. Did you turn these moneys over to the company at the time you received them?

Ans. Yes, sir.

Ques. And they received them from you?

Ans. Yes, sir.

Ques. And you were their agent for that purpose?

Ans. Yes, sir.

Ques. You did not exceed your agency in any particular?

Ans. I don't think that I did.

Ques. Were you not to be at Cape May on the 23d to  
10 receive these assessments?

Ans. I think not.

Ques. See if that is one of your envelopes?

(Envelope shown witness.)

Ans. That is, sir.

Ques. Is that your letter?

(Letter dated October 21st, 1880, shown witness.)

Ans. That is, sir.

Ques. Read it?

Ans. (Reading.) "Dear sir:—I will be at Cape May on  
20 Saturday 23d, 1880, at Colonel Lansing's Hotel, when  
you can come and pay your amount due Millville Insurance  
Company. I am instructed to say that unless payment  
is made that day suit will be commenced." That  
is October 23d.

Ques. Then you are mistaken when you say Colonel  
Sawyer is mistaken and you were not to be there on the  
23d?

Ans. No; I never had any conversation with Sawyer  
and I never told anyone else. This is my letter and I  
30 wrote it.

Ques. It is headed, "Millville Mutual Marine and Fire  
Insurance Co."?

Ans. Yes, sir.

Ques. Was it written from their office?

Ans. No, sir; I think it was written at my own office,  
from supplies of the company.

Ques. Did Mr. Sawyer pay you this money at your office?

Ans. On Monday, the 25th of October.

Ques. Were you at the Millville Mutual Marine Fire Insurance Company's office at the time he made payment?

Ans. I happened to be.

Ques. He paid you?

Ans. Yes, sir.

Ques. Did you immediately pay it over to them? 10

Ans. At once.

Ques. You collected a great many assessments?

Ans. Yes, sir.

Ques. You would collect a part at one time and part at another?

Ans. I may in one or two instances.

Ques. Not more than that?

Ans. I think not.

Ques. Were there not a great many suits? Did you not make a great many appointments and come down 20 here and make collections after the 16th?

Ans. I did.

Ques. Would you tell people, when you came to make collections after the 16th, the policies were void and they would be paying on void policies?

Ans. I never did.

Ques. Did you say anything to them to lead them to believe the policies on which you were demanding payment were void or considered void?

Ans. No, sir; because, really, I didn't know anything 30 about it. I was simply their collector and did it in that simple way.

Ques. Did the Company defendant ever say anything about refunding any of this money to the plaintiff?

Ans. It never did.

Ques. You say that you never told Mr. Ware that you would be there on Saturday previous to August 23?

Ans. I never did.

(Re-examined.)

10 Ques. Will you look at the post-mark of that letter dated August 23. There is "Dear Sir" addressed to nobody under cover to S. F. Ware and dated August 23. Did you ever write such a letter as that in your life to Mr. Ware?

Ans. I can't say that I did, sir.

Ques. Did you write that letter to Mr. Ware, or anything like it?

Ans. I can't say I did. This is a sort of stereotype letter I wrote to a number of policy holders who did not come to time. I don't know whether I wrote to Mr. Ware.

20 Ques. Did you inform Mr. Ware you were going to be there on the 23d?

Ans. No, sir.

Ques. Mr. Ware had no knowledge from you, directly or indirectly, in any way or manner, that you were to be at Cape May on Saturday, October 23rd?

Ans. No, sir.

Ques. Read that letter?

Ans. "I am instructed to say that unless payment is made that day suit will be commenced. Yours Truly."

Ques. To whomsoever that was written?

30 Ans. Yes, sir.

(Cross-Examined.)

Ques. Do you mean to say that you did not write that letter to Mr. Ware?

Ans. I can't tell you. I may or may not have done so.

Ques. "I will be at Cape May on Saturday 23, 1880,

at Colonel Lansing's hotel, when you can come and pay your amount due Millville Insurance Company. I am instructed to say that unless payment is made that suit will be commenced." Who were you instructed to begin suit against?

Ans. Generally.

Ques. Was that letter written to "generally?"

Ans. I say that is a sort of stereotyped letter. I wrote to several and it may have been to Ware when I wrote—  
to Ware with anybody else. 10

Ques. Here is another letter. Is that your letter to Mr. Ware? (Letter shown witness.)

Ans. That's my letter to Mr. Ware.

Ques. What is the date?

Ans. 9th month, 7th.

Ques. That was after the assessment was due?

Ans. The assessment was due on the 16th of August.

Ques. Read the letter?

Ans. "DEAR SIR:—The Company has fixed Saturday next as the day when they shall expect you to pay 20 the assessment due them on your note. I shall be at Cape May at Richardson's & Farrar store at 12 o'clock of that day for last time."

Ques. Is that what you wrote to Mr. Ware that day, that the company had fixed the time for him to pay?

Ans. I could not have written it if it had been false.

Ques. Is it true the company had fixed a time in September for him to pay that premium?

Ans. I had my instruction from the head manager of that sort, that unless payment was made on Saturday. 30

Ques. Then you had authority to write such a letter?

Ans. Yes, sir.

Ques. Read that letter and say if that is one of yours to Mr. Ware on the same subject later? (Letter shown witness, Sep. 13.)

Ans. Yes, sir; I wrote this letter. (Letter read by wit-

ness.) "S. F. Ware, Esq.: Dear Sir:—I made report of your case, and the company instruct me to say that your balance must be paid by first of next week to close the account on books of company. Also policy 11437, Annie Sempler. Let me hear from you at once,"

Ques. When would the next week be?

Ans. In seven days.

Ques. Seven days after the 13th?

Ans. Yes, sir.

10 Ques. To close the account on the books of the company, that would be the twenty-first?

Ans. Yes, sir.

Ques. The company knew he was behind hand by your reporting him?

Ans. Yes, sir.

Ques. Was it not fixed by correspondence? You had reported a previous failure to pay the company and had fixed the 23rd of September as the time he must pay?

Ans. Yes, sir.

20 Ques. You were acting within the scope of your authority in making reports to the company?

Ans. I was in making reports.

Ques. It was after that you wrote the note saying you would be there on the 23d; it was after the 13th and after the 21st?

Ans. Yes, sir.

Re-examined:

By Mr. Nixon:

30

Ques. In these letters when you have said to plaintiff it must be paid on a certain time, what did you mean him to understand by that?

Ans. The usual persuasion of a lawyer, to pay or to be sued.

Ques. Had you ever, at any time, directly or indirect-

ly, any power from the company to say to Mr. Ware or anybody else that their policy should be revived?

Ans. Never.

Ques. You did not propose to do anything of the kind?

Ans. No, sir.

Ques. You never gave anybody, by letter or word, any reason to suppose you had?

Ans. No, sir.

Ques. In all these letters the language was to the effect that you would sue them if they did not pay at a certain time, and when you said the "company say the assessment must be paid by Saturday next," you mean the company tell me I must sue you? 10

Ans. I am using my own language.

SAMUEL F. WARE, sworn and examined.

By Mr. Pancoast:

Ques. Look at that letter and state whether or not you 20 received that letter from Nimrod Woolery?

Ans. I did.

Ques. The person to whom you paid the assessment?

Ans. Yes, sir.

Ques. Did you get the other letters from him?

Ans. Yes, sir.

Ques. Do you know what became of the envelope of this letter?

Ans. No, sir. I received that letter, I think, on the 23d at noon. I went down in the afternoon to pay; Mr. 30 Woolery was not there, at least I could not find him.

Ques. Who paid it and when was it paid?

Ans. It was paid by Mr. Sawyer the next Monday morning; I sent him to pay it.

Ques. Did you get all these letters from him? (Letters produced.)

Ans. All these.

Cross-examined.

By Mr. Nixon :

Ques. Where is the cover of that ?

Ans. I don't know ; I sent it to Mr. Pancoast in its proper cover. I suppose he's lost it.

Ques. Your fire took place on Sunday, the 24th ?

10 Ans. Yes, sir.

Ques. The full amount of your assessment had not been paid when that fire took place ?

Ans. I don't know about that. I sent \$10 more over, but I ain't so sure it was not paid.

Ques. You sent \$10 the next morning ?

Ans. Yes, sir.

Ques. How is it you did not go yourself ?

Ans. I was busy.

Ques. You signed a premium note to the Company ?

20 Ans. I suppose I did ; I don't recollect.

Ques. Is that your signature to that note for \$200 ?

Ans. Yes, sir ; I think it is.

Ques. You had other property insured besides the house ?

Ans. Yes, sir ; there was a barn in the same policy and some outbuildings, I think.

Re-examined :

30 By Mr. Pancoast :

Ques. Did you write a letter to Mr. Howell after they had refused to pay you the full amount of the policy, asking whether they considered the policy void or in force ?

Ans. I did write a note. I wanted to know whether they considered the balance insured.

Ques. Is that the answer? (Letter shown witness.)

Ans. This is the answer.

Ques. State whether or not they considered it insured?

Ans. They didn't give me any satisfaction whether it was insured or not, and said they expected it would depend on the result of this suit whether it was insured or not. I have not got any satisfaction.

Ques. Did you write for the purpose of knowing whether to get other insurance?

Ans. Yes, sir.

10

Ques. Did you get other insurance?

Ans. Yes, sir; on their refusal to acquaint me with whether I was insured, I have taken out other insurance.

Re-cross-examined:

By Mr. Nixon:

Ques. In this letter Mr. Howell says to you, does he not, "We have invariably considered such policies valid from the moment the assessments were paid in full?" 20

Ans. He says if the one was not valid the other is not; that is my instruction in the matter.

Ques. The house was burned down before the assessment was paid in full?

Ans. I don't know whether it was or not.

Ques. Was the house burned down before you paid that assessment in full?

Ans. I believe the Company claimed there was ten dollars due.

Ques. Did you not pay this ten dollars after the house 30  
burned down?

Ans. Sawyer paid it.

Ques. He paid it at your request?

Ans. Yes, sir.

Ques. You gave him the money to pay it with?

Ans. Yes, sir.

Ques. After your house burned down ?

Ans. No ; the day it was burned.

Ques. What time of the day did it burn ?

Ans. About half-past one o'clock.

Ques. Then he drove right down to Cape May ?

Ans. No, sir ; he was up there ; I told him he had better go up and pay it. I calculated to settle it on Saturday if Mr. Woolery had been there.

10 By Mr. Pancoast :

Ques. Did they ever offer to pay any of it back to you.

Ans. No, sir.

The plaintiff rests.

Adjourned to 9.30.

Cape May Court House, September 28th, 1881.

The Court met at 9.30 A. M.

20 R. L. HOWELL, recalled and examined on behalf of the defendant.

By Mr. Nixon :

Ques. Explain about the available surplus over \$30,000. (Newspaper produced and handed witness.)

30 Ans. This contains a notice we have advertised of an actual net available surplus of over \$30,000. The date of the notice is December 3rd, 1880. Of course this surplus includes assets not available for payment of loss, although from actual loss. For instance, the real estate of the company amounted to \$8,000. This was a period of six months after the assessment. During that time there had been large profits made over what we had any right to suppose would be made over the disparity of assessment. The first item is that of the marine depart-

ment had not been ordered by the Secretary of State to re-insure its business to the company, carrying that business over until its expiration. The amount due of assessment as insurance fund appeared to be larger than the next six months made necessary on that department, making a profit of \$8,000. In making the estimate as to the amount to take to re-insure we were only allowed to account pro rata. By careful management of Secretary Mulford he succeeded in making a bargain with another insurance company that covered the business 10  
 over at a discount of 25 per cent, making a profit of \$8,000. There were also at the time of the assessment-claims that were sent in on which there had been no judicial action, and which the Directors had no right to consider as assets, between the time of making the assessment and the date of this notice. They had succeeded in obtaining judgments on two of those claims amounting to \$5,500 and in the other to nearly \$3,000. These make that assessment between the day of the assessment and the day of this notice. 20

By Mr. Pancoast :

Ques. Your former statements are true, subject to the qualification you have just made?

Ans. Yes, sir.

Mr. Pancoast: I will offer and read in evidence the following advertisement: " Millville Mutual Marine and Fire Insurance Co. This company having disposed entirely of all its stock plan business, and having been 30  
 reorganized, has decided to in the future do a strictly mutual home business. Having succeeded in paying all its liabilities, and securing an actual net available surplus of over \$30,000, the Directors feel that they can offer to all who desire insurance not only as low rates and unquestionable security, but much greater probability of

immunity from assessment for years to come than other companies, since this surplus is large enough to pay all probable losses on the policies now in force, until their expiration, without any dependence on receipts from new business—a condition of things that can be shown by but very few companies in the State. The present Directors pledge to the policy holders an economical management and a careful supervision of the business, and will continue in the future, as in the past, to act on the principle  
 10 of prompt payment of honest losses without seeking to evade them on technical grounds.

Hereafter, no notes will be subject to assessment until they are a year old.

We would call especial attention to our marine department, to our low rates and favorable form of policies.

Any information cheerfully given by the officers of the Company or its agents.

F. L. MULFORD, Pres.

R. L. HOWELL, Sec'y.

20

December 3rd, 1880.

MR. PANCOAST:—I call the court's attention to some provisions in the by-laws, page 5, section 11:

“In case of marine losses sufficient to justify an assessment of marine premium notes, all such notes in possession of the Company will be taxed, except in case the person insured has notified the Company in writing of his intention to discontinue his policy, in which case the note will not be taxed for any losses that may occur after  
 30 the expiration of the time set for the policy to terminate.

SEC. 15. All accounts of Marine and Fire Insurances shall be kept separate and distinct from each other, and all moneys paid for marine policies shall be appropriated only for the benefit of such as insure against losses or damages to vessels or cargoes, and all moneys paid for the benefit of those who insure buildings against loss or

damages by fire are to be appropriated for that purpose only; and in no case will any assessment on premium notes, received for insurance for vessels or cargoes, be made to pay any loss that may occur to buildings or anything pertaining thereto by fire, nor will any assessment be made upon any premium notes received for insuring buildings or anything pertaining thereto, to pay any loss that may occur to vessels or cargoes; and all expenses of the Company shall be charged as equitably as possible to the respective class of property insured." 10

I also offer in evidence the following letters :

MILLVILLE, N. J., October 30, 1880.

JOHN McMAKIN, Cape May City, N. J.

DEAR SIR:—We are not clear in our minds whether we are legally or morally bound to pay Mr. Ware's loss as his assessment was unpaid at the time of loss. We have the question under advisement and shall try to do right in the matter. At present we do not care to adjust. The Company has come through its trouble nobly—has a surplus of between \$30 and \$40,000, and is ready for business which in the future will be strictly mutual. 20

Yours truly,

(Signed) R. L. HOWELL, Sec'y.

MILLVILLE, N. J., October 28th, 1880.

S. F. WARE :

DEAR SIR:—Yours is received, and in reply would say that there are several questions to be decided before we are satisfied that we are either legally or morally bound to pay your loss. 30

In the first place your assessment was unpaid at the time of the fire. You paid \$10 on September 13th, and you paid no more until the morning *after* the fire, when the balance of \$10 was paid but no hint was given that any fire had occurred. In your letter received here on

Wednesday night you notify us of the fire but apparently avoid telling us when it occurred.

Now, knowing these facts, the question naturally occurs to us, what ought we to do in the case, not what the law will compel us to do for we say to you frankly that we do not believe we are bound in law for a dollar, but what we ought in right and justice to you and to other policy-holders to do. To decide this question will require considerable investigation.

10 In the mean time we consent without any admission of liability on our part, to your removal of your goods.

The loss on the goods must be determined by the goods burned and destroyed, with reasonable allowance for damage to those saved.

We have no desire to evade our just responsibility but do want to be sure of what is right in the case.

Yours truly,

R. L. HOWELL, Sec'y.

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MILLVILLE, N. J., 9, 7, 1880.

DEAR SIR:—The company has fixed Saturday next as the day when they shall expect you to pay the assessment due them on your note.

I shall be at Cape May at Richardson & Farrar's store at 12 o'clock of that day for last time.

Respectfully yours,

N. WOOLERY,

Att'y for Co.

30 To S. F. WARE.

MILLVILLE, N. J., 9, 13, 1880.

S. F. WARE, ESQ.,

DEAR SIR:—I made report of your case and the company instruct me to say, that your balance must be paid by 1st of next week to close the account on books of

company; also Policy 11437, Annie Sempler. Let me hear from you at once.

Yours truly,

N. WOOLERY,  
Att'y for Co.

MILLVILLE, N. J., 10, 21, 1880.

DEAR SIR:—I will be at Cape May on Saturday, 23d, 1880, at Colonel Lansing's Hotel, when you can come 10 and pay your amount due Millville Insurance Company.

I am instructed to say that unless payment is made that suit will be commenced.

Yours truly,

N. WOOLERY,  
Att'y for Co.

And both parties having rested the court directed a verdict for the defendant. And the jury, through their foreman, immediately rendered a verdict for the defendant according to the direction of court, to which decision and action of the court the plaintiff by his attorney excepted and prayed a bill of exceptions, and it is hereby allowed and sealed accordingly. 20

The assignment of error is as follows :

And now, on this sixteenth day of May, eighteen hundred and eighty-two, comes the plaintiff in error in this case by David J. Pancoast, his attorney, and assigns the following causes of error : 30

First: Because the judge at the trial directed a verdict for the defendant when he should have directed a verdict for the plaintiff.

Second: Because the judge at the trial refused to let the jury pass upon the issues of fact involved in the case, but directed them to find for the defendant according to his own view of the evidence and the fact.

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DAVID J. PANCOAST,  
Att'y of Plaintiff.

The joinder of error is in the common form.