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New Jersey Court of Errors and Appeals

Notice of Appeal

(Filed, January 14, 1919)

IN CHANCERY OF NEW JERSEY

Between	20
JOSEPH GIAMMARES and TONY CAFFARO,	
Complainants,	
and	
ALLEMANNA FIRE INSURANCE COMPANY of PITTSBURG, PA., a body corporate, and JAMES A. EDGAR,	
Defendants.	

30

The defendants hereby appeal from the final decree made in this Court, in the above entitled cause, reforming the policy of insurance involved in this suit and enjoining these defendants and their agents, attorneys and assignees from setting up any defense in any action at law upon the said insurance policy based upon the fact that the said policy was issued without having noted there-
on that the property thereby insured stood upon

40

Bill of Complaint

leased ground and that the complainant, Tony Caffaro, held a chattel mortgage alleged to be an incumbrance thereon, and from the whole and every part of said final decree, to the Court of Errors and Appeals in the last resort in all caus-

10 es.

Dated, January Sixth, 1919.

I. BENJ. GLUECKFIELD,

Solicitor for and of counsel with defendants.

I conceive that there is good cause for appeal in the above entitled cause.

I. BENJ. GLUECKFIELD,

Solicitor for and of counsel with defendants.

20

Bill of Complaint

(Filed, May 31, 1918)

IN CHANCERY OF NEW JERSEY

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

30 The Complainants Joseph Giammares and Tony Caffaro, residing in the City of New Brunswick, County of Middlesex and State of New Jersey, complain—

40 1. That on or about the 8th day of January, 1917, the Complainant Tony Caffaro was owner of a one-story frame building known as 89 Jersey Avenue, in the City of New Brunswick, N. J., and stock of merchandise consisting of candy, cigars, cigarettes, tobacco, ice cream and all other merchandise therein; also the stock of fixtures con-

Bill of Complaint

sisting principally of soda fountain, cash register, show cases, counters, stools, chairs and tables kept in the above described premises.

2. That the Allemannia Fire Insurance Company of Pittsburgh, Pa., a corporation and a Fire Insurance Company authorized by the laws of this State to do business herein and write policies of insurance against loss by fire, on the said 8th day of January, 1917, through its duly authorized agent, James A. Edgar, of the City of New Brunswick, N. J., issued to the said Complainant Tony Caffaro its insurance policy in the standard form for the State of New Jersey, this policy or contract of insurance dated the said 8th day of January, 1917, and known as Policy No. 528022, expiring January 4, 1918, insuring the said Complainant Tony Caffaro in the sum of \$2350 as follows:

\$1500.00 On the one-story roof frame building, additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work and fences connected therewith, occupied as a store (confectionary) situated #89 Jersey Ave., Corner of Sandford St., New Brunswick, N. J.

\$650.00 On his stock of merchandise, consisting principally of candy, cigars, cigarettes, tobacco, ice-cream and all other merchandise not more hazardous, usually kept in a first class confectionary store and

Bill of Complaint

\$200.00 On his stock of fixtures consisting principally of a soda-fountain, cash register, show case, counters, stools, chairs and tables, kept in the above described premises.

10 and in consideration of the issuing of the said insurance, the said Complainant, Tony Caffaro then and there paid to the said James A. Edgar, the premium, which was required, to wit: the sum of \$20.48 and the said policy was duly delivered to him, the said Complainant, Tony Caffaro, to which policy now in the possession of the Complainants, they refer.

20 3. That at the time of writing the said policy of insurance the said Complainant, Tony Caffaro notified James A. Edgar, Agent of the said Insurance Company that he was the owner of the building and contents only, and was not the owner of the land whereon the same stood, but that the said building stood on leased land, and the said James A. Edgar acting as representative and agent of the said Insurance Company issued the said policy with full knowledge of said fact and accepted the premium, but by a mistake and in-
30 advertence, which was mutual, failed and omitted to endorse on said policy a statement that said building stood on leased land. Said Complainant Tony Caffaro did not notice said mistake and omission at that time.

40 4. Subsequently on or about February 21, 1917, the said Complainant, Tony Caffaro sold the said building and contents to the Complainant, Joseph Giamares and thereupon in order to secure Complainant, Tony Caffaro, for a part of the purchase

Bill of Complaint

price of said store and contents the said Complainant, Joseph Giamares gave to said Complainant, Tony Caffaro, a Chattel Mortgage for a part of the consideration price, covering the said building and said contents, which said Chattel Mortgage was immediately thereafter recorded in the Middlesex County Clerk's Office. 10

5. That at the time of said sale, said Complainants called at the office of the said James A. Edgar at 349 George St., in the City of New Brunswick, N. J., and then and there notified him of the transfer and of the Chattel Mortgage and requested him as Agent for the said Allemennia Fire Insurance Company of Pittsburgh, Pa., to make the necessary changes in and on the policy of insurance held as aforesaid by the said Complainant, Tony Caffaro, and he, the said James A. Edgar acting as the Agent of the said Allemennia Fire Insurance Company of Pittsburgh, Pa., then and there stated that he would make the necessary changes as to ownership and as to the Chattel Mortgage and interest of Complainant, Tony Caffaro, thereunder and that it would be all right, and the said Complainants thereupon delivered up to the said James A. Edgar the said policy of insurance in order that said changes might be made. 20 30

5. That Complainants relied on the statement of the said James A. Edgar as Agent of the said Insurance Company.

6. That said Edgar endorsed upon the said policy the following:

"Ownership is now vested in Joseph 40

Bill of Complaint

Giammares, as owner, instead of as heretofore.

Attached to and forming part of policy #528022, of the Allemannia Ins. Co., of Pittsburgh, Pa.

10 Dated, Feb. 21, 1917.

Signed,

JAMES A. EDGAR,

Agent."

and through a mistake or neglect, which mistake or neglect was mutual failed to endorse on said insurance policy a memorandum to the effect that Complainant, Tony Caffaro was the holder of a Chattel Mortgage on said building and contents, which mistake was not then noticed by said Complainants or either of them at that time.

20

7. That said Complainant, Tony Caffaro in the first instance relied entirely upon his notice to the said James A. Edgar as Agent of the said Allemennia Fire Insurance Company of Pittsburgh, Pa., to note upon said policy the fact that the said building stood on leased ground, and the Complainants Tony Caffaro and Joseph Giamares, relied entirely in the second instance upon the notice to the said James A. Edgar as Agent of the said Allemennia Fire Insurance Company at Pittsburgh, Pa., to note upon the said policy the fact that the said Complainant, Tony Caffaro was the holder of a Chattel Mortgage on the said building and contents and that loss, if any, be first made payable to the said Tony Caffaro as Chattel Mortgagee, and in each instance left the office of the said James A. Edgar, as Agent of the Allemennia Fire Insurance Company of Pittsburgh, Pa., believing that he had done all necessary or requir-

30

40

Bill of Complaint

ed of him in the premises, and the said Tony Caffaro, Complainant believed that the said James A. Edgar the Agent, as aforesaid, had carried out his request and notification as to the fact that said building stood on leased land and the said Tony Caffaro and Joseph Giamares believed that he, the said James A. Edgar, as agent of the said Allemennia Fire Insurance Company of Pittsburgh, Pa., had carried out their request and notification as to the fact that the said Tony Caffaro held a Chattel Mortgage on the said building and contents and that he had noted said facts on the said policy and had attached thereto a clause making loss if any first payable to the said Tony Caffaro as Chattel Mortgagee. 10

8. That notwithstanding the premises and the promises of the said James A. Edgar, as Agent of the said Allemennia Fire Insurance Company of Pittsburgh, Pa., to have noted upon the policy the fact that the building stood on leased ground, and the Chattel Mortgage interest of said Tony Caffaro, the said Defendant, Allemennia Fire Insurance Company of Pittsburgh, Pa., through said mistake, inadvertence and omission wholly failed to note said facts and interest upon the policy and utterly failed to notify the said Complainants or either of them of said failure to make said changes, or to cancel the said insurance policy or to return to Complainants or either of them any part of the said premium, but on the contrary thereof, retained the whole of the said premium in its possession and delivered back the said insurance policy to the said Complainant Tony Caffaro, as a valid and subsisting contract of insurance, well knowing that said building 20 30 40

Bill of Complaint

stood on leased ground, and that the said Complainant, Tony Caffaro, had a Chattel Mortgage interest therein and on the contents thereof, recognizing said Tony Caffaro as the person entitled to hold said insurance policy.

10 9. That on March 25th, 1917, the said building and contents were totally destroyed by fire, which building and contents were insured by said policy of insurance and which policy of insurance the Allemennia Fire Insurance Company of Pittsburgh, Pa., and the said Complainants and the said James A. Edgar, Agent as aforesaid, believed to be and intended to be a valid and subsisting policy of insurance upon the said building and contents for the sum of \$2350, with the
20 notation thereon, as all parties believed, that the said building stood on leased ground and that the said Complainant, Tony Caffaro held a valid and subsisting Chattel Mortgage interest thereon with a clause endorsed thereon to the effect that loss, if any, should first be payable to Tony Caffaro, as Chattel Mortgagee and secondly payable to Joseph Giamares as owner.

30 10. That the total loss of the said Complainants was \$2000, of which Complainants made due and timely proof.

40 11. That the said Allemennia Fire Insurance Company of Pittsburgh, Pa., now refuse to pay the said loss on the ground that the building stood on leased land and also on the ground that said Complainant, Tony Caffaro, held a Chattel Mortgage on said building and contents, neither of which facts he alleges, were noted in writing on the said policy as required by the terms, although

Bill of Complaint

the said facts were well known to the Allemennia Fire Insurance Company of Pittsburgh, Pa., and its Agent. And the said Allemennia Fire Insurance Company of Pittsburgh, Pa., and its said agent and the said Complainants believed and intended the said contract of insurance to be a valid and subsisting contract of insurance. 10

12. Complainants have brought an action in the New Jersey Supreme Court on the said insurance policy against the Allemennia Fire Insurance Company of Pittsburgh, Pa., and the said James A. Edgar within twelve calendar months from the date of the said fire as required by the terms of the said Insurance Policy, and which said action is now pending in the New Jersey Supreme Court, and which said action the said Defendants have answered setting up that it, the said Allemennia Fire Insurance Company of Pittsburgh, Pa., is not liable on said policy to said Complainants, because said building stood on leased land and the fact that the chattel mortgage interest of Tony Caffaro was not noted in writing thereon. 20

13. Complainants are without adequate remedy in the Courts of Law and therefore pray: 30

1. That the said Allemennia Fire Insurance Company of Pittsburgh, Pa., a corporation and James A. Edgar, who are the Defendants in this suit, may answer this Bill of Complaint without oath and each statement therein made.

2. That said policy of insurance may be changed or reformed so as to show and have thereon the fact that it was issued for a building and contents 40

Subpoena ad Respondendum

thereof, which stood on leased ground and that said Tony Caffaro, the Complainant, after the 21st day of February, 1917, held a Chattel Mortgage interest thereon, with loss if any, first payable to him as Chattel Mortgagee.

10 3. That Complainants have such other and further relief as may be required.

4. That a Writ of Subpoena may issue commanding the said Defendants to answer this Bill of Complaint and to abide by such Decree as this Court may make in the premises.

GEORGE J. PLECHNER,

Solicitors for Complainants.

FREEMAN WOODBRIDGE,

Of Counsel with Complainants.

20

Subpoena ad Respondendum

New Jersey, to wit:

The State of New Jersey, to Allemennia (L. S.) Fire Insurance Company of Pittsburgh, Pa., and James A. Edgar,

GREETING:

30

WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery by Tony Caffaro and Joseph Giamares to be relieved touching the matters therein contained.

40

THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said Court at Trenton, on or before the expiration of twenty days from and after the eleventh day of June,

Subpoena ad Respondendum

1918, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

WITNESS, his Honor, EDWIN ROBERT WALKER,
Chancellor of our said State, at Trenton, the thirty-first day of May, in the year of our Lord, one thousand nine hundred and Eighteen. 10

ROBERT H. McADAMS,
Clerk.

George J. Plechner,
Freeman Woodbridge,
Sol'rs.

(Endorsed)

45/94

IN CHANCERY OF NEW JERSEY 20

Between TONY CAFFARO and JOSEPH GIAMARES, and ALLEMENNIA FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a corporation and JAMES A. EDGAR, Def't.	}	Compl'ts., Sub. ad Resp. Def't.	30
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Ret'ble June 11th A. D. 1918,
 FREEMAN WOODBRIDGE,
 GEORGE J. PLECHNER,
 Sol'rs.
 Ntl. Bk. of N. J. Bldg.,
 New Brunswick, N. J. 40

Subpoena ad Respondendum

Filed June 11, 1918.

Fees:

Sheriff \$2.12

B. Com. 2.00

10
\$4.12

I hereby deputize and appoint George B. Hulit, of Pennington, N. J., a Special Deputy to serve the within writ.

Witness my hand and seal this 31st day of May, A. D., 1918.

FREDERICK P. REES,
Sheriff of Mercer County,
by Harry V. Holden,
Under Sheriff.

20 Duly served May 31st, 1918, upon Allemennia Fire Insurance Company of Pittsburgh, Pa., defendant, by leaving a copy of the same in the office of the Commissioner of Banking and Insurance of the State of New Jersey, at the State House, Trenton, N. J., with a service fee of two dollars, with Thomas K. Johnston, Deputy Banking Commr., James A. Edgar, Deft., not in my County, Frederick P. Rees, Sheriff, by George B. Hulit, Spec. Dep.

30

Subpoena ad Respondendum

New Jersey, to wit:

The State of New Jersey, to Allemennia
(L. S.) Fire Insurance Company of Pitts-
burgh, Pa., and James A. Edgar,

GREETING:

10

WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery by Tony Caffaro and Joseph Giamares to be relieved touching the matters therein contained.

THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the eleventh day of June, 1918, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

20

WITNESS, his Honor, Edwin Robert Walker, Chancellor of our said State, at Trenton, the thirty-first day of May, in the year of our Lord one thousand nine hundred and Eighteen.

ROBERT H. McADAMS,
Sol'rs.

Clerk.

George J. Plechner,
Freeman Woodbridge.

30

(Endorsed)

45/94

Subpoena ad Respondendum
IN CHANCERY OF NEW JERSEY

10	Between TONY CAFFARO and JOSEPH GIAMARES, and ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a corporation and JAMES A. EDGAR, 	}	Compl't., Def't.	Sub. ad Respt.
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Ret'ble June 11, A. D. 1918.

20 FREEMAN WOODBRIDGE,
 GEORGE J. PLECHNER,
 Sol'rs. for Complainants,
 Ntl. Bk. of N. J. Bldg.,
 New Brunswick, N. J.

I hereby depute Milton R. Jaques a Citizen of
 my County to serve the within process.

CHARLES ANDERSON,
 Sheriff.

30 Filed June 1, 1918.
 Sheriff's Fees \$2.12
 Subpoena duly served May 31, 1918, personally
 upon James A. Edgar one of the defendants here-
 in.

CHARLES ANDERSON,
 Sheriff.

40 By Milton R. Jaques.

Answer

fect on the policy a change of ownership of the insured premises is admitted, the rest is denied.

(Complainants have erroneously numbered two consecutive paragraphs "5").

10 5. Paragraph 5 is denied.

6. So much of paragraph 6 as refers to the indorsement of change of ownership is admitted the rest which relates to the chattel mortgage is denied.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied, except that these defendants admit receipt of the premium.

20 9. So much of paragraph 9 as refers to the occurrence of a fire is admitted except that, defendants do not know the date thereof; the rest of paragraph 9 is denied.

10. Paragraph 10 is denied.

11. So much of paragraph 11 as refers to the defendant company's refusal to pay for any loss is admitted the rest is denied.

12. Paragraph 12 is admitted.

30 13. These defendants deny that the complainants are entitled to the relief prayed for in subdivisions 1, 2, 3 and 4 of paragraph 13.

FIRST DEFENSE TO COMPLAINANTS'
CAUSE OF ACTION

40 1. Complainants are not entitled to relief in this court because they are guilty of laches in failing;

Answer

promptly or within a reasonable time to assert their rights.

2. The policy of insurance referred to in the complaint provides that no suit or action therein shall be sustainable in any court of law or equity "until after full compliance by the insured * * * 10 nor unless commenced within twelve (12) months next after the fire."

SECOND DEFENSE

1. Complainants are not entitled to the relief sought by reason of the fact that they seek to vary the terms of a written agreement by oral testimony.

2. Complainants are bound by a written agreement duly executed, delivered and accepted, and retained for an unreasonable length of time. 20

THIRD DEFENSE

1. The complainant, Tony Caffaro, is neither a proper nor a necessary party to this suit because there is no privity of contract between him and the defendants or either of them. 30

FOURTH DEFENSE

1. The policy of insurance conforms to the law prescribing a standard form of policies in this State and the Court lacks jurisdiction to afford relief contrary to the express terms of a written contract. 40

2. Complainants seek the Court's making or

Replication

construing a new contract which the Court has no power to do.

10 I. BENJ. GLUECKFIELD,
Solicitor of Defendants,
Allemania Fire Insurance Co.
of Pittsburg, Pa., a corporation
and James A. Edgar.

Replication

(Filed August 16, 1918)

IN CHANCERY OF NEW JERSEY

20	Between TONY CAFFARO and JOSEPH GI- AMMARES, <p style="text-align: right;">Complainants,</p> and ALLEMANNIA FIRE INSURANCE COMPANY, OF PITTSBURG, PA., a corporation and JAMES A. EDGAR, <p style="text-align: right;">Defendants.</p>	}	On bill etc.
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The Complainants join issue on the Answer of the Defendants in said cause.

GEORGE J. PLECHNER,
 FREEMAN WOODBRIDGE,
 Solicitors for Complainants.

I hereby consent to the filing of this Replication as within time.

40

I. BENJ. GLUECKFIELD,
 Solicitor for Defendants.

Order of Amendment*(Filed November 3, 1918)*

IN CHANCERY OF NEW JERSEY

10	Between JOSEPH GIAMMARES and TONY CAFFARO, <div style="text-align: right; padding-right: 20px;">Complainants,</div> <div style="text-align: center; padding: 5px 0;">and</div> ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and JAMES A. EDGAR, <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On bill, etc.
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20

This cause coming on to be heard on the 23d day of October, 1918 at the Chancery Chambers in the City of Newark, before the Hon. Merritt Lane, Vice-Chancellor of the State of New Jersey, to whom the same was referred and application being made on behalf of the said Complainants to amend their Bill of Complaint and due notice of the said application having been given,

30 And it appearing that the said Amendments are proper and no good cause being shown to the contrary,

It is thereupon on this third day of November, 1918 on motion of Freeman Woodbridge and George J. Plechner, Solicitors for the said Complainants ordered that the said Bill of Complaint be and the same is hereby amended as follows to wit:

40 Paragraph 3 of the said Bill of Complaint amended to read as follows:

Order of Amendment

"That at the time of writing the said policy of insurance the said complainant, Tony Caffaro, notified James A. Edgar, agent of the said Insurance Company, that he was the owner of the building and contents, only and was not the owner of the land whereon the same stood, but that the said building stood on leased land, and the said James A. Edgar acting as representative and agent of the said Insurance Company issued the said policy with full knowledge of said fact and accepted the premium, but by a mistake or inadvertence which was mutual or fraudulently planning and contriving to deceive the complainants and mislead complainants to the detriment of the complainants with full knowledge of the said facts, neglected and failed and omitted to endorse on said policy the statement that the said building stood on leased land, and the said Complainant, Tony Caffaro did not notice the said mistake, failure, omission and neglect at that time. That said conduct on the part of the said James A. Edgar acting as agent and representative of the said Insurance Company was so inequitable that same amounted to fraud in law and equity upon the said complainants.

Paragraph 6 of the said Bill of Complaint amended to read as follows:

"That the said James A. Edgar, endorsed upon the said policy the following:

"Ownership is now vested in Joseph

Order of Amendment

Giammares, as owner, instead of as here tofore. Attached to and forming part of Policy Number 528022 of the Allemania Insurance Company of Pittsburgh, Pa.

Dated February 21, 1917.

10

Signed, JAMES A. EDGAR,
Agent.' ”

20

and through a mistake or neglect, which mistake or neglect was mutual or fraudulently planning and contriving to deceive the complainants and mislead the complainants to the detriment of the complainants with full knowledge of the said facts, neglected and failed and omitted to endorse on said policy the statement or memorandum to the effect that the said Tony Caffaro was the holder of a chattel mortgage on the said building and contents and that loss if any, should first be payable to Tony Caffaro, as mortgagee which mistake, failure, omission and neglect was not then noticed by the said complainants or either of them at that time. That said conduct on the part of the said James A. Edgar, acting as agent and representative of the said Insurance Company was so inequitable that the same amounted to fraud in law and in equity upon the said complainants.

30

Paragrah 8 of the said Bill of Complaint amended to read as follows:

40

“That notwithstanding the premises and the promises of the said James A. Edgar, as Agent of the said Allemania Insurance Company of Pittsburgh, Pa., to have noted

Order of Amendment

upon the policy the fact that the said building stood on leased ground and the chattel mortgage interest of the said Tony Caffaro the said Defendant Allemania Fire Insurance Company of Pittsburgh, Pa., through said mistake, inadvertence, omission and the fraud of the said James A. Edgar, acting as its agent and representative, wholly failed to note said facts and interest upon the policy and utterly failed to notify the said complainants or either of them of said failure to make said changes or to cancel the said insurance policy, or to return to complainants or either of them any part of the premium, but on the contrary thereof, retained the whole of said premium in its possession and delivered back the said insurance policy to the said complainant Tony Caffaro, as a valid and subsisting contract of insurance, well knowing that said building stood on leased ground and that the said complainant Tony Caffaro had a chattel mortgage interest therein and and on the contents thereof, recognizing the said Tony Caffaro as the person entitled to hold said insurance policy.”

Paragraph 9 of the said Bill of Complaint amended to read as follows:

“That on March 25, 1917, the said building and contents were totally destroyed by fire, which said building and contents were insured by the said policy of insurance and which policy of insurance the said Allemania Fire Insurance Company

Order of Amendment

10 of Pittsburgh, Pa. and the said complainants and the said James A. Edgar, Agent as aforesaid believed to be and intended to be a valid and subsisting policy of insurance upon the said building and contents for the sum of \$2350.00 or which by the said fraud and inequitable conduct of the said James A. Edgar he and the said Allemania Insurance Company of Pittsburgh, Pa., induced the said complainants to believe was a valid and subsisting contract of insurance, with the notation thereon that the said building stood on leased ground, and that the said complainant Tony Caffaro held a valid and subsisting chattel mortgage interest thereon, with a clause endorsed thereon to the effect that loss if any, should first be payable to Tony Caffaro, as chattel mortgagee and secondly to Joseph Giammares as owner.

20 Paragraph 11 of the said Bill of Complaint amended to read as follows:

30 "That the said Allemania Fire Insurance Company of Pittsburgh, Pa. now refuse to pay the said loss on the ground that the building stood on leased land and also on the ground that said Complainant, Tony Caffaro held a Chattel mortgage on said building and contents, neither of which facts it alleges were noted in writing on the said policy as required by the terms, although the said facts were well known to the Allemania Fire Insurance Company of Pittsburgh, Pa., and its said Agent."

40

Order of Amendment

And it is further ordered that the said Complainants have leave to amend the Prayer to their Bill of Complaint by adding thereto the following paragraph, after paragraph 2 of the said Prayer:

And also that the said defendants may be perpetually enjoined and restrained by the decree of this Honorable Court from setting up in any action at law as a defense to the right of the said complainants to recover on the said policy in such action at law, the fact that there was a failure to note upon the policy the statement that the building was on leased ground and that there was a chattel mortgage existing thereon on the property therein mentioned and also restrained and enjoined from setting up as a defense in any action at law the said policy in its unreformed condition, in said respects. 10 20

Respectfully advised,
MERRITT LANE,
V. C.

Testimony

October 23, 1918.

IN CHANCERY OF NEW JERSEY

10 Between
 JOSEPH GIAMMARES and TONY
 CAFFARO,
 Complainants,
 and
 ALLEMANNIA FIRE INSURANCE
 COMPANY OF PITTSBURG, a
 body corporate, and JAMES
 A. EDGAR,
 Defendants.

20

Transcript of shorthand notes of testimony taken in the above entitled cause on Wednesday, October 23, 1918, at 10 o'clock in the forenoon, at the Chancery Chambers, Prudential Building, Newark, New Jersey, before the HONORABLE MERRITT LANE, Vice Chancellor.

Appearances:

30 Mr. George J. Plechner and Mr. Freeman Woodbridge for complainants.
 Mr. I. Benjamin Glueckfield for defendants.

JOSEPH CANTRE, sworn:

Direct-examination by Mr. Plechner:

Q. Mr. Cantre, where do you reside? A. New Brunswick, New Jersey.

40 Q. And your occupation? A. Real Estate agent and fire insurance broker.

Joseph Cantre—Direct

Q. Your occupation in the month of January, 1917? A. Same.

Q. You are acquainted with James A. Edgar?
A. Yes, sir.

Q. Real estate agent? A. Yes, sir.

Q. You are acquainted with Tony Caffaro? A. 10
Yes, sir.

Q. And with Joseph Giammares? A. Yes, sir.

Q. State whether or not you had any conversation at any time with Tony Caffaro relative to securing an insurance policy for him?

Mr. Glueckfield: I object to the question.

The Court: On what ground?

Mr. Glueckfield: Any conversation between the witness and the complainants can in no way affect or bind the defendant here. 20

The Court: Not unless it was communicated; I presume it was.

A. Yes, sir.

Q. Was that conversation relative to any building in New Brunswick? A. Yes, sir.

Q. What building? A. On Jersey Avenue and Sandford Street.

Q. What did Mr. Caffaro say to you in reference to that insurance on that building? A. He 30
told me that he built a little store, used for fruit and cigar store, and that only he owned the building and the contents, but he didn't own the ground, which he leased from someone else; he would like to have the place insured for \$1,500, on the building and \$400, or \$500, on the contents; I took note and I went to Mr. Edgar's 40
office and told him what Caffaro told me.

Joseph Cantre—Direct

Q. Just what did you tell him? A. I told him that Caffaro like to have his place insured on Jersey Avenue and Sandford Street, building and contents and that the ground was not his.

10 Q. About when did that—what month and year did that occur? A. The first week in January, 1917.

Q. What, if anything, did Mr. Edgar do following that conversation? A. Why, he wrote the policy and he mailed it to me.

Q. I show you a paper document and ask you if you ever saw that, and state when you first saw it? A. I saw it about the fifth or sixth of January, 1917.

20 Q. Is that the policy that was delivered to you? A. Yes, sir.

Q. And who delivered the policy to you? A. To Mr. Caffaro.

Q. Who delivered it to you? A. It was delivered to me by mail from Mr. Edgar.

By the Court: Q. What did you do with it? A. Immediately delivered it to Mr. Caffaro.

By the Court: Q. Did you read it? A. No, I did not.

30 Mr. Plechner: I will offer it in evidence.
The Court: Any objection.

Mr. Glueckfield: No objection.

Offered in evidence and marked Exhibit C-1.

Q. Mr. Cantre, did you have any occasion subsequent to that time to have that policy in your possession? A. Yes, sir.

40 Q. When? A. About the middle of February, 1917.

Q. Who gave the policy to you? A. Mr. Caffaro.

Joseph Cantre—Direct

Q. Did he give you anything else with the policy? A. He gave me a bill of sale.

Q. From whom and to whom? A. From Tony Caffaro to Joseph Giammares.

Q. Conveying what? A. Building and store from Caffaro to Giammares. 10

Q. That was given to you for what purpose? A. To have new endorsement on the policy and also notify me that there was a chattel mortgage clause in that sale.

Q. What do you mean by new endorsement on the policy? A. Mr. Caffaro told me that he sold his building and the business to Mr. Giammares—

Mr. Glueckfield: I object to the question asked and I ask that so much as has been answered be stricken out. 20

The Court: I will permit it.

A. (Continuing) And he also told me to have Mr. Giammares' name on the policy and chattel mortgage from Giammares to Caffaro.

Q. What did you do with the policy and that bill of sale that you speak of? A. I took the bill of sale and policy and I brought them down to Mr. Edgar's office and I left them; told Mr. Edgar's stenographer to have that endorsement put on the policy. 30

Q. When you went to Mr. Edgar's office, state whether or not the young lady that you saw there had charge of his office? A. Yes, sir, at the time.

Q. What information did you give her concerning that policy? A. I recall I told Miss Powers—

Q. That is the name of the stenographer? A. Yes, that Mr. Caffaro sold his place on Jersey 40

Joseph Cantre—Direct

Avenue and Sandford Street to Joseph Giammares and that the policy was returned to me to have new endorsement put in.

10 Q. What endorsement put in? Did you tell her that? A. The name of Joseph Giammares as new owner and Tony Caffaro as chattel mortgagee clause.

Q. What, if anything, did the stenographer, Miss Powers, Mr. Edgar's stenographer, say to you? A. I don't remember she said anything.

Q. Did she write down the information that you had given to her? A. I don't recall that.

Q. Did you leave the policy and the bill of sale at Mr. Edgar's office? A. Yes, sir.

20 Q. With the stenographer? A. With the stenographer, yes.

Q. Did you ever see that policy and bill of sale again? A. Mailed to me about two or three days later.

Q. Did any letter accompany the enclosures? A. No, sir.

Q. What was enclosed in the envelope? A. A few fire insurance policies and bill of sale.

Q. The same policy that we have here? A. Yes, sir.

30 Q. And the bill of sale? A. Yes, sir.

Q. And what then did you do with that policy? A. I delivered it to Mr. Caffaro.

Q. I show you paper writing, Mr. Cantre, and ask you to inspect it and see if that is the paper writing that you refer to? A. Yes, sir.

Mr. Woodbridge: Q. Referred to as the bill of sale? A. Yes, sir.

40 Q. To someone? A. Yes, sir.

Offered in evidence and marked Exhibit C-2.

Joseph Cantre—Direct

Mr. Glueckfield: No objection to it.

Q. Did you have occasion at any time subsequent to receiving the insurance policy and bill of sale to meet Mr. Edgar again? A. About a month later.

Q. Where did you meet him and for what purpose? A. Mr. Caffaro came to me and reported that this place was burned; was destroyed by fire; and I made a report; me and Mr. Edgar went up and see the damage and we went up there. 10

Q. Yes; what did, did Mr. Edgar make any comment? A. Why, he looked all over and see how much damage there was in the building, and we had quite a little conversation.

Q. And what was the nature of that conversation? A. About the building and fire, and he also asked me if I knew how much interest was in Giammares and how much in Tony Caffaro. 20

Q. Anything further said by Mr. Edgar? A. I recall he said that Caffaro was foolish not to have bought the lot.

Q. Anything said by Mr. Edgar as to the chattel mortgage?

Mr. Glueckfield: I object to the question as being leading? 30

The Court: I will admit it; it is not leading.

A. The chattel mortgage was mentioned.

Q. What was said about the chattel mortgage? A. I don't recall exactly the words; but during the conversation between me and Mr. Edgar, I remember distinctly that the chattel mortgage was mentioned, but I don't recall exactly what the conversation was between him and me. 40

Joseph Cantre—Cross

Q. Mr. Cantre, will you speak a little louder?

A. We spoke only about ten minutes in regard to the fire and in regard to the transaction between Caffaro and Mr. Giammares; I don't recall exactly what was said, but I remember distinctly that the chattel mortgage was mentioned, and he asked me if I know how much Caffaro's interest was in that loss and how much Giammares.

Mr. Plechner: That is all.

CROSS-EXAMINATION by Mr. Glueckfield:

Q. Mr. Cantre, you say that your occupation, among other things, was that of insurance broker? A. Yes, sir.

20 Q. You have a regular running account with Mr. Edgar? A. Yes, sir.

Q. You generally have insurance charged to yourself when you broker a policy through Mr. Edgar's office for any customer or client of yours? A. Yes, sir.

Q. You have Mr. Edgar charge the policy to you, don't you, the premium? A. Yes, sir.

30 Q. You acted, of course, as agent for Caffaro when you placed the insurance? A. As broker, not agent.

Q. You were acting as broker for Mr. Caffaro? A. Yes, sir.

Q. How long, Mr. Cantre, have you been an insurance broker? A. About three and a half years.

Q. You handled a great many policies during that time? A. Quite a few, yes.

40 Q. Caffaro was a pretty good customer of yours? A. No, sir.

Joseph Cantre—Cross

Q. Was that the first insurance you have placed for him? A. Yes, sir.

Q. Why, Mr. Cantre, did you not read the policy after you procured it through Mr. Edgar's office? A. No, sir.

Q. Why did you not read it? A. Why? 10

Q. Yes. A. I didn't; I never read the policies delivered by Mr. Edgar to me.

Q. You have told us that Mr. Caffaro told you certain things with regard to the building standing on the leased land? A. Yes, sir.

Q. And you told Mr. Edgar that? A. Yes, sir.

Q. Why did you not see whether or not the policy contained that clause? A. I couldn't answer that. 20

Q. When you delivered the policy to Mr. Caffaro did he ask you whether the policy contained that clause? A. No, sir.

Q. Neither of you made any attempt to find out whether or not that clause had been inserted? A. No, sir; never knew that until yesterday.

Q. Until yesterday? A. Yes, sir.

Q. How did you come to know it yesterday? A. When I was subpoenaed to come in this Court here. 30

Q. Did the fact that you were given a subpoena remind you that it wasn't in there, or how did you discover it? A. When I see the policy.

Q. So that the first time that you examined that policy since it was issued was yesterday? A. Yes, sir.

Q. And it is a year and nine months that the policy has been issued? A. Yes, sir. 40

Joseph Cantre—Cross

Q. Now, then, when you first ordered this policy to whom did you speak? A. To Mr. Edgar.

Q. And to him personally? A. Yes, sir.

10 Q. Did you have him any written memorandum or tell him personally? A. A little piece of paper memorandum.

Q. Why didn't you tell us about that before? A. I did say that.

Q. My recollection is that you said before you told Mr. Edgar? A. I took note from Mr. Caffaro and I brought it down to Mr. Edgar's office.

Q. What was written on that paper? A. Was written on—

20 Mr. Woodbridge: We gave him notice to produce it.

Mr. Glueckfield: We deny we have received any.

A. (Continuing) the note was the amount of the insurance requested by Mr. Caffaro; he told the building was frame building and leased ground, there was on that little note.

Q. In whose hand writing was that? A. My hand writing.

30 Q. Have you any idea as to how many policies you placed through Mr. Edgar during January, 1918? A. Five or six, I received from Mr. Edgar.

Q. How many notes or memorandum did you give him in the other cases? A. Every time I go down to Mr. Edgar's I go along with the note which I leave there.

40 Q. You say you saw that policy again after it was issued in—about the middle of February, 1917? A. Yes, sir.

Joseph Cantre—Cross

Q. And you say you went with the policy and the bill of sale to Mr. Edgar's office, is that right? A. Yes, sir.

Q. Why did you take the bill of sale? A. As I read the bill of sale I noticed that the chattel mortgage was mentioned, and that Mr. Giam- 10
mares didn't pay cash to Caffaro, and I was re-
quested by Caffaro that he wanted to put the
chattel mortgage clause in that policy.

Q. Why didn't you make a little note and leave it with Mr. Edgar? A. I brought the bill of sale myself and the policy so that he can put the endorsement on it.

Q. Wasn't it unusual to bring the bill of sale yourself? A. That was the first time.

By the Court: Q. Whom did you give it to?, A. 20
To Miss Powers.

By the Court: Q. Did she take it? A. Yes, sir. I left it in the office.

By the Court: Q. You didn't get back until you got the policy of insurance? A. The bill of sale with the policy, in a couple of days, other fire insurance policies were mailed to me, two or three days after I brought it to the office.

By the Court: Q. Was the letter in the en-
closure? A. No, sir; just the bill for the policy. 30

Q. What did you do with both the policy and bill of sale? A. I delivered to Mr. Caffaro.

Q. What did you give him the bill of sale for? A. He gave it to me and I gave it back to him.

Q. He didn't own the property any more? A. I don't know anything more; he gave the bill of sale to me with the policy, the first time Mr. Caf-
faro and Mr. Giammares came to me so when I 40

Joseph Cantre—Cross

received the policy with the bill of sale I didn't know where Mr. Giammares live; I give it to Mr. Caffaro to deliver to Mr. Giammares.

Q. You said in your direct-examination that when you brought the bill of sale to Mr. Edgar's office you told the clerk to do what? A. To put the new endorsement on the policy.

Q. Endorsement of what? A. That Mr. Caffaro sold his business to Mr. Giammares and also he took a chattel mortgage.

Q. When you got the policy and bill of sale back by mail did you look at the policy to see whether there was either or both of these endorsements on the policy?

The Court: He has already testified he didn't.

Q. Are you positive that you personally took the bill of sale and the policy to Mr. Edgar's office? A. Yes, pretty sure about that.

Q. Do you know who drew the bill of sale? A. Mr. Barwis.

Q. He was the attorney connected with Mr. George L. Burton's office? A. Yes, sir.

Q. Don't you know, as a matter of fact, that the request for the endorsement of change of ownership was made by Mr. Burton, or through his office, and not by you? A. It was made by me.

Q. Positive of that? A. Yes, sir.

Q. When you took over the bill of sale, why didn't you also take along the chattel mortgage? A. If I recall right Mr. Caffaro showed me the chattel mortgage and the chattel mortgage was not recorded, and I advised Mr. Caffaro, for his own good, to go down to the County Clerk's and file it on record.

Joseph Cantre—Cross

Q. You say that after the fire you and Mr. Edgar went up to the scene of it and you had a conversation there? A. Yes, sir.

Q. Mr. Edgar asked you what was the interest of each of these complainants? A. Yes, sir.

Q. What did you understand him to mean by that question? A. Well, I understood at the time that Mr. Edgar asked me if I knew if Mr. Giammares have paid anything to Mr. Caffaro on the chattel mortgage. 10

Q. Who first mentioned chattel mortgage, you or Edgar? A. Mr. Edgar.

Q. Sure about that? A. Yes, sir, and he also asked—he said after looking around he didn't think there was enough stuff there to cover four hundred and some odd dollars insurance. 20

Q. Do you also remember Mr. Edgar's telling you that the premises had been greatly over-insured? A. Yes, he said that.

Q. He did say that? A. Yes. He looked at the foundation of the building; there was no foundation there at all.

Q. Do you remember Mr. Edgar telling you at the same time that whereas the value of the building had been given by Caffaro or by you as \$1,500 it was actually worth perhaps two or three hundred dollars. A. He said more than that. 30

Q. Did he say that?

The Court: More money?

A. Yes, he said that the place wasn't worth \$1500.

Q. You were familiar with the building and contents before you had Mr. Edgar draw this policy? A. Yes, sir.

Q. Didn't you know that the amount of insur- 40

Joseph Cantre—Cross

ance you asked for was a far greater amount than the value of the building and contents?

Mr. Plechner: I object.

A. I couldn't say.

10 Q. Did you know the value of the building and contents? A. What I know, understood, I couldn't know precisely because there was something there worth three or four hundred dollars, like soda fountain and lot of stuff there; couldn't say what it was worth at the time.

Q. Why did Mr. Edgar say to you, if you know, that it was foolish for Mr. Caffaro not to have bought the lot? A. On account of being near the Simplex factory; it was worth six or seven times what it was worth before.

20 Q. Mr. Cantre, how long did you have the policy in your possession after it was first issued, and before you delivered it to Mr. Caffaro? A. I don't believe—one day, twenty-four hours.

Q. Within twenty-four hours you delivered it to Mr. Caffaro? A. Yes, sir.

Q. How long did you have it in your possession after you had given it to Mr. Edgar for the endorsements? It was delivered to Mr. Caffaro the same day that I received it by mail.

30 Q. And those were the only two occasions on which you had the policy in your possession? A. Caffaro's policy?

Q. Yes. This particular policy? A. Yes, and after the fire, three times.

The Court: Any further direct?

Mr. Plechner: No further.

Tony Caffaro—Direct

TONY CAFFARO, sworn:

Direct-examination by Mr. Plechner:

Q. Mr. Caffaro, you are one of the complainants in this case? A. Yes.

Q. And you are acquainted with Mr. Cantre? 10
A. Yes.

Q. Did you ever secure any insurance on any building in New Brunswick? A. Yes.

Q. On what building and from whom did you secure it? A. Jersey Avenue and Sandford Street, New Brunswick, New Jersey.

Q. From whom did you secure the insurance?
A. From Mr. Cantre.

Q. Did you own the land on which that building stood? A. No. 20

Q. Who owned the land? A. A man by the name of Hopson.

Q. What place did you have there? A. Lease for five years.

Q. Where is the lease now? A. Can't find it.

Q. When did the lease begin to run? A. I couldn't remember the date, 1917.

Q. State what occurred at the time in your interview with Mr. Cantre, state just what took place? 30

Mr. Glueckfield: I object to that.

The Court: I will permit it.

A. You mean when I went to get the insurance?

Q. Yes, what did you say to him about wanting insurance? A. I went to Mr. Cantre's place and said I wanted insurance, please, and I told him I had the building on the corner of Jersey Avenue and Sandford Street, which stood on leased 40 ground; I wanted to have my place insured, so

Tony Caffaro—Direct

Mr. Cantre took pen and ink and started to write down and took the insurance.

Q. After that, did you receive a policy? A. About three or four days after that.

Q. Who gave you the policy? A. Mr. Cantre.

10 By the Court: Q. Did you read it when you got it? A. No, sir.

By the Court: Q. How long did you keep it?

A. I kept the policy for a month and a half, after I sold the place to Mr. Joseph Giammares.

By the Court: Q. Then what did you do? A. I took the policy back to Mr. Cantre and told him I sold the place to Joseph Giammares and wanted to have the name changed as to ownership and left it to Mr. Cantre.

20 By the Court: Q. Left what with Mr. Cantre? A. The policy.

By the Court: Q. Anything else? A. No, Mr. Cantre told me that he was sending it and would get it in a few days; in a few days after that I got the policy back again.

Q. You told Mr. Cantre that you wanted a change of ownership on it? A. Yes, sir.

Q. That is all you told him? A. I told him I sold the place for \$1,750; told him also I got
30 \$250 in cash and I took a \$1,500 chattel mortgage.

Q. Yes.

By the Court: Q. Where was the chattel mortgage at this time? A. On the bill of sale.

Q. Where was the paper? A. I left it with Mr. Cantre.

By the Court: Q. Where was the bill of sale?

A. I handed all of the papers to Mr. Cantre and
40 left it to him.

By the Court: Q. How long did you leave them

Tony Caffaro—Direct

with him? A. Couple of days, about three days.

By the Court: Q. What did you get back? A. The same paper I gave to him.

By the Court: Q. What were they? A. The same paper I handed to Mr. Cantre.

Q. What was the nature of the papers? A. 10 Policy with bill of sale.

Q. What became of the chattel mortgage? A. It was attached to the bill of sale.

Q. What did you do with the chattel mortgage? A. I kept it home after Mr. Cantre gave it to me.

Q. What did you do with the chattel mortgage, if anything? I show you a paper writing; can you read English? A. No.

By the Court: Q. Did you have a paper like 20 that? A. Yes, sir.

By the Court: Q. What did you do with it? A. I gave it Mr. Cantre and Mr. Cantre gave it to me three days after that to be included in the policy; I put them together and kept them home.

Q. Did you ever record any of these papers in the Middlesex County Clerk's Office? A. Yes, sir.

Q. Which paper did you record? A. Chattel mortgage.

By the Court: Q. When did you record that? 30 A. I can't remember exactly the date.

Offered in evidence and marked Exhibit C-3.

(This is the chattel mortgage which is referred to in the witness's testimony.)

Q. Who told you to put the chattel mortgage on record, Mr. Caffaro? A. Why, a lawyer did.

Q. What lawyer? A. Lawyer Burton. 40

Q. Did Mr. Cantre say anything to you about recording the chattel mortgage?

Tony Caffaro—Direct

Mr. Glueckfield: Object to the question.

The Court: I will permit it.

A. I can't recall that; I don't remember.

10 Q. Did you have any conversation with Mr. James A. Edgar in reference to the insurance policy and if so, when and where? A. When I took the policy to Mr. Cantre, the day after I met Mr. Edgar on George Street and I told him that I sold the place, and I brought the policy to Mr. Cantre to have the name of the ownership changed, and Mr. Edgar told me he had heard I sold the place; after we had a little conversation and I told him I sold it for \$1,750 and I got \$250 cash and I took back a chattel mortgage and he told me he knew about it as Mr. Cantre told him.

20 By the Court: Q. When was that? A. It was in February sometime; I can't recall the date; it was the day after I brought the policy to Mr. Cantre.

By the Court: Q. Where did you meet Edgar?
A. George Street.

By the Court: Q. Just happened to meet him on the street? A. Yes, I meet him every day.

By the Court: Q. You knew him? A. Yes, sir.

30 Q. What is your occupation? A. Baker.

Q. What was your occupation during the months of January and February, 1917? A. 1917—I went back again to my trade.

Q. What is your trade? A. Baker.

Q. And did you keep a store before you sold to Giammares? A. I kept a store before I sold to him.

40 Q. Were you personally acquainted with Mr. Edgar? A. Yes, sir.

Tony Caffaro—Cross

Q. Have you any conversations with him before? A. Not before that, no.

Q. Have any talks with him before; ever speak to him before that? A. Yes, sir; I spoke to him on several times.

Q. He knew you and you knew him? A. Yes, 10
sir.

CROSS-EXAMINATION by Mr. Glueckfield:

Q. How long did you have the store before you sold it? A. About eight months.

Q. Eight months? A. Yes, sir; seven or eight months.

Q. You had it only about five or six weeks after you got this policy of insurance and sold it? A. Yes, sir. 20

Q. And you were not insured for seven months before that? A. Yes, sir.

Q. Why? A. Never wanted to take it.

Q. Why did you suddenly want to take it in January? A. Because I felt like it.

Q. What was the value of your building? A. The building cost me alone \$1,400, building and loan.

Q. That building was made of a lot of old timber that you had lying around? A. Not all. 30

Q. Most of it? A. No, only a few boards I put on the roof.

Q. And the rest of the walls and foundation was of new? A. Yes.

Q. And wasn't old brick?

Mr. Plechner: Object to the questions.

The Court: What is the materiality of 40
this?

Tony Caffaro—Cross

Mr. Glueckfield: That his sudden desire to secure this insurance was inspired by the fact that this amount of insurance was greatly over-valued.

10 The Court: It is for a reformation of this policy.

Mr. Glueckfield: It is a well known fact among this class of people that the mortgagee is absolutely guiltless of anything the owner does and is always entitled to recover, no matter what happens; easy to get his insurance; that this man thought by taking back a chattel mortgage he would be safe even though there were a great over valuation, is one of the theories on which I am proceeding.

20

The Court: That is so in an action at law, but what has it to do with this particular case?

Mr. Glueckfield: That he has not come into this Court with clean hands, among other things.

The Court: Do you plead that?

Mr. Glueckfield: I haven't in so many words, no.

30

The Court: I am not going to sit here and decide that this fire was the result of arson, or he has over-valued this property; that is an issue to be determined in the Law Court.

Mr. Glueckfield: I will abandon that line of questioning.

40 Q. Now, you say you recorded that chattel mortgage; did you take it over to the County Clerk's Office yourself? A. No.

Tony Caffaro—Cross

Q. Who did? A. I left it to Mr. Burton.

Q. When did you get it back again? A. Oh, a couple of weeks after that.

Q. A couple of weeks after that? A. Yes.

Q. Does the bill of sale state the date on which you sold the property; is the date in the bill of sale, exact date, on which you transferred your property to Giammares? A. I can't tell you. 10

By the Court: Q. That is, February 19th, 1917; is that the date you sold to Giammares? A. I think I did.

By the Court: Q. Was it the same day you sold to Giammares that you signed the bill of sale? A. No.

By the Court: Q. How long after it?

Mr. Plechner: He doesn't understand the question, your Honor. 20

By the Court: Q. How long before you went to Burton's office to sign the bill of sale was it that you agreed to sell the property? A. I don't understand that.

Q. You had some arrangement with Giammares before you sold the property? A. Yes.

Q. How long before you went and signed the bill of sale in Burton's office? A. About two or three weeks after; I don't remember exactly; it is a long time now, two years. 30

Q. How long after you made the bill of sale and chattel mortgage in Mr. Burton's office—Mr. Burton drew them both, didn't he? A. Yes.

Q. How soon after Mr. Burton had drawn these two papers did you go to Mr. Cantre with both of them, as you say, to have the policy transferred? A. About a month and a half after that.

Q. It was after the fire, is that it? A. Just as soon as I got them from Mr. Burton. 40

Tony Caffaro—Cross

Q. I want you to understand my question, Mr. Caffaro; on the 19th according to these papers you were with Mr. Burton at his office, and had the bill of sale drawn and chattel mortgage? A. I don't remember.

10 The Court: That was the day.

Q. How many days after you signed the bill of sale in Mr. Burton's office did you go with the bill of sale and chattel mortgage and policy to Mr. Cantre? A. After I got them from the County Clerk's Office.

Q. When was that? A. A couple of weeks after that.

Q. About how long? A. Just as soon as I got them from the County Clerk's office.

20 Q. Can't you say about how soon that was?

The Court: What is the use of wasting time on the question, because he is mistaken. The papers themselves show he is mistaken. No use trying to trip a witness because he is mistaken; the insurance was changed on the 21st of February.

30 Q. When Mr. Cantre gave you the policy the first time did you ask him whether or not it contained a clause to the effect that the building stood on leased ground? A. I did.

Q. You did ask Cantre? A. The first time I took the policy?

Q. After Cantre gave you the policy? A. No, I didn't ask him; he just gave me the policy.

Q. You say you can't read English yourself? A. No.

40 Q. Did you have anybody else read the policy for you? A. No.

Q. Why didn't you ask Cantre whether that

Tony Caffaro—Cross

clause was there? A. I just took the policy and took it with me; didn't ask him anything.

Q. Now, after you made the sale and told Mr. Cantre to change the ownership and to mention the chattel mortgage, did you try to find out whether or not the policy contained those facts? 10

A. No; I didn't tell anything.

Q. Did you ever try to find out whether the policy had the changes? A. No.

Q. Didn't have anybody read the policy for you? A. No.

Q. Didn't ask Cantre either? A. No.

Q. When did you first learn that the policy did not have the endorsement regarding the chattel mortgage? A. After the place took fire.

Q. Who told you about it then? A. Lawyer 20
Watson.

Q. When did this fire occur? A. It was in March sometime, around the 25th of March, 24th or 25th.

Q. Of 1918, this year? A. No, 1917.

Q. Now, Mr. Caffaro, if this fire occurred on March 25th, 1917, why did you wait until almost a full year had expired before you took any action? A. I did not wait; I went right after the fire, about a month after that I see that nobody would pay any attention, neither Mr. Edgar or anybody 30
from the company, pay any attention to this.

Q. Did you go to speak to Mr. Edgar after the fire? A. Cantre went.

Q. Did you? A. No, I went direct to Cantre.

Q. But you never went to Mr. Edgar? A. No.

Q. Did you ever go to Mr. Edgar's office in connection with this policy before or after this fire? A. No.

Q. Why did you wait almost a year before you 40

Tony Caffaro—Cross

started any proceedings in any court? A. I see about a month after that the place had took fire nobody would take any notice; I went to Mr. Watson he said he will give me answer later; when I go in later, he Lawyer Watson, Lawyer Watson
 10 tell me he read the policy; he says to me "Tony, this policy ain't no good;" I said, "Why, ain't it" and he mentioned about chattel mortgage and about the leased ground; I told him that before I took the policy all those things were mentioned; he kept the policy for almost five months; after five months he returned the policy to me; he says to me that he couldn't do nothing with it, he says, "You go back to your lawyer who drew the bill of sale;" I did, I went to Mr. Burton at South
 20 River; he used to be in New Brunswick; I went to him and Mr. Burton told me "I see what I can do;" about a month after that or two months after that, I couldn't tell you which, Mr. Burton told me he couldn't do nothing with it; I took it up to Mr. Plechner and Judge Woodbridge.

Q. You had it, you waited a month, then Mr. Watson had it five months, that is six months, and Mr. Burton had it for a month or two months, that is six or seven months; why then did you wait
 30 three and a half months before you started this proceeding? A. I am only saying that; I didn't count the months, about five months, probably seven or eight months for all I know.

Q. Then the fault was not yours but your counsel's, is that it?

The Court: He has said what the facts are. I am going to say whether it was his
 40 fault or his counsel's. When was the summons issued in the action at law?

Tony Caffaro—Cross

Mr. Glueckfield: Ten days before the year expired when any action could have been brought.

Q. If you knew Mr. Edgar, as you say you did, why didn't you go to him personally to see that everything was inserted in the policy as you wanted it? A. I didn't want to go to him. 10

Q. Why not? A. I didn't feel like going to him.

Q. Now, Mr. Caffaro, are you quite positive in your own mind that you went to Cantre and asked him to have the endorsements made on the policy; are you sure you went to Cantre about that? A. I went to Cantre.

Q. Are you certain as to whether or not Mr. Burton said that he would attend to the changes?

A. I took them myself personally to Mr. Cantre. 20

Q. Now, this time that you met Mr. Edgar, who started the conversation about that policy, you or Mr. Edgar? A. I told Mr. Edgar that I had sold the place for \$1,750.

Q. Where was the policy then? In Mr. Cantre's possession? A. This was the day after I left the policy with Mr. Cantre I met Mr. Edgar on George Street.

Q. And that was the time when you told him? A. Yes. 30

Q. You hadn't gotten the policy back then, had you? A. When I told that to Mr. Edger?

Q. Yes. A. No, I got it about two days after that.

It is admitted that if Joseph Giammares, one of the complainants in this case were sworn, he would say, that he is one of the complainants mentioned in this case; that he is the vendee mentioned in the bill of sale 40

George L. Burton—Direct

and the mortgagor mentioned in the mortgage referred to and the Joseph Giammares whose name is endorsed on this policy under the change of ownership.

Mr. Glueckfield: I will admit all that.

10

Mr. Plechner: We rest.

GEORGE L. BURTON, sworn:

Direct-examination by Mr. Glueckfield:

Q. Where do you reside, Mr. Burton? A. In South River, New Jersey.

Q. You are a practicing lawyer? A. Yes, sir.

20 Q. And have been for how many years? A. Since 1911.

Q. Were you practicing in February 1917? A. Yes, sir.

Q. Where? A. In New Brunswick and South River.

Q. Do you know Mr. Cantre? A. Yes.

Q. Do you know Mr. Caffaro? A. Yes.

30 Q. Do you recollect the transaction in your office on or about the 19th day of February 1917? A. I remember there was a transaction in the office in which Caffaro was interested in February.

Q. This bill of sale which was drawn in your office? A. Yes, sir.

Q. Do you recall the chattel mortgage which was then executed? A. I remember there was one drawn at the same time between the same parties.

40 Q. Have you any recollection as to the effecting of any change of ownership on any policy of insurance that might then have existed? A. I

George L. Burton—Direct

would like to make a statement before I testify any further as to any change of ownership or anything else in regard to this matter. All I know is this. I remember distinctly the drawing of this bill of sale and I remember distinctly the drawing of this chattel mortgage. I have a recollection, which is very, very faint, as to anything else that took place. I can testify and tell you what that recollection is. There is a possibility I may be mistaken; that I am wrong. It is nearly two years since this took place and I didn't pay any attention to it. I will give that testimony. My recollection is that at the time this bill of sale was executed and the chattel mortgages was executed that I suggested that the insurance policy be delivered to the agent for a change of ownership and for the attachment of a chattel mortgagee clause. I am under the impression that I had that done myself. Possibly, I am wrong. I have made an examination of my office to see if I can find any letter which was mailed out to the agent and I can't find it, so it is possible if I did it, it was sent by messenger. I also have a recollection of the policy coming back to me with the change of ownership on it, but not with the mortgagee clause. I have also searched my office to see if I can find any letter by which it was returned to me and I can't find any. This is my impression of the matter.

By the Court: Q. If it was sent to the agent by you it would have been sent with directions to insert the chattel mortgage clause? A. Yes, sir.

Q. What is your recollection as to what you did after the policy was returned to you without the mortgagee clause? A. I don't remember; I can

George L. Burton—Direct

only give you my impression of it; I must have returned it to Mr. Caffaro and I told him here was the policy with the change of ownership and no mortgagee clause.

10 Q. Wouldn't have been likely you would have agreed to have it inserted if it had gone through in that way? A. No, I don't think so, because it strikes me further I had an impression that the company wouldn't attach it and that I was not very much surprised when it came back to me having understood that the insurance companies wouldn't recognize chattel mortgagees. At that time I was very busy and a great deal of work was done by a lawyer in my office who might have had more to do with this than I did.

20 By Mr. Plechner: Q. Who recorded the chattel mortgage? A. I believe I did, it is charged to my account in the County Clerk's Office, I understand.

By the Court: Q. Did you know the property was on leased land? A. Yes, sir.

By the Court: Q. Who owned the land? A. I was told at the time the name of the owner, and I inserted that name, I believe, in the bill of sale which I drew; I don't remember it.

30 By Mr. Woodbridge: Q. Mr. Hopson? A. I think that is the name.

Q. Have you any present recollection, Mr. Burton, as to when you got the chattel mortgage back from the County Clerk? A. No; I know how long it takes.

40 Q. How long does it take to record a chattel mortgage in Middlesex County? A. That varies; present time very fortunate in less than three months; may be a year and a half ago you would have gotten it a little sooner.

George L. Burton—Cross

Q. Do you recollect any time during two years when you got it back any sooner than six weeks?

A. Hardly; I should say that was about the time.

By the Court: Q. It might have been charged to your account and still be recorded by the mortgagee? A. Yes, sir.

10

Q. With your name on the endorsement? A. Yes, sir.

By the Court: Q. Nothing unusual about your giving the chattel mortgage to the mortgagee or mortgagor to go right to the Court House to have it recorded rather than send a messenger from your own office? A. I didn't ordinarily do that.

By the Court: Q. I said it wouldn't be unusual? A. It would be unusual in my business; it might have been, but ordinarily I record the papers, I have someone going to the Court House three and four times every day; it didn't require an extra trip in this case; Caffaro might have taken it himself; I am not sure.

20

CROSS-EXAMINATION by Mr. Plechner:

Q. Mr. Burton, could it have been impossible that you would have delivered the insurance policy to Mr. Caffaro with the request that he take it? A. It would be possible, Mr. Plechner; my recollection is to the contrary, but my recollection may be entirely wrong.

30

Q. You wouldn't say that was done? A. I would say it.

Q. Did you know at that time that Mr. Joseph Cantre had been the broker in securing the original policy? A. No.

Q. Would you say that while this transaction was in your office that Mr. Caffaro had not said to

40

James A. Edgar—Direct

you that he would take it to Mr. Cantre, the original broker? A. I have no recollection of Mr. Caffaro ever having mentioned that in my office.

10 Q. Would you say it was not mentioned? A. No, I wouldn't say anybody's name was not mentioned. I didn't pay particular attention to it.

Q. If you had mailed the policies you would have given directions to Mr. Edgar as to the change of ownership and chattel mortgagee clause? A. Yes, sir.

Q. In the form of a letter had it been mailed? A. Yes, sir.

20 Q. And you would have kept a copy of that letter? A. Probably; at the time I moved my office from New Brunswick to South River a great many of my letters, which I thought were of no further use, were destroyed; I didn't want to litter my new office; if there had been a copy it might have been destroyed at that time; I can find no copy now; I am not sure I sent it by mail.

JAMES A. EDGAR, sworn:

30 Direct-examination by Mr. Glueckfield:

Q. Mr. Edgar, you are one of the defendants in this case? A. I presume so.

Q. You were in January and February 1917 New Brunswick agent for the Allemannia Fire Insurance Company? A. Yes, sir.

Q. Do you reside in New Brunswick? A. Highland Park.

40 Q. Which is just across the river from New Brunswick? A. Yes, sir.

James A. Edgar—Direct

Q. How long have you been a resident of Highland Park? A. Twenty years.

Q. How long have you been in the insurance business? A. About fifteen.

Q. Do you know Mr. Cantre? A. Yes.

Q. How long have you known him? A. I should judge about three or four years; perhaps longer. 10

Q. Have you done any business with him during that time? A. Yes.

Q. More than one occasion? A. Mr. Cantre has brokered perhaps a hundred to one hundred and fifty policies.

Q. For your office? A. Yes.

Q. Does he have an account with you? A. Yes.

Q. When he brokers, as you call it, a policy through your office, to whom you charge up the premium? A. To Mr. Cantre; we have a double account; we have the name of the insured, account with the insured and also an account with Mr. Cantre, charging up the item in duplicate. 20

Q. Do you recall the circumstances surrounding the issuance of the policy in question here? A. No.

Q. Did Mr. Cantre secure this policy through you personally? A. No. 30

Q. Did he speak to you relative to the issuance of such a policy? A. No.

Q. Did he, at any time, tell you of the existence of this policy and of any desired change of ownership of interests in the policy? A. No.

Q. Do you recall any conversation with Mr. Cantre shortly after the occurrence of the fire? A. No; oh, after the fire I did go up to Jersey Avenue where the fire occurred. 40

James A. Edgar—Direct

Q. Did you go with Mr. Cantre? A. I don't recollect that; I may have.

Q. Do you recollect ever talking with him about the question of ownership of the land?

A. No.

10 Q. When, Mr. Edgar, did you first become aware of the facts that the persons in interest here did not own the land with reference to the date either before or after the fire, don't care for the exact date? A. I don't know.

Q. Understand my question? When did you learn of the fact that the persons interested here did not own the land; did you learn that fact before or after the fire occurred? A. Oh, before the fire.

20 By the Court: How long before the fire? A. I didn't learn it at any time; I did not; I take that back.

Q. When did you first learn that this building stood on leased ground? A. I don't know, I can't tell.

Q. Can you say whether it was before or after the fire, if you can't tell the exact date? A. I couldn't say whether it was before—

30 By the Court: Q. How did you find it out? A. I found it out after there was a claim of loss; that is when I found it out.

Q. Then, why are you so uncertain as to whether you found it out before or after the fire? A. I will tell you; the thing was so remote; I don't know; I didn't have anything to do with the transaction myself personally.

40 By the Court: Q. How many insurance policies do you handle in the course of a year? A. Guess we handle a thousand policies.

By the Court: Q. You mean to say that you

James A. Edgar—Cross

are positive that you had no conversation with the witnesses who have testified here or that you don't recollect any such conversation? A. I don't recollect.

Q. Do you remember meeting Mr. Caffaro on the street and his telling you that he had sold the property? A. I may have; I met him lots of times on the street; had lots of business with him at different times, and I may have met him on the street. 10

By the Court: Q. How long have you known him? A. I have known Tony for, I guess, may be ten years; done considerable business with him; loaned him money; quite some business with him.

By the Court: Q. Did you know that he had this store on Jersey Avenue? A. I did after the policy was issued. 20

By the Court: Q. Did you know before that? A. No.

By the Court: Q. Know he was going in that business? A. No.

By the Court: Q. Did you have any knowledge as to who owned the land up there? A. No.

Q. Were you personally told to endorse any change of ownership? A. No.

The Court: Isn't any contention that he was. 30

Mr. Glueckfield: Oh, yes.

The Court: The statement is that the change of ownership was left with the stenographer.

Mr. Glueckfield: That is right.

CROSS-EXAMINATION by Mr. Plechner:

Q. Mr. Edgar, besides being in the insurance business you are in the real estate business? A. Yes. 40

James A. Edgar—Cross

Q. Actively? A. Yes.

Q. Have been for how many years? A. About fourteen or fifteen.

Q. In the city of New Brunswick? A. Yes.

Q. Continuously? A. Yes.

10 Q. As real estate man you know every building and every vacant lot in that city? A. I wouldn't say; I know every building.

Q. You know the values of the buildings? A. Yes.

Q. Almost every one? A. Yes.

Q. Are you acquainted with Mr. Hopson? A. Yes, I know him.

Q. Where does he live? A. On College Avenue.

20 Q. Did you know Hopson owned the land on Jersey Avenue where Caffaro had his store? A. No.

Q. You had nothing to do with the purchase of that land? A. No.

30 Q. You never tried to sell it for him; was it listed on your books as property to be sold? A. I know that Mr. Hopson listed some properties to be sold; I don't know just what properties; I know he had a house on Sandford Street; I think he had properties he told me to sell at different times, and I listed them.

Q. Did that list contain property on Sandford Street and Jersey Avenue? A. I don't know.

Q. Isn't it a well known fact in the city of New Brunswick that Caffaro leased that property? A. No.

Q. Among real estate men? A. No.

Q. You say it wasn't known to you? A. No.

40 Q. At that time? A. No.

Q. Now, Mr. Edgar, you are the general agent

James A. Edgar—Cross

of the Allemannia Fire Insurance Company? A. Not general agent, agent; general agent would be the agent for the State.

Q. You issue their policies? A. Yes.

Q. The same way that you issued this one, as the agent of the Allemannia Insurance Company? A. 10
Yes.

Q. You say you had no knowledge at the time that policy was issued it covered leased ground? A. No.

Q. How about when there was change of ownership; did you have knowledge of that? A. No.

Q. Didn't have knowledge of the change of ownership? A. No.

Q. You had no knowledge of change of ownership to Giammares? A. No. 20

Q. And you had no knowledge of the chattel mortgage? A. The chattel mortgage, no.

Q. You had no knowledge of the chattel mortgage? A. No.

Q. I will show you—if you had no knowledge of the change of ownership, is that your signature? A. No.

Q. Is that your signature? A. No.

Q. Whose signature is that? A. That is my signature. 30

Q. Why did you say no? A. I didn't sign it, James A. Edgar, I didn't sign it, though that is my name, but not my signature.

Q. You had no knowledge of it?

By the Court: Q. Who did sign it? A. Clerk.

By the Court: Q. Authorized to do it? A. Yes.

By the Court: Q. Who is the clerk? A. Miss Powers.

By Mr. Woodbridge: Q. The same signature 40

James A. Edgar—Re-direct

on the policy; authorization by you to your clerk?

A. That is my signature; I also countersign all of the policies.

10 Q. Before they are to be delivered in blank? A. No, after the policy is written and completed, all filled in, the form, the clerk brings it to my desk and I sign it.

Q. When I asked you before as to whether you knew of the change of ownership and you said you did not know of a change of ownership, is that just what you intended to say? A. Exactly.

Q. You inspect your policies? A. No.

Q. You do not? A. No, no, sir, do not.

Q. Just sign your name to it without looking them over? A. Sign my name.

20 Q. Don't look them over? A. No.

RE-DIRECT-EXAMINATION by Mr. Glueckfield:

Q. Was your name written by you personally on the policy? A. Yes, countersigned the policy at the bottom.

Q. By you yourself? A. Yes.

Q. Is there any signature to the change of ownership? A. Yes.

30 Q. And in whose handwriting is that? A. Miss Powers.

The Court: Don't go over that.

Q. That is the general practice in your office to permit your clerk to sign your name on change of ownership? A. Yes.

Q. All endorsements? A. Yes.

40 By Mr. Woodbridge: Q. Have you the right in your agency to delegate that power to sign endorsements? A. You mean does the company empower me to do it?

Margaret M. Powers—Direct

Q. Yes. A. Why we do it; in fact, all the clerks in the different offices do that; it is a common practice.

By the Court: Q. All over the state? A. Yes.

Q. Is that known to the officers of the insurance company, to your knowledge? A. They have passed on—they don't say anything about it; they have never raised the question. 10

Q. Insurance policies that have been signed in that way after fires have been liquidated without any question about it? A. Yes.

 MARGARET M. POWERS, sworn:

Direct-examination by Mr. Glueckfield: 20

Q. Where do you live? A. One hundred sixty-two Somerset Street, New Brunswick.

Q. What is your occupation? A. Stenographer.

Q. For whom do you work? A. James A. Edgar.

Q. How long have you worked for him? A. Since February, 1916.

Q. You worked for him during the months of January and February, 1917? A. Yes, sir. 30

Q. You were continuously there during that time? A. Yes, sir.

Q. Do you know anything about the policy in question here? A. That was issued to Tony Cantre, yes.

Q. Who ordered that policy? A. It was ordered by Mr. Cantre. 40

Q. From whom? A. From Mr. Tony Caffaro; from me.

Margaret M. Powers—Direct

Q. From you personally? A. Yes.

Q. Are you sure of that? A. Yes, I am sure.

Q. Cantre ordered it from you personally?

A. Yes; came to me personally and ordered it.

10 Q. What did he say to you at the time this policy was ordered? A. He gave me a memorandum; gave me data; name, construction of the building, location, things like that, that I had to know; that was all that was given to me; what it was used for; contents of this building and the amounts that he wanted on it; that was all that was given to me.

By the Court: Q. Do you remember this transaction specially? A. Why, yes; I had an earnest recollection; I tried hard to remember it after
20 this came up and I did remember the details.

By the Court: Q. How many policies do you handle in the course of a month? A. Probably, we will say a hundred, approximately.

By the Court: Q. No reason for your remembering this specially until after the case was started? A. I try to remember these brokered policies specially.

30 Q. Was anything said to you by Mr. Cantre in regard to ownership of the land? A. Absolutely nothing.

Q. Were you told the details of the policy verbally or were you given any written memorandum? A. To the best of my recollection it was given verbally; that is one reason that Cantre has started giving me written memorandum.

Q. How recently? A. Within the past year, perhaps.

40 Q. Who put that endorsement on, change of ownership, on the policy? A. Why, I put it on.

Margaret M. Powers—Direct

Q. Who told you about it; who directed you to or requested you? A. I rather imagine Mr. George L. Burton did.

By the Court: Q. How did he do it? A. He was interested; I believe he had the paper he drew up.

By the Court: Q. How did you get the policy? A. I do not remember whether the policy was delivered to me by messenger or by mail; I know that I put the endorsement on as I was told to.

10

Q. Were you told to endorse any interest of any chattel mortgagee at that time? A. No.

Q. Were you ever told to endorse such an interest? A. No.

Q. Does your company endorse such an interest? A. No; that was one of the things I was told when I came to Mr. Edgar's office; not to put any chattel mortgage interest on the policies; that would invalidate the interest of the insured, and so I would inform the insured if he came to me and asked me to put a chattel mortgage interest on the policy; tell them I couldn't do it.

20

By the Court: Q. Tell them what they could do? A. Would have to get insurance elsewhere unless they wanted to take a chance on it, which, of course, they wouldn't do.

30

By the Court: Q. If they wanted to take a chance you would write the policy? A. With a chattel mortgage?

By the Court: Q. If they wanted to take a chance you would write the policy? A. With the chattel mortgage?

40

By the Court: Q. Without the chattel mort-

Margaret M. Powers—Cross

gagee clause on? A. And knowing there was a chattel mortgage; no, I would not.

Q. When did you first learn that there was a request for the change of ownership and the chattel mortgage interest here? A. After the
10 fire.

By the Court: Q. Suppose Burton had asked you to note the change of ownership and also to put the chattel mortgage clause on? A. I would have told him it wasn't allowed by the company; the company wouldn't keep the policy with the chattel mortgage on; that would order it cancelled.

Q. What else would you do? A. That is what I would tell him.

20 By the Court: Q. Would you note the change of ownership? A. Not before taking it up with him as to the chattel mortgage.

Q. Did Mr. Cantre bring the policy to you and bill of sale? A. No, sir.

Q. Have you ever seen the bill of sale? A. No, sir.

Q. Have you ever seen the chattel mortgage? A. NO, SIR.

30 Q. Did Mr. Cantre see you again in reference to this policy after he gave you the original statement regarding the details to put into it?

A. No, sir.

CROSS-EXAMINATION by Mr. Plechner:

40 Q. Miss Powers, how can you recall that Mr. Cantre did not leave the bill of sale at your office at the time he left the insurance policy with the request for the change of ownership and the chattel mortgage clause? A. It wasn't left by Mr. Cantre; Mr. Burton sent it.

Margaret M. Powers—Cross

Q. Who brought it there? A. I don't remember whether it was mailed or brought by messenger from Mr. Burton's office.

Q. How would it strike your mind, Miss Powers, at this date, eighteen months or more later, that Mr. Cantre did not bring that; could it be possible that Mr. Cantre did bring that policy to your office? A. I am certain that he did not. 10

Q. What makes you certain? A. Because we have very few transactions with Mr. Burton, I can remember, except about notes, and this was one that Mr. Burton sent to our office and that is the way I remember about it; I try hard to remember these broker transactions because they are given to us by another man; they are not our own business; he brings it to us and Mr. Edgar does not personally investigate it the way he would a policy that he got himself. 20

Q. Because it is rather unusual you would have made a memorandum of the transaction so if there had been a bill of sale you would have had a record of it? A. Why no bill of sale was brought to our office.

Q. In order to make the required change? A. Not at all.

Q. If there had been a statement or memorandum you would have kept that among your files? A. Yes. 30

Q. Do you keep statements? A. Yes.

Q. Where do you keep them? A. We keep them in our files.

By the Court: Q. Have you any files in your office of this policy? A. No, we have none.

Q. You say you are not sure whether it was sent by messenger or by letter? A. No. 40

Margaret M. Powers—Re-direct

Q. Then, if it had been sent by letter you would have kept that letter? A. Yes.

Q. So now, what do you say as to that proposition, would you say it was sent either by letter or by messenger? A. Yes, I can't recall which.

10 Q. If it was sent by letter, you would have kept the letter? A. We would have kept the letter.

Q. Now, after that question would you say it wasn't sent by letter? A. Yes.

Q. You would say it was sent by messenger? A. Yes, according to that.

Q. Would you say it was not brought to your office by Mr. Cantre? A. Yes, I would.

20 Q. Do you recall who brought it then? A. No, I do not; I recall it was sent back to Mr. Burton.

Q. By Mr. Barwis of Mr. Burton's office? Do you know him? A. No, I am not sure.

Q. Do you know Miss Roth of Mr. Burton's office, who was with Mr. Burton at that time? A. No, I am not sure. Claire Roth, no.

Q. Don't recall then a young lady brought it to your office; that young lady brought it to your office? A. No, I do not.

30 Q. How do you know it was Mr. Burton sent it? A. It was Mr. Burton because I returned it to Mr. Burton's office.

Q. But it might have been brought to your office by someone else?

The Court: When you reach the point you want to stop.

RE-DIRECT-EXAMINATION by Mr. Glueckfield:

40 Q. In answer to a question on the part of the Court before you said you had no file of this

George L. Burton—Direct

policy? A. We have only a copy in our record; in our daily report record; we have that copy.

Q. Copy of what? A. Daily report and of the endorsements.

Q. I show you this and ask you what that is? A. That is a copy of what I made yesterday from our Allemannia Fire Insurance daily report register. 10

Q. A daily report register made up when and how? A. It is made when I send the policy; made up of copies of the policy, carbon copies of the policy.

Q. This is made up when you send the policy, from policy to policy? A. From policy to policy, consecutively numbered, according to the number of the policy. 20

Q. This is the only file you keep? A. Yes, the only one; premium and amounts in a large book for the company, and then we have loose leaf ledger, with the name of the insured, amount of the premium and the number of the policy of the company.

Q. And this is an exact copy of what is in your daily report? A. Yes, I copied that yesterday, yes.

By Mr. Woodbridge: Q. And that is contained in that policy? A. Yes, I believe it is. 30

GEORGE L. BURTON, re-called:

Direct-examination by Mr. Glueckfield:

Q. Have you any recollection of having informed Mr. Caffaro or Giammares the policy re- 40

George L. Burton—Direct

turned to you did not contain the chattel mortgage clause? A. I have no positive recollection of having done it; my recollection is the policy came back to me; that it had the change of ownership upon it and did not have the chattel mortgage clause and I presumed that—I know
 10 the policy did not stay in my possession; it must have gone to someone, to Caffaro, I presume it was; I have no positive recollection of it.

Q. At that time when you got this policy back and saw the clause was not in it you reported it to Mr. Caffaro? A. I would say so; I never met the other man—known Caffaro for ten years; they came in my office together for this transaction; charged both of them.

20 By the Court: Q. In the ordinary way? A. Yes, sir.

Q. Had you represented Mr. Caffaro before that? A. Yes.

Q. He was your client? A. He was not a client.

The Court: What is the object of this?

Mr. Glueckfield: Notice to defendant is notice to Burton.

30 The Court: No; in this particular case do you think notice to Mr. Burton would be notice to Caffaro in reference to this insurance?

Mr. Glueckfield: I think so, yes.

The Court: Be that as it may be.

Q. You had represented Caffaro on previous occasions? A. Yes.

40 Q. About how many, all told? A. This Mr. Caffaro, four times, I suppose; in and out of my office hundreds of times.

Exhibit C-1

No. 528022

\$2350.00

INCORPORATED 1868

THE

ALLEMANIA FIRE INSURANCE COMPANY

OF

PITTSBURGH, PENNSYLVANIA

10

In Consideration of the Stipulation herein named and of

Twenty and Forty-eight one hundredths— Dollars Premium Does Insure Antonio Caffaro. for the term of One year

From the Fourth day of January, 1917 at noon, to the Fourth day of January, 1918 at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Twenty-three Hundred and Fifty Dollars to the following described property while located and contained as described herein, and not elsewhere, to wit:

20

Ownership is now vested in Joseph Giammares, as Owner, instead of as heretofore.

Attached to and forming part of policy #528022, of the Allemannia Insurance Co., of Pittsburg, Pa.

30

Dated, February 21, 1917.

JAMES A. EDGAR,
Agent.

STORE (BUILDING), (PROTECTED).

One Thousand Five Hundred Dollars on the one-story roof frame building, additions and ex-

40

Exhibit C-1

tensions thereto, and all permanent fixtures therein, thereon and belonging thereto, including plumbing, steam, gas and water pipes and fixtures, electric light wiring and fixtures, permanent apparatus for heating and cooking, awnings, stoops, sidewalks, mason and iron work, and fences connected therewith, occupied as a store, (confectionary) situated #89 Jersey Avenue, corner of Sandford Street, New Brunswick, N. J.

10 Six Hundred Fifty Dollars on his stock of merchandise, consisting, principally of candy, cigars, cigarettes, tobacco, ice-cream, and all other merchandise not more hazardous, usually kept in a first class confectionary store, and

20 \$200.00 on his stock of fixtures, consisting, principally of a soda-fountain, cash register, show case, counters, stools, chairs and tables, kept in the above described premises.

Privilege granted to use steam, coal stoves, hot air furnaces or grates for heating; to use public or municipal gas or kerosene oil for light, heating or cooking purposes; to remain unoccupied a portion of each year; to remain vacant during any change of tenant or while awaiting a tenant not to exceed six consecutive months

30 at any one time in any one year; and to use not exceeding one quart of gasolene, naphtha or benzine for domestic purposes in each housekeeping apartment.

Other insurance permitted without notice until

40 required.

MECHANIC'S PRIVILEGE.—Permission for mechanics to be employed for ordinary alterations and repairs in the within-described premises,

Exhibit C-1

but this shall not be held to include the constructing or reconstructing of the building or buildings, or additions, or the enlargement of the premises.

Privilege to use electric current for light, heat or power. 10

DYNAMO CLAUSE.—If dynamos, exciters, lamps, motors, switches or other electrical appliances or devices are covered under this policy, this company shall not be liable for any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

LIGHTNING CLAUSE.—New Jersey Standard.— 20
This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term Lightning, and in no case to include loss or damage by cyclone, tornado, or wind storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only 30
pro rata with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and made a part of Policy No. 528022 of the Allemannia Insurance Company, issued at its New Brunswick, N. J. Agency.

JAMES A. EDGAR,

Agent. 40

This company shall not be liable beyond the

Exhibit C-1

actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Exhibit C-1

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding)

Exhibit C-1

standing) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

* * * *

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in

Exhibit C-1

such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

* * * *

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

* * * *

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

* * * *

This Policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy

Exhibit C-1

except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have
 10 waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, this Company has executed and attested these presents this 8th day of January, 1917, but this Policy, shall not be valid until countersigned by the duly authorized
 20 Agent of the Company at New Brunswick, N. J.
 W. STEINMEYER,
 President.
 JAMES A. EDGAR,
 Agent.

Charles B. Reiter,
 C. R. Kellerman,
 Secretary.

Countersigned at New Brunswick, N. J., this
 8th day of January, 1917.

30

ASSIGNMENT OF INTEREST BY INSURED.

The interest of _____ as owner of property covered by this Policy is hereby assigned to _____ subject to the consent of THE ALLEMANNIA FIRE INSURANCE COMPANY, of Pittsburgh, Pa.

40

Signature of the Insured.

Dated

Exhibit C-2

Note: To secure Mortgagees, if desired, the Policy should be made payable on its face to such Mortgagee as follows: Loss if any payable to John Doe, Mortgagee.

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST 10

THE ALLEMANNIA FIRE INSURANCE COMPANY, of Pittsburgh, Pa. hereby consents that the interest of _____ as owner of the property covered by this Policy be assigned to

Signature for Company.

Dated.

20

Exhibit C-2

THIS AGREEMENT, made this Nineteenth day of February, Nineteen hundred and seventeen, between Antonio Caffaro of the City of New Brunswick, in the County of Middlesex and State of New Jersey, party of the first part, and Joseph Giammares, of the City of Brooklyn, in the County of Queens and State of New York, party of the second part: 30

WITNESSETH, that the said party of the first part for and in consideration of the sum of Seventeen hundred and fifty (\$1750.00) Dollars, and other good and valuable consideration, does hereby for himself, his heirs, executors and administrators, sell and transfer and set over unto the said party of the second part and his heirs, executors and administrators, all his right, title 40

Exhibit C-2

and interest in and to the building (not including the land) now owned by the party of the first part and located at #89 Jersey Avenue (corner of Jersey Avenue and Sandford Street) New Brunswick, N. J. together with all his right, title and interest in and to the business now conducted in said building, to wit, the sale of Ice Cream, Soda Water, Soft Stuff, Candies, Cigars, Cigarettes, Fruit, etc. And the said party of the second part does hereby purchase from the said party of the first part the building and business together with all of the stock pertaining to the same and agrees to pay the aforesaid sum of Seventeen hundred and fifty (\$1750.00) Dollars in the following manner: Two hundred and fifty (\$250.00) Dollars in cash upon the signing of this agreement, and Bill of Sale, and the balance of Fifteen Hundred (\$1500.00) Dollars by giving a promissory note for that amount to bear interest at the rate of six per cent per annum, said note to be a three months' note, which said party of the second part agrees to reduce every three months by paying not less than One hundred and Fifty (\$150.00) Dollars.

Said party of the second part further agrees to execute a sufficient Chattel Mortgage upon the building, goods, fixtures and contents above mentioned to secure unto the said party of the first part the payment of the note above mentioned or any and all renewals thereof.

Whereas, the building above mentioned is built upon property not owned by the party of the first part but upon land which said party of the first part has by written lease rented from the owner thereof for a period of five years com-

Exhibit C-2

mencing on or about the First day of July, 1916 and whereas, said party of the first part, notwithstanding the sale of the building and business hereby conveyed, is and will be liable for the ground rent in the sum of Twenty (\$20.00) Dollars per month, therefore, the said party of the second part does hereby covenant to and with the said party of the first part to pay said rent according to the terms of the Lease above referred to unto the said party of the first part until such time as said party of the second part has paid in full the note above mentioned at which time said party of the first part agrees, if the terms of the Lease permit, to transfer said Lease unto the said party of the second part.

And the said party of the second part further agrees that should default be made in the payment of the rent or any part thereof, that the amount so due and unpaid shall be added to the amount for which said Chattel Mortgage is executed.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

TONY COFFARO (L. S.) 30
GIUSEPPE GIAMMARES (L. S.)

Signed, sealed and delivered in the presence of:

Horace E. Barwis.

Exhibit C-3

KNOW ALL MEN BY THESE PRESENTS, THAT I, Joseph Giammares, of the City of Brooklyn in the County of Queens and State of New York party of the First Part, for securing the payment of the money herein mentioned, and in consideration of the sum of One Dollar, to me duly paid by Antonio Caffaro of the City of New Brunswick, County of Middlesex and State of New Jersey party of the Second Part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold and by these presents do bargain and sell unto the said party of the second part, his executors, administrators and assigns, all the goods and chattels mentioned in the schedule hereunto annexed and now in the building located at #89 Jersey Avenue (corner of Jersey Avenue and Sandford Street) in the City of New Brunswick, County of Middlesex and State of New Jersey.

TO HAVE AND TO HOLD all and singular the said goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns forever. AND I, the said party of the first part, for myself my heirs, executors, administrators, all and singular the said goods and chattels above bargained and sold unto the said party of the second part, his executors, administrators, and assigns, against me the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant and forever defend.

UPON CONDITION that if I the said party of the

Exhibit C-3

first part, shall and do well and truly pay unto the said party of the second part, his executors, administrators and assigns, the sum of Fifteen hundred (\$1500.00) Dollars, then these presents shall be void. AND I the said party of the first part, for myself my heirs, executors, administrators and assigns, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall, at any time before the day of payment herein provided for remove the said goods and chattels, or any of them, or permit or suffer any attachment or other process against property to be issued against me or permit or suffer any judgment to be entered up against me then the said sum of money herein mentioned shall become instantly due and payable, and then it shall and may be lawful for, and I the said party of the first part do hereby authorize and empower the said party of the second part, his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter said dwelling-house, store and other premises, and such other place or places whatsoever, in which the said goods and chattels, or any of them, are or may be placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto me the said party of the first part, my heirs, executors, administrators or assigns.

Exhibit C-3

IN WITNESS WHEREOF, I, the said party of the first part have hereunto set my hand and seal the Nineteenth day of February in the year of our Lord One Thousand Nine Hundred and Seventeen.

10 Sealed and Delivered in the presence of
Horace E. Barwis.

GIUSEPPE GIAMMARES (L. S.)

State of New Jersey, }
County of Middlesex. }^{ss:}

20 Antonio Caffaro, the mortgagee in the foregoing mortgage named, being duly sworn on his oath says that the true consideration of the said mortgage is as follows, *viz*: Whereas the party of the first part has signed and delivered unto the said party of the second part a promissory note payable at the National Bank of New Jersey, New Brunswick, N. J., due in three months, with interest.

30 Now, therefore, this Chattel Mortgage is given and the consideration for the same is the securing unto the said Antonio Caffaro, the payment of the same or any renewal thereof and deponent further says that there is due on said mortgage the sum of Fifteen Hundred (\$1500.00) Dollars besides lawful interest thereon from the Nineteenth day of February, Nineteen Hundred and Seventeen.

TONY CAFFARO.

Sworn and subscribed this

20th day of February, A. D., 1917

before me, at New Brunswick, N. J.

40 Horace E. Barwis,

Attorney at Law, State of New Jersey.

Exhibit C-3

SCHEDULE

The following is the Schedule of the goods and chattels referred to in the foregoing mortgage and is hereby made a part thereof to wit:

One-story frame building, 16 ft. x 35 ft. now 10
located on the corner of Jersey Avenue and Sandford Street, known as No. 89 Jersey Avenue; one National Cash register, one Soda Fountain, three tables, eight Chairs, one large Show Case (glass), two small Show Cases (glass), one Stove, one Peanut Roaster, two Clocks, together with all of the Jars, Containers, Glasses, Spoons, China ware, Candy, Cigars, Cigarettes, Tobacco, etc., (the intention of the party of the first part to this Chattel Mortgage being to convey to said 20
party of the second part all of the fixtures, goods, merchandise, etc., now contained or hereafter to be placed in the store above mentioned.

State of New Jersey, }
County of Middlesex. } ss:

BE IT REMEMBERED, That on this twentieth day of February in the year of Our Lord One Thousand Nine Hundred and Seventeen before me, 30
the subscriber, an Attorney at Law of the State of New Jersey, personally appeared Joseph Giammares, who, I am satisfied is the mortgagor in the within mentioned instrument to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary

Exhibit C-3

act and deed, for the uses and purpose therein expressed.

HORACE E. BARWIS,
Attorney at Law,
State of New Jersey.

10 Received and recorded, February 21, 1917 at
10:00 a. m.

BERNARD M. GANNON,
Clerk.

State of New Jersey, }
County of Middlesex. } ss:

I, BERNARD M. GANNON, Clerk of the County of
Middlesex, do hereby certify, That the fore-
going is true, full and correct copy of a certain
20 Chattel Mortgage as the same is on record in
my office in Book 60 of Chattel Mortgage on
pages 96 and C.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed my seal of said county, this
22d day of October A. D. 1918.

BERNARD M. GANNON,
Clerk.
(Seal)

30

Oral Conclusions

October 23, 1918.

IN CHANCERY OF NEW JERSEY

JOSEPH GIAMMARES and TONY CAFFARO, <p style="text-align: center;">Complainants,</p> <p style="text-align: center;">and</p> ALLEMANIA FIRE INSURANCE COMPANY OF PITTSBURG, a body corporate, and JAMES A. EDGAR, <p style="text-align: center;">Defendants.</p>	}	10 On Bill.
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Mr. George Plechner and Mr. Freeman Wood-
 bridge for the complainants.
 Mr. I. Benjamin Glueckfield for defendants.

LANE V. C. (Orally):

I am going to determine the facts now be-
 cause I will never be in a position where I can
 better determine them than I am at this moment.

I am inclined to take the story of the com-
 plainants with respect to what actually happen-
 ed. The testimony of Cantre and Caffaro is
 specific in detail and bears evidence of inherent
 probability, and neither of the witnesses have
 been impeached. The facts are that a man
 named Caffaro in January 1917 had a building
 erected upon leased land. Cantre was an insur-
 ance broker. Caffaro went to Cantre and asked
 him to effect insurance upon the store and its
 contents. Cantre received notice that the build-

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Oral Conclusions

ing was erected on leased land. He did a considerable business with Edgar, who was the general agent of the Allemannia Fire Insurance Company in New Brunswick. He testifies that at the time he and Caffaro had the conversation he made a memorandum. He went to Edgar's office and he says saw Edgar personally and told him the facts. That thereupon a policy was issued which was received by Cantre and by him within twenty-four hours transmitted to Caffaro. Edgar has no recollection that any such conversation took place. His testimony does not indicate to my mind that even in his own mind he considered that such a conversation could not have taken place. Caffaro testifies to a conversation on the street with Edgar in which the fact that his building was erected on leased ground, (that he didn't buy the land) was adverted to. There is no improbability in this. Edgar knew Caffaro for some years and such a conversation is very likely to have taken place. It is very unlikely that Caffaro would have been able to, out of his own mind, create this story and not, in some respect, be shaken by cross-examination. Edgar doesn't deny that such a conversation took place; he says he doesn't recollect it. I am convinced that the policy was issued by Edgar originally either was issued by mistake omitting the provision with respect to leased ground, or, that the agency deliberately issued it omitting that provision in which case there would be fraud.

In February 1917 Caffaro sold his store to a man named Giammares. The transaction took place in Mr. Burton's office, a lawyer in New

Oral Conclusions

Brunswick. A bill of sale was drawn in which it is stated that part of the consideration was to be paid by chattel mortgage. Such a chattel mortgage was drawn. The testimony of Caffaro is that he took the bill of sale and the insurance policies and the chattel mortgage to Cantre, the broker, for the purpose of having the insurance changed. Again the broker agrees with Caffaro and says that he received the insurance policy and bill of sale and that Caffaro also had the chattel mortgage which Cantre advised him to immediately record at the Court House. That the broker swears he then took the policy and the bill of sale to Edgar's office and left the policy with the stenographer there in charge, who is authorized to make endorsements and advised her that the title of the property had been changed and that there was a chattel mortgage. Mr. Burton's testimony is to the effect that he had but a very faint recollection as to the entire transaction but that he thinks that he was the one that caused to be transmitted, either by mail or messenger, the policy of insurance to the agency; he says that if he did in fact transmit the policy to the agency he advised the agency of the fact that there was a chattel mortgage. The stenographer is certain that she received the policy from Mr. Burton; first she was uncertain as to whether it was by mail or messenger, then when her attention was called to the fact that if it was sent by mail there would be a letter accompanying it in the office, she became quite certain it must have been by messenger. I am unable to accept her testimony at its face value. The

Oral Conclusions

story of Mr. Burton is in direct conflict with Cantre and Caffaro. I am prepared to hold that the policy was delivered by Cantre to the stenographer and at the time it was delivered there was brought to her attention the fact that this sale had been made and that there was a chattel mortgage interest. Even if Mr. Burton's version of the transaction be correct there was brought home to the knowledge of the agency the fact that there was a chattel mortgage. Therefore, the issuance of the policy with the endorsement must have been either a mistake or a fraud in law. In the face of the testimony of Miss Powers that the company never issues policies where there are chattel mortgage interests in existence, I think it must be held that she deliberately, although aware of the fact that there was a chattel mortgage interest, issued this policy without having the chattel mortgage interest endorsed. It is a fact, not disputed, that neither Cantre nor Caffaro read the policies. Caffaro cannot read English. There is no evidence that Cantre knew that the policy did not have the endorsement that the building was erected on leased ground nor the endorsement that the chattel mortgage was in existence. Both of them testify that they never discovered that these endorsements were absent until after the fire. What effect the fact that the policies were never read by Caffaro or by Cantre has will have to be considered hereafter; also what effect there may be by reason of the fact that this suit was not commenced within twelve months. My impression on the latter point is that this suit is not such a suit as would

Oral Conclusions

be covered by that limitation. This suit was in reality in aid of an action which was brought on the policy and really for the purpose of permitting the effective prosecution of that suit. Upon the other question I will take briefs. I will take briefs on both questions.

10

I will hold now that there was no notice brought home to either Cantre or Caffaro that these endorsements that they thought were on the policies were not. I do not think that the uncertain testimony of Mr. Burton that he might have known or has a recollection that he knew it or that he may have communicated the fact to his client is sufficient to outweigh the positive testimony of Cantre and Caffaro. I don't think that the policies went through the agency and went back to Burton as Burton has a recollection they did.

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Opinion*(Filed, November 26, 1918)*

IN THE CHANCERY OF NEW JERSEY

10	JOSEPH GIAMMARES and TONY CAFFARO, <div style="text-align: right; padding-right: 20px;">Complainants,</div> <div style="text-align: center; padding: 0 10px;">and</div> ALLEMANIA FIRE INSURANCE COMPANY, OF PITTSBURGH, Pa., James A. Edgar, <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On Bill.
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20 *(Headnote by the Court)*

1. A suit in equity to reform a contract of insurance or to enjoin an insurance company from setting up certain defenses, in aid of an action at law, is not an action within the meaning of the provision of the policy providing a short period of limitation.
2. Delay of upwards of a year before instituting an action to reform the policy, etc., unaccompanied with injury to the insurance company is not such laches as to warrant withholding relief.
3. Where a policy of insurance is issued by an agent having knowledge, communicated to him by the insured, that the building stands on leased ground and that the property is encumbered by a chattel mortgage does not contain notations to such effect, the company is estopped from setting

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Opinion

up in an action at law that the policy is void under a provision that it shall be void if the building stands on ground not owned by the insured, or if the interest of the insured is other than unconditional ownership.

4. Failure of the insured to read the policy and thus discover the omissions is not such negligence as will bar relief. 10

Mr. George J. Plechner and Mr. Freeman Woodbridge for complainants.

Mr. I. Benj. Glueckfield for defendants.

LANE, V. C.

The facts as I have found them are as follows: Complainant, Caffaro, was the owner of a building standing on leased land. He applied for insurance through a broker to the agent of defendant insurance company; the agent was informed that the building stood on leased ground; the company issued its policy without a notation to that effect. The policy was delivered by the agent to the broker and by the broker to Caffaro, neither of whom read it. Subsequently Caffaro sold the building and contents to Giammares. As part of the consideration, Giammares gave Caffaro a chattel mortgage. The policy was sent to the agent, through the broker, for a notation to the effect that Giammares was the owner and for the addition of a clause protecting the chattel mortgagee. The fact that there was a chattel mortgage was brought to the attention of the agent. He returned the policy with a notation with respect to the change of ownership but without the chattel mortgagee clause and without no- 20 30 40

Opinion

tation to the effect that there was a chattel mortgage, to the broker, who in turn delivered it to Caffaro. Neither the broker, Caffaro or Giammares read the policy. Caffaro and Giammares cannot read English. The broker can. A fire occurred and an action at law was instituted a few days before the expiration of the period of limitation, in which action the insurance company set up the defense that the policy was void because the building stood on leased ground and there was a chattel mortgage on the building and contents which facts rendered the policy void, under provisions thereof that it should be void, if the interest of the insured was other than unconditional ownership or if the building stood upon ground not owned by the insured. After the expiration of the period of limitation fixed by the policy, this suit was instituted to reform the policy, or in the alternative, for an injunction enjoining defendant from setting up the defense referred to upon the ground of estoppel in pais. Neither the broker, Caffaro nor Giammares had notice of the omissions in the policy until after the fire.

The defendant insurance company first contends that the suit is barred by the limitation of one year prescribed by the policy. I think not. *Rosenblum Bros. vs. The Council Bluffs Insurance Co.*, United States Circuit Court for the Northern District of Iowa, Shiras, J., 3 L. R. A., 189; *Abraham vs. North German Fire Insurance Co.*, same Court, same judge, 3 L. R. A., 188. And see note to *Harrison vs. Hartford Fire Insurance Co.*, 47 L. R. A., 711. A consideration of *Kelsey vs. Agricultural Insurance Company*, 78 N. J. E., 378, and *Kupferschmidt vs. Agricultural Insur-*

Opinion

ancy Company, 80 N. J. L., 441, will indicate that the suit to reform the policy in that case was brought after the expiration of the period of limitation fixed by the policy.

The defendant insists second, that irrespective of the provisions of the policy the complainants are guilty of laches. The policy in question was issued January 8, 1917; the fire occurred March 25, 1917; a suit was commenced in the Supreme Court March 22, 1918; this suit was commenced on Generally mere delay will not be sufficient to warrant withholding relief. The delay must be injurious to defendant. I cannot see that in this case defendant has been injured. *Kelsey vs. Agricultural Insurance Company*, 78 N. J. E., 378.

The defendant insists third, that the contract of insurance being evidenced by a written document and the policy containing a provision that its terms cannot be changed, or altered, except by a written notation, the Court cannot either reform the contract or apply the doctrine of estoppel in pais. While the precise question has not been settled by the Courts of this State, yet I think there is authority clearly indicating how it should be determined. In *The Franklin Fire Insurance Company vs. Martin*, 40 N. J. L., 568, the Court of Errors and Appeals, speaking through Mr. Justice Depue, said:

“If the proposal for insurance be prepared by the agent of the company, and he misdescribe the premises, with the full knowledge of their actual condition, and there be no fraud or collusion between the

Opinion

agent and the insured, the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as they were known to the agent."

- 10 10 In *Lloyd vs. Hulick*, 69 N. J. E., 784, the Court of Errors and Appeals, speaking through the present Chief Justice held that a deed might be reformed where it did not conform to the provisions of a written contract. In *Sloss-Sheffield Steel & Iron Co. vs. Aetna Life Insurance Co.*, 74 N. J. E., 635, Vice Chancellor Howell said that contracts inter parties may be reformed by this Court whenever by reason of a mutual mistake the written instrument fails to express the agreement on which the minds of the parties met, or where there is a mistake by one of the parties and fraud or other inequity attempted on the part of the other.

- 20 This case was reversed by the Court of Errors and Appeals in 75 N. J. E., 545, but only on the question of fact. In *Seymour vs. German-American Ins. Co.*, 83 N. J. E., 37, it appeared that the insurance policy contained a provision stamped with a hand stamp "Warranted by the assured that the within described building is occupied exclusively for dwellings above the first or grade floor." The policy had been issued as a renewal of a policy which described the premises as insured "while occupied as a dwelling and for manufacturing of oil stones." The defendant's agent transmitted the policy to complainant, who, failing to notice the stamped words, paid the premium and placed the paper in his safe, sup-
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Opinion

posing it to conform in all respects to the one that had preceded it. The Court, Stevens, V. C. permitted reformation. The case was affirmed in the Court of Errors and Appeals on the opinion below 84 N. J. E., 206. In *Koch vs. Commonwealth Ins. Co. of N. Y.*, 87 N. J. E., 90, Vice Chancellor Leaming did not doubt but that if the insurance company had knowledge that the insured property actually was used as a printing office it would have been proper to have decreed reformation. In *Martin vs. Jersey City Insurance Co.*, 44 N. J. L., 273, the Supreme Court held that knowledge by the president of an insurance company who had exercised the power of making and renewing contracts of insurance, that the insured was making additions to the insured buildings with an oral permission to do so, estops the company from defending an action brought upon the policy upon the ground that, by reason of such additions, there had been an increase of risk. And further that knowledge by the company of the existence of subsequent insurance, followed by any words or acts on the part of the company by which the insured is induced or permitted to believe that the contract of insurance is still subsisting and the property of the policy had occurred because of a failure of the insured to comply with the condition to give notice of such subsequent insurance and have it endorsed upon the policy or acknowledged in writing.

I have not overlooked the cases of *Deweese vs. The Manhattan Insurance Company*, 35 N. J. L., 366; *Bennett vs. St. Paul Fire and Marine Ins. Co.*, 55 N. J. L., 377; *Dimick vs. Metropolitan*

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Ins. Co., 69 N. J. L., 384; *Kupferschmidt vs. Agricultural Insurance Co.*, 80 N. J. L., 441. These were all actions at law, and I do not think that their effect is to modify the general rule that permits a Court of Equity to reform a contract
 10 or to apply the doctrine of estoppel to pais where there has been either a mutual mistake or a mistake on one part and fraud or other inequitable conduct on the other.

It is impossible to reconcile the cases from other jurisdictions. See the note to *Bostwick vs. Mutual L. Ins. Co.*, 116 Wis. 392, 67 L. R. A., 705, particularly sec. 1; sec. 3, subdivision b, subsection 1, sec. 4, subdivision a, subsection 1, subdivision c, subsection 3, subdivision a, subdivision
 20 b, subdivision c, sec. 9. Although the Supreme Court of the United States in a life insurance case, *New York Life Insurance Co. vs. Fletcher*, 117 U. S., 519, 29 L. E. 934, held where both the assured and the insurer are deceived by fraudulent acts of an agent in inserting in the application false answers, where the assured answered truthfully, if both parties acted bona fide, the policy should be cancelled and the premiums returned, and that a party insured is presumed to
 30 have read his application and to be cognizant of the limitations therein expressed, and that a retention of the policy containing a copy of the application was an approval of the application by the assured, yet the same Court in *Continental Life Ins. Co. vs. Chamberlain*, 132 U. S., 304, 133 L. E., 341, after considering the *Fletcher* case held that where the insured stated to an
 40 agent the exact facts with respect to other insurance and the agent then wrote "no other," al-

Opinion

though in fact there was other, the insurance company is estopped from denying the interpretation put upon the facts by the agent. In *Glens Falls Ins. Co. vs. Michael*, Indiana Supreme Court, 74 N. E., 964, 8 L. R. A. N. S., 708, the Court held that the issuance without written application to a life tenant of a fire insurance policy without inquiry as to the state of title, no representations being made by assured upon that question, and the assured paying the premium and accepting the policy without notice of a provision in the policy that it shall be void if the interest of the assured be other than unconditional and sole ownership, is a waiver of such provision. So the Supreme Court of Arkansas in *Great Southern Fire Insurance Co. vs. Burns*, 175 S. W., 1161, L. R. A., 1916 B held that an insurer issuing a standard policy upon a parol application in which no reference is made to encumbrances upon the property waives a provision printed on the back of the policy making it void if the property is encumbered by a chattel mortgage. The Court in the latter case said:

“The effect of a directed verdict would have been to hold that the contract of insurance was void from the beginning, and that the policies never in fact had any force or validity because of the antimortgage provisions inserted therein by the insurance company without the knowledge of the insured. It that view should be adopted, the insurance company would not only have wrongfully received and accepted the premium from the assured, but would have also misled them into the belief that their

Opinion

property was insured when in fact it was not."

10 It seems to me when a person applies to the agent of an insurance company, authorized to act, and informs the agent with respect to the facts, that the insured may upon receipt of a policy assume that the policy is a valid and binding obligation on the part of the insurance company. As Vice Chancellor Stevens said in *Seymour vs. German-American Insurance Co.* with respect to the situation presented before him, if the contention of the insurance company be sound it issued the policy and took the premium when the policy was *ab initio* to its knowledge. Either
20 the agent of the insurance company mistakenly omitted to place on the policy a notation to the effect that the building stood on leased ground and subsequently a notation to the effect that there was a chattel mortgage or in issuing the policy intentionally omitted the notations in which event he committed a fraud upon the insured for which the company is responsible. It is no answer to say with respect to the notation in reference to the chattel mortgage that no additional premium was received. The defendant
30 company by its act led the insured to believe that his property was still covered by insurance.

The principles enunciated in such cases as *Dimick vs. Metropolitan Life Insurance Co.*, 69 N. J. L., 384, and *Insurance Company vs. Fletcher*, 177 U. S., 519, are not at all applicable in the case at bar. In such cases involving life insurance the contract consists of the written proposal, written representations by the insured and
40 the policy. In fire insurance generally, as in

Opinion

this case, there is no written proposal, the oral request, including statements and representations by the insured, takes its place. The contract is not reduced to writing by the parties. The policy is a unilateral affair, prepared by the company with a view primarily of protecting its interests, and this is so, so far as the written as distinguished from the printed portion of the policy is concerned, notwithstanding that the form is standard. Its acceptance and retention by the insured does not have the same effect, at least in equity, as the written representations of the insured in a life policy accepted by the company forming a part of the contract. In considering the matter of the responsibility for written answers in a proposal for life insurance, the questions for whom the scribner is agent, and the duty of the insured before signing, to see to it that the answers are properly transcribed as well as questions arising under the law with respect to warranties are involved. No such questions are involved in a case like this. The agent who received the oral request and representations, who issued the policy did so in each instance as the agent of the company. He did not act as agent for the insured for an instant. The company alone is responsible for his acts. His knowledge and fraud are imputed to the company. It may be that in a life case the knowledge and fraud of the agent may be imputed to either the insured or insurer as he may act as agent for either. And this is the reason underlying the first head note in *Insurance Company vs. Fletcher*. In *Continental Insurance Co. vs. Chamberlain*, 182 U. S., 304, the Supreme Court

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Opinion

of the United States held that in interpreting the meaning of the term "other insurance" the agent acted as the agent of the insurer alone and the company was bound by his interpretation. I think the insured in a life case may safely assume that the policy issued by the company is in
 10 accord with the written proposal. So the insured in a fire case may safely assume that a policy issued is in accord, so far as the description of the property and the insured interest therein are concerned, with the oral request. That he may safely assume that the policy is not, to the knowledge of the insurer, void, *ab initio*.

The defendant insists fourth that because of the failure of the insured or his broker to read the policy, there can be no relief. Here again there
 20 is a wide divergence of opinion in foreign jurisdictions. Some have followed the rule adopted by the Wisconsin Supreme Court in *Bostwick vs. Mutual L. Ins. Co.*, 116 Wis., 392, 67 L. R. A., 705, which is to the effect that the principles of *caveat emptor* apply to the sale of an insurance policy with as much rigidity as in the case of a sale of merchandise. Others have adopted a contrary rule, 67 L. R. A., 727 *et sequi*; see note to *Dolvin vs. American Harrow Co.*, 28 L. R. A. N. S., 882,
 30 *et sequi*.

I think the rule to be applied in this state is to be gathered from a consideration of the following cases. *Lloyd vs. Hulick*, 69 N. J. E., 786, in which the Chief Justice said:

40 "Its (that is, the deed) delivery by the defendants to the complainants without a disclosure of the fact that it contained these covenants was equivalent, it seems

Opinion

to me, to a declaration on their part that the deed was drawn in conformity to the provisions of the contract. It is true that the complainants might readily have discovered by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business men ordinarily deal with one another in the belief that each is honest.” 10

Seymour vs. German-American Insurance Co., 83 N. J. E., 37, in which Vice Chancellor Stevens said: 20

“The facts appear to me to show mutual mistake—mistake by the company’s agent in stamping the objectionable matter on the printed policy—and mistake by the complainant, who supposed that the policy was like the one which had immediately preceded it and who was guilty of no more carelessness than Lloyd when he took his deed from Hulick under the supposition that it conformed to the prior written contract.” 30

See also the cases of *Kelsey vs. Agricultural Insurance Co.*, 78 N. J. E., 378, and *Koch vs. Commonwealth Ins. Co. of N. Y.*, 87 N. J. E., 90.

The complainants, Caffaro and Giammares, could not read English. The delivery of the policy following the oral application was a representa- 40

Opinion

tion that the policy conformed to the facts stated in the oral application.

I am of the opinion that the defendant insurance company is estopped from setting up in the action at law that the policy is void either because
10 the building stood upon leased ground or because of the existence of the chattel mortgage.

It may be a different question as to whether the policy should be reformed so as to express an agreement on the part of the insurance company to pay to the chattel mortgage the amount of his loss. The insurance company never intended to make any such contract. The testimony is to the effect that the agent was forbidden by the company to make such a contract. I desire to be
20 informed by counsel whether the equities between the parties cannot be worked out without finding as to whether the policy can be reformed as above indicated. I wish counsel for complainants would notify me at once whether they consider it necessary that the policy be reformed by writing in the chattel mortgage clause.

Memorandum

(*Filed December 23, 1918*)

IN CHANCERY OF NEW JERSEY

Between

JOSEPH GIAMMARES and TONY
CAFFARO,

Complainants,

and

ALLEMANNIA FIRE INSURANCE
COMPANY OF PITTSBURG, a
body corporate, *et al.*

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Mr. George J. Plechner and Mr. Freeman 20
Woodbridge for complainants.

Mr. I. Benj. Glueckfield for defendants.

LANE, V. C.

Upon reflection, I have come to the conclusion to advise a decree in the form applied for by counsel for complainants. Contractual relations had existed between Caffaro and the Insurance Company. The request made to the Insurance Company was to change those contractual relations, to insure Giammares as the owner of the property and Caffaro, who had previously been the owner, as the mortgagee. I think that the circumstances under which the policy was granted estopped the defendant insurance company from claiming that the standard mortgage clause was not attached. 30

I have advised a decree in accordance with this 40
conclusion.

Final Decree*(Filed December 24, 1918)*

IN CHANCERY OF NEW JERSEY

10	Between JOSEPH GIAMMARES and TONY CAFFARO, <div style="text-align: right; padding-right: 20px;">Complainants,</div> <div style="text-align: center; padding: 5px 0;">and</div> ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PA., a Body Corporate and JAMES A. EDGAR, <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On Bill, etc.,
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This cause being opened to the Court in the presence of George J. Plechner, and Freeman Woodbridge, Solicitors for the Complainants and I. Benjamin Glueckfield, Solicitor for the Defendants, and having come on for hearing before the HON. MERRITT LANE, one of the Vice Chancellors of the State of New Jersey, to whom the said cause was referred by order of the Chancellor bearing date the Sixteenth day of August, 1918.

Whereupon upon reading the Bill of Complaint and the Answer of the said Defendants, thereto, and the testimony of witnesses having been taken and the arguments of counsel having been heard and the proofs considered and it appearing that the said Defendant, Allemania Fire Insurance Company of Pittsburg, Pa., is an Insurance Company doing business in this State and authorized to

Final Decree

write policies of fire insurance in this State through the defendant, James A. Edgar, its agent at New Brunswick, N. J., and that on or about the 8th day of January, 1917, it issued through the said James A. Edgar a policy of fire insurance known as Policy No. 528022 to the said Complainant, Tony Caffaro, but failed to note upon the said policy that the property thereby insured to wit, a one story roof frame dwelling known as No. 89 Jersey Avenue, corner of Sanford Street, New Brunswick, N. J., occupied as a store (confectionary) stood on leased ground, although due notice of the fact that said building stood on leased ground was given to the said Company by the said Complainant, Tony Caffaro, at the time said policy was issued, with the request by him that said policy be issued accordingly.

And it further appearing that subsequently on or about the 21st day of February, 1917, the said Complainant, Tony Caffaro sold the said building and contents thereof, covered by the said insurance policy to the said Complainant, Joseph Giammares and took a chattel mortgage on the said building and contents covered by said policy for a part of the consideration price thereof, and that due notice of the said sale and of the said Chattel mortgage was given to the said Defendant, Allemania Fire Insurance Company of Pittsburg, Pa., and the said Defendant, James A. Edgar, its agent and that he was requested to endorse the said change of ownership to the said Complainant, Joseph Giammares and Chattel mortgagee interest of the said Complainant, Tony Caffaro on the said policy, and that the said policy was delivered to the said James A. Edgar

Final Decree

the Agent of the said Insurance Company for that purpose.

10 And it further appearing that the said Defendant, Allemania Fire Insurance Company of Pittsburg, Pa., acting through the said James A. Edgar, its agent, noting the change of ownership on the said policy by writing thereon "Ownership is now vested in Joseph Giammares, as owner, instead of as heretofore," but failed to note on said policy the Chattel Mortgagee interest of the said Complainant, Tony Caffaro, although it had due notice thereof, and that the said Allemania Fire Insurance Company of Pittsburg, Pa., defendant, through its said agent, James A. Edgar, defendant did deliver up to the said complainants the said policy without said facts as to said building standing on leased ground and the existence of a Chattel Mortgage, Chattel Mortgagee interest in said complainant, Tony Caffaro, being noted thereon, although due notice thereof was given as aforesaid, and that said Defendants dealt with the said Complainants in the premises as though the said policy was a valid and subsisting contract of insurance, although it had failed to note as required the fact that the said property insured stood on leased ground and the existence of the Chattel Mortgage and Chattel Mortgagee interest of the said Complainant, Tony Caffaro.

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And the Court being of the opinion that the said Policy should be reformed and the said Defendants enjoined as prayed for by the said Complainants in their Bill of Complaint.

40 It is thereupon on this 20th day of December, 1918, ordered, adjudged and decreed and the Chancellor of the State of New Jersey by virtue

Final Decree

of his power and authority does hereby order, ad-
judge and decree that the said contract of insur-
ance known as Insurance Policy No. 528022 is-
sued by the Allemania Fire Insurance Company
of Pittsburg, Pa., on the 8th day of January,
1917, to the said Tony Caffaro insuring him 10
against loss or damage by fire on the one story
roof frame dwelling occupied as a store (confec-
tionary) at No. 89 Jersey Avenue, corner of San-
ford Street, New Brunswick, N. J., and on his
stock of merchandise consisting principally of
candy, cigars, cigarettes, tobacco, ice cream and
all other merchandise not more hazardous usu-
ally kept in a first class confectionary store and
on his stock of fixtures, consisting principally of 20
soda fountain, cash register, show cases, counters,
stools, chairs, and tables kept in the above men-
tioned premises be and the same is hereby re-
formed to the end that the said Policy shall have
noted thereon as of the date of the issue of the
same fact that the said property thereby insured
stands on leased ground and also that it shall
have noted thereon as of the 21st day of Febru-
ary, 1917, the fact that Tony Caffaro was the
holder of a Chattel Mortgage on the said prop-
erty covered by the said Policy with mortgagee 30
clause thereto attached in the usual and standard
form with loss, if any, payable to the said Tony
Caffaro as such Chattel Mortgagee as his inter-
est may appear and that the said Policy of Insur-
ance as so reformed stand as the insurance con-
tract existing between the parties Complainant
and Defendant in this suit, and that said Defend-
ants do carry out the decree of this Court in the 40
premises by writing said notations on said policy,
in due and proper form.

Final Decree

And it is further ordered, adjudged and decreed that the said Defendants and each of them and their and each of their Agents, Attorneys and Assigns be and they are hereby enjoined and restrained from setting up in any action at law any
10 defense to the said payment of loss incurred under said insurance policy to the said Complainants or either of them by reason of the fact that the said Policy was issued without having noted thereon the fact that the property thereby stood on leased ground and the fact that there was not noted thereon the existence of a Chattel Mortgage held by the said Tony Caffaro and the Chattel Mortgagee interest of the said Tony Caffaro, or either.

20 And it is further ordered, adjudged and decreed that the said Complainants do recover their costs of this suit to be taxed against the said Defendants, and in addition thereto a counsel fee of Two Hundred Dollars to the Solicitors for the said Complainants.

E. R. WALKER,
C.

Respectfully advised,
Merritt Lane,
30 V. C.

Petition

(Filed January 14, 1919)

NEW JERSEY COURT OF ERRORS AND APPEALS

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JOSEPH GIAMMARES and TONY
CAFFARO,

Complainants,

and

ALLEMANNIA FIRE INSURANCE
COMPANY OF PITTSBURG, PA., a
body corporate and JAMES A.
EDGAR,

Defendants.

On Appeal
From a Decree
of the Chan-
cellor Advised
by Vice Chan-
cellor Lane.

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*To the Honorable, The Court of Errors and Ap-
peals in the Last Resort in All Cases:*

The petition of Allemannia Fire Insurance
Company of Pittsburg, Pa., and James A. Edgar,
the appellants in the above stated cause, respect-
fully show that your petitioners find themselves
aggrieved by a final decree made in the Court of
Chancery by his Honor, Edwin Robert Walker,
Chancellor of the State of New Jersey, bearing
date the twentieth day of December, Nineteen
Hundred and Eighteen and advised by his Honor,
Merritt Lane, Vice Chancellor, wherein the said
Joseph Giammares and Tony Caffaro were com-
plainants and the said Allemannia Fire Insur-
ance Company of Pittsburg, Pa., and James A.
Edgar were defendants, in this respect, to wit,
that the said Decree adjudges:

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Petition

(a)“That the said contract of insurance known as Insurance Policy No. 528022 issued by the Allemannia Fire Insurance Company of Pittsburg, Pa., on the 8th day of January, 1917, to the said Tony Caffaro insuring him against loss or damage by fire on the one story roof frame dwelling occupied as a store (confectionery) at No. 89 Jersey Avenue, corner of Sanford Street, New Brunswick, N. J., and on his stock of merchandise consisting principally of candy, cigars, cigarettes, tobacco, ice cream and all other merchandise not more hazardous usually kept in a first class confectionary store and on his stock of fixtures, consisting principally of soda fountain, cash register, show cases, counters, stools, chairs, and tables kept in the above mentioned premises be and the same is hereby reformed to the end that the said Policy shall have noted thereon as of the date the issue of the same the fact that the said property thereby insured stands on leased ground and also that it shall have noted thereon as of the 21st day of February, 1917, the fact that Tony Caffaro was the holder of a Chattel Mortgage on the said property covered by the said Policy with mortgagee clause thereto attached in the usual and standard form with loss, if any, payable to the said Tony Caffaro as such Chattel Mortgagee as his interest may appear and that the said Policy of Insurance as so reformed stand as the insurance contract existing between

Petition

the parties Complainant and Defendant in this suit, and that said Defendants do carry out the decree of this Court in the premises by writing said notations on said policy, in due and proper form.

(b) "And it is further ordered, adjudged and decreed that the said Defendants and each of them and their and each of their Agents, Attorneys and Assigns be and they are hereby enjoined and restrained from setting up in any action at law any defense to the said payment of loss incurred under said insurance policy to the said Complainants or either of them by reason of the fact that the said Policy was issued without having noted thereon the fact that the property thereby stood on leased ground and the fact that there was not noted thereon the existence of a Chattel Mortgage held by the said Tony Caffaro and the Chattel Mortgage interest of the said Tony Caffaro, or either." 10
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And your petitioners humbly appeal from the Decree of the Chancellor which Decrees as aforesaid, upon the ground that the same is erroneous in the following respects: 30

1. A provision in a policy of insurance prescribing a limited period in which suits at law or in equity may be brought thereon is a bar to a suit in equity to reform the policy or to enjoin the insurance company from setting up certain defenses, instituted after the limitation has elapsed. 40

2. It is the legal duty of an insured person to

Petition

read or examine the policy of insurance and his failure to object or except to the form or any provision thereof until after the occurrence of a fire constitutes a ratification and acceptance of the policy in the form in which it is issued.

10 3. An insured person is presumed in law to have read his policy and to be cognizant of the limitations therein expressed and a retention of the policy constitutes of an approval of its contents.

20 4. A special duty rests upon the insured to examine his policy where he has requested an insertion of special clauses necessitating "riders" to be attached to the policy and his failure for an unreasonable length of time so to examine, with resultant injury to the insurer, is a bar to relief by way of reformation or restraint of defenses.

5. It is the duty of an insured person promptly to notify the insurer of the latter's or its agent's failure to embody certain alleged stipulations in the policy.

30 6. Where an action at law on a policy is brought three days before contractual limitations have expired and there is a failure to institute a suit in equity in aid of the law action until several months thereafter and the law action is about to be dismissed on motion, such failure constitutes laches in bar of relief.

40 7. Where the injuries resulting from complainants' failure promptly to institute an action or to take other appropriate action to offset assumption of his abandonment of the claim consists of

Petition

the (1) impairment of the memory of a witness, or (2) loss, deterioration, demolition or removal of all evidence relative to extent of loss, salvage, etc., or (3) deprivation of opportunity to cancel the policy, the insured is chargeable with negligence in bar of any relief. 10

8. On a question of mistake concerning the terms of a contract it must appear that the mistake was one of fact not only not known to a party but one which he could not, by reasonable diligence have ascertained.

9. There is no privity of contract between insurer and the complainant, Tony Caffaro, as chattel mortgagee and relief afforded him is therefore, improper. 20

10. A policy of insurance being a written instrument containing a provision that its terms cannot be changed, altered or amended except by a written notation endorsed thereon or added thereto, the Court cannot under the testimony adduced, reform the contract nor apply the doctrine of estoppel in pais.

11. It is not within the jurisdiction of the Court of Chancery judicially to alter the terms of a written instrument by oral testimony especially in the face of an inhibition relative thereto embodied in the instrument. 30

12. The decree of the Lower Court is drastic, contrary to law, oppressive and confiscatory inasmuch as the defendants, thru the complainants' unreasonable delay and negligence, have been deprived of every opportunity properly to meet 40

Petition

the allegations in the action at law as to extent of damage, salvage, etc.

10 13. The Court of Chancery exceeded its power and jurisdiction in decreeing both a reformation of the policy and an estoppel in pais as against defendants' defenses.

Your petitioners, therefore, pray that the said Decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

I. BENJ. GLUECKFIELD,
Solicitor for and of counsel
with Defendants-Appellants.

Answer to Petition*(Filed February 21, 1919)*NEW JERSEY COURT OF ERRORS AND
APPEALS

JOSEPH GIAMMARES and TONY CAFFARO, Complainants and Respondents, and ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PA., a body corporate and JAMES A. EDGAR, Defendants and Appellants.	}	On Appeal On Petition
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The Answer of the above named Complainants and Respondents to the Petition of Appeal of the above named Defendants and Appellants.

These Respondents not acknowledging all or any of the matters which in the said Petition of Appeal are contained, to be true, for answer thereto nevertheless admit and say:

That a Decree was on the 20th day of December last past made and entered in the Court of Chancery in the said cause for that purpose mentioned in the said Petition as is therein stated, but as to the substance and form thereof these Respondents pray to refer thereto when the same shall be produced and these Respondents are advised and believe that the said Decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these Respondents.

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GEORGE J. PLECHNER,
 Solicitor for Respondents.
 FREEMAN WOODBRIDGE,
 Solicitor for and of counsel with Respondents.

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New Jersey Court of Errors and Appeals.

Between

JOSEPH GIAMMARES and
TONY CAFFARO,

Complainants-Respondents,

and

ALLEMANNIA FIRE INSURANCE
COMPANY OF PITTSBURG, PA.,
a body corporate, and JAMES
A. EDGAR,

Defendants-Appellants.

On Appeal
from a
Decree of the
Chancellor.

Supplemental Brief for Complainants- Respondents

GEORGE J. PLECHNER,

Solicitor for Complainants-Respondents.

FREEMAN WOODBRIDGE,

Of Counsel.

THE FACTS.

At the argument of this case before the Court, the question was ~~then~~ raised as to whether or not the information given to Miss Powers, a clerk in the general agent's office, that the building and the contents thereof insured by the defendant company had been conveyed by Caffaro to Giammares and that a chattel mortgage had been delivered to secure part of the purchase price and requesting the change of ownership be noted on the policy and a chattel mortgage clause in favor of Caffaro, chattel mortgagee, be annexed thereto would be binding on the defendant company without showing that the general agent had knowledge of said facts.

It is established by the proofs that said information had been given to Edgar, the general agent of the defendant insurance company, prior to the return of said policy to Caffaro after the same had been left in the agent's office for the purposes aforesaid.

Caffaro took the policy and bill of sale to Cantore at the time the property, covered by said policy, had been conveyed by him to Giammares, and requested Cantore to take the same to the insurance agent's office in order to have Giammares' name, as the new owner, endorsed thereon and to have a chattel mortgagee clause annexed thereto in favor of Caffaro as chattel mortgagee (p. 28, l. 34; p. 29, l. 25).

Cantore immediately thereafter took the policy and bill of sale to Edgar's office and left both paper writings with Miss Powers, the clerk in Edgar's office, and then and there instructed Miss Powers to have both said endorsements noted on said policy (p. 29, l. 26; p. 30, l. 20).

As to the authority of Miss Powers to issue insurance policies, see p. 3, l. 30-42, of the original brief on the part of the complainants-respondents.

Cantore testified that the said policy and bill of sale was mailed to him about two or three days later (p. 30, l. 20-30).

Caffaro testified that he informed Edgar of the facts

aforesaid the day after the policy had been delivered by Cantore to Miss Powers of Edgar's office (p. 42, l. 8-30), viz:

"Q. Did you have any conversation with Mr. James A. Edgar in reference to the insurance policy, and if so, when and where?

A. When I took the policy to Mr. Cantre, the day after I met Mr. Edgar on George street, and I told him that I sold the place, and I brought the policy to Mr. Cantre to have the name of the ownership changed, and Mr. Edgar told me he had heard I sold the place; after we had a little conversation and I told him I sold it for \$1,750, and I got \$250 cash and I took back a chattel mortgage, and he told me he knew about it as Mr. Cantre told him."

Edgar does not deny this testimony (p. 56, l. 38; p. 57, l. 15).

Note particularly the following testimony by Edgar:

"By the Court: Q. You mean to say that you are positive that you had no conversation with the witnesses who have testified here or that you don't recollect any such conversation? A. I don't recollect."

"Q. Do you remember meeting Mr. Caffaro on the street and his telling you that he had sold the property? A. I may have; I met him lots of times on the street; had lots of business with him at different times, and I may have met him on the street."

It is, therefore, most apparent and most conclusive that Edgar, the agent of the defendant insurance company, had full knowledge of ^{such} facts before the policy had been returned to Cantore with the change of ownership noted thereon and no chattel mortgage clause annexed thereto. If, however, there is any doubt as to this contention the cases herein submitted hold without question that the knowledge of a sub-agent of the above facts would be the knowledge of the general agent and that the defendant insurance company is bound thereby.

LAW.

An insurance agent having the right to issue insurance policies may in the due prosecution of the business of his principal delegate to another authority to do any act within the scope of his authority and the acts of a sub-agent done in pursuance of such delgated authority will have the same effect as if done by the general agent himself. In such case the sub-agent becomes the agent and direct representative of the principal.

“Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents and when this is the case the principal is bound by the act of the sub-agent.” *Amer. and Eng. Enc. of Law, 2nd Edition, Volume 1, p. 981.*

“Although an insurance agent cannot delegate his authority to another or sub-let it he may employ clerks and sub-agents whose acts if done in his name and recognized by him either specially or according to his usual method of dealing with them, will be regarded as his acts and as such binding on the principal.” *Eingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252; Bodine v. Exchange F. Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Grady v. American Cent. Ins. Co. 60 Mo. 116.*

“A person authorized by an insurance company to accept risks to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies is a general agent of the company, though he represents his principal only for a particular locality or within a limited territory, and is therefore called a local agent.” *Am. and Eng. Enc. of Law, 2nd Edition, Volume 16, p. 908.*

“The agent of defendant company who issued the policy here in question and at whose request the insurance broker, already referred to, solicited the policy, was a general agent of defendant company in the sense of an agent who was clothed with power within a limited territory to assume risks and execute policies by his counter-

signature." *Koch v. Commonwealth Ins. Co. of N. Y.* 87 N. J. Equity, p. 93.

"When an agent employs a person as his agent to assist him in transacting the affairs of his principal, the person so employed is called a sub-agent." *Am. and Eng. Enc. of Law, 2nd Edition, Vol. 1*, p. 980.

In *Hoover vs. Wise*, 91 U. S. 308, 23 L. ed. 392, the Court stated that it was undoubted law that where an agent has power to employ a sub-agent, the acts of such sub-agent or notice given to him in the transaction of the business had the same effect as if done or received by the principal.

"The maxim *delagatus non potest delegare* has been held not to apply to the case of insurance agents whose business required them to employ clerks to assist them who can bind their principals by any business they are authorized to transact." *Bodine v. Exchange Fire Ins. Co.* 51 N. Y. 117, 10 Am. Rep. 566.

"Insurance companies establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his authority and employment, as if they proceeded from the principal." *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 80 U. S. 13 Wall 222, 20 L., ed. 617.

"Such sub-agents employed by custom are to be considered as the agents of the company so as to bind them as effectually as the local agents themselves might do." *Woodbury Sav. Bank and Bldg. Asso. v. Charter Oak F. and M. Ins. Co.* 31 Conn. 517.

"Where the facts showed that the application was filled in by a broker in the local agent's office and upon being sent to the defendant was returned for further information as to the ownership and tenancy of the property, whereupon the agent requested the said broker, who was neither agent nor recognized as such, to procure the necessary facts which the latter did, finding out that the insured was only conditional vendee, but the tenant filled

in an assertion showing that the insurer was both owner and tenant, the Court held that such acts were those of the agent and charged the company with notice of the knowledge of the broker, the acts being those of one employed by the latter." *Mullin v. Vermont Mut. F. Ins. Co.* 58 *Vt.* 113.

"And where at the time of taking an application for fire insurance the agent had notice of the use of a gasoline stove and after the issuance of the policy the fact became known to the general agent, the company was held to have waived a condition as to the use of the stove and was bound by the notice." *Farmers and M. Ins. Co. v. Nixon*, 2 *Colo. App.* 265.

"In *Carpenter v. German-American Ins. Co.* 135 *N. Y.* 298, where it was shown to be the common custom of insurance agents having the power of general agents, to employ subordinates, the Court held that notice to such sub-agent while engaged in soliciting ^{insurance} insurance of any fact material to the risk which affected the contract was notice to the company to the same extent as though it had been given directly to the agent himself." *Arff v. Star Fire Ins. Co.* 10 *L. R. A.* 609, 125 *N. Y.* 57, and *Bodine v. Exchange Fire Ins. Co.* 51 *N. Y.* 117, 10 *Am. Rep.* 566.

"In *Chase v. Peoples F. Ins. Co.* 14 *Hun.* 456, it was held that the knowledge of the clerk of the agents of the defendants that the house insured was vacant, was the knowledge of the agents of the company, and, therefore, the knowledge of the defendant company itself. In the above case the facts showed that the insurance was taken by a soliciting agent who had knowledge at the time that the house was vacant and so communicated the fact to a clerk in the office of the defendants' agents."

"The ruling of the Court in *Van Schoick v. Niagara F. Ins. Co.* 68 *N. Y.* 434, was followed in the last preceding case. There the evidence showed that the fact that the building insured was upon leased ground was known to the party who procured the insurance and who

was in partnership with the commissioned and ostensible agent of the defendant company, which fact was known to the company and not disapproved of by it, a joint commission being promised and paid prior to the delivery of the policy, and the Court held the defendant bound by the knowledge of the agent who secured the insurance."

"Where the evidence showed that the notice was given to a clerk or employee whose duty it was to solicit insurance for the duly commissioned agents of the defendant company for which he received a commission, the Court held that such notice was sufficient to bind the company, and that the position of such employee was not that of a mere insurance broker, and that the rules of law applied to the facts and positions of those employed in like manner by insurance agents." *Arff v. Star Fire Ins. Co.* supra, distinguishing *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609, and *Devens v. Mechanics and T. Ins. Co.* 83 N. Y. 168, upon the ground of brokerage.

CONSIDERATION.

The only other point raised by the Court on the argument was as to the consideration moving to the insurance company for the change of ownership and chattle mortgage clause requested at the time of the notice to them.

We think it is not necessary to cite any other authority than the following from the American & English Enc. of Law, Second Edition, Volume 13, pages 196-197. See also footnotes under the above.

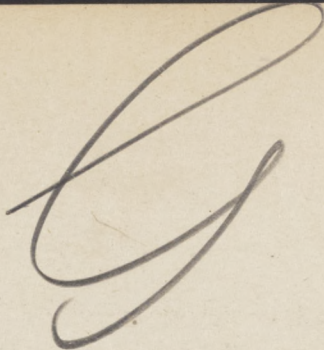
"Upon a sale of the insured property and an assignment of the policy to the purchaser duly assented to by the insurer a new contract arises between the company and the assignee. But all the terms and conditions of the old contract are imported into the new and the latter is created on the basis of the old. The effect, in short, is to put the assignee in the same situation and confer upon him the same rights in future as if he were the original insured."

"The exemption of the insurer from further liability to the original insured and the premium already paid for a term not yet expired constitute a good consideration for the new promise upon the part of the insurer."

We think it is very obvious that the above is a correct statement of the law. Transfers of real estate take place, mortgages are placed on real estate by savings institutions, building loan associations and other investors without paying the insurance companies a new consideration. In such instances existing policies are taken to the general agent of an insurance ~~company~~ ^{company order} in order that a proper clause showing the change of ownership and a mortgagee clause be annexed. This seems to be the practice in this state.

We respectfully submit that the decree of the Court of Chancery should be affirmed.

GEORGE J. PLECHNER,
Solicitor for Complainants-Respondents.
FREEMAN WOODBRIDGE,
Of Counsel.



New Jersey Court of Errors
and Appeals

Between JOSEPH GIAMMARES and TONY CAFFARO, Complainants-Respondents, and ALLEMANNIA FIRE INSURANCE COMPANY of Pittsburg, Pa., a body corporate, and JAMES A. EDGAR, Defendants-Appellants.	}	On Appeal From a De- cree of the Chancellor.
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BRIEF FOR APPELLANTS

This is an appeal from a final decree of the Chancellor, advised by Vice Chancellor Lane, and filed on December 24th, 1918, which decrees that a policy of insurance issued by the defendant, Allemannia Fire Insurance Company, of Pittsburg, Pa., to the complainant, Tony Caffaro, be reformed so that the policy shall have embodied therein or noted thereon that (1) the property thereby insured stands upon leased grounds; that (2) the complainant, Tony Caffaro, is the holder of a chattel mortgage on the insured property; and that (3) loss, if any, be payable in the first instance to the said mort-

gagee as his interest may appear. The decree furthermore, enjoins the defendants from setting up any defense in any action at law for the recovery of loss incurred under said policy based upon the fact that it was issued without having noted thereon that the insured property stood upon leased ground, that there is a chattel mortgage thereon and that the complainant, Tony Caffaro, has an interest therein as chattel mortgagee.

The Facts

A. THE TESTIMONY

Considering the nature of the case and the fundamental principles involved, the trial was very brief—but two witnesses being heard for the complainants and three for the defendants.

The complainant, Tony Caffaro, testified that he had, in 1916, built a small store on a plot of ground leased by him on the corner of Jersey Avenue and Sanford Street, in the City of New Brunswick, Middlesex County and that seven or eight months later, to wit, in January, 1917, (p. 43, l. 20) he went to Nicholas Cantore (incorrectly called Cantre) an insurance broker who acted for him, told him his requirements and secured through the broker a policy of fire insurance issued by the defendant fire insurance company (p. 39, l. 40). He, Caffaro, did not read the policy nor have it read or examined by anyone for him. Witness his testimony at page 40, line 10:

“Who gave you the policy? A. Mr. Cantore.”

“By the Court: Did you read it when you got it? A. No, sir.”

Again at page 46, line 27 he testifies as follows :

“Q. When Mr. Cantre gave you the policy the first time did you ask him whether or not it contained a clause to the effect that the building stood on leased ground? A. I did.”

“Q. You did ask Cantre? A. The first time I took the policy?”

“Q. After Cantre gave you the policy? A. No, I didn't ask him; he just gave me the policy.”

“Q. You say you can't read English yourself? A. No.”

“Q. Did you have anybody else read the policy for you? A. No.”

“Q. Why didn't you ask Cantre whether that clause was there? A. I just took the policy and took it with me; didn't ask him anything.”

“Q. Now, after you made the sale and told Mr. Cantre to change the ownership and to mention the chattel mortgage, did you try to find out whether or not the policy contained those facts? A. No; I didn't tell anything.”

“Did you ever try to find out whether the policy had the changes? A. No.”

“Q. Didn't have anybody read the policy for you? A. No.”

“Q. Didn't ask Cantre either? A. No.”

“Q. When did you first learn that the policy did not have the endorsement regarding the chattel mortgage? A. After the place took fire.”

“Q. Who told you about it then? A. Lawyer Watson.”

Caffaro kept the policy for a month and a half and then, having sold his place of business to the complainant, Joseph Giammares, took the policy back to Cantore informing the latter that he had sold the property in question and that he "wanted to have the name changed as to ownership" and accordingly deputized Cantore to effectuate the matter (p. 40, l. 12) not "feeling like" nor "wanting" to go to the insurance agent himself (p. 49, l. 10).

Caffaro testified further that the chattel mortgage which he took back to secure part of the purchase price of the store was "attached" to the Bill of Sale and that he "left" all of the papers with Cantore (p. 41, l. 10) receiving them back in two or three days with the policy of insurance and kept ^{them} ~~that~~ home thereafter. When asked whether he had recorded any of the papers in the office of the Middlesex County Clerk he replied that he had recorded the chattel mortgage but could not remember the date (p. 41, l. 30). The chattel mortgage itself, Exhibit C-3 (p. 80), indicates it to be a separate instrument, signed on February 19th, 1917 (p. 82, l. 3) acknowledged on February 20th, 1917 (p. 83, l. 28) ~~and recorded on February 21st, 1917 (p. 83, l. 28)~~ and recorded on February 21st, 1917 at 10 o'clock in the morning (p. 84, l. 10). The attorney George L. Burton, in whose office the transaction between the complainants was consummated, testified that the recording fee had been charged to his account (p. 52, l. 20) thus indicating that the instrument had, in all likelihood, been recorded by him.

Caffaro adduced further testimony to the effect that on the day following his giving the papers to Cantore for the endorsement of the change of ownership he (Caffaro) met the defendant Edgar,

who is the defendant company's local agent in New Brunswick, and that the following conversation ensued (p. 42, l. 10):

“Q. Did you have any conversation with Mr. James A. Edgar in reference to the insurance policy and if so, when and where?
A. When I took the policy to Mr. Cantre, the day after I met Mr. Edgar on George Street and I told him that I sold the place, and I brought the policy to Mr. Cantre to have the name of the ownership changed, and Mr. Edgar told me he had heard I sold the place; after we had a little conversation and I told him I sold it for \$1,750 and I got \$250 cash and I took back a chattel mortgage and he told me he knew about it as Mr. Cantre told him.”

This time Caffaro again failed to read the policy (p. 46, l. 27).

Cantore, the insurance broker, confessedly acting for Caffaro (p. 32, l. 30) testified that the latter had asked him to obtain insurance on the building in question; that he went to Edgar's office and told the latter what Caffaro had told him (p. 27, l. 40); that he mentioned the fact that the ground did not belong to Caffaro; that he received the insurance policy, Exhibit C-1 (p. 69) which is the basis of this suit, from Edgar about January 5th or 6th, 1917 by mail and that he immediately thereafter delivered it to Caffaro but did not read it or examine it (p. 28, l. 27):

“Q. What did you do with it? A. Immediately delivered it to Mr. Caffaro.

“Q. Did you read it? A. No, I did not.”

Again, at page 33:

“Q. Why, Mr. Cantre, did you not read the policy after you procured it through Mr. Edgar’s office? A. No, sir.

“Q. Why did you not read it? A. Why?

“Q. Yes. A. I didn’t; I never read the policies delivered by Mr. Edgar to me.

“Q. You have told us that Mr. Caffaro told you certain things with regard to the building standing on the leased land? A. Yes, sir.

“Q. And you told Mr. Edgar that? A. Yes, sir.

“Q. Why did you not see whether or not the policy contained that clause? A. I couldn’t answer that.

“Q. When you delivered the policy to Mr. Caffaro did he ask you whether the policy contained that clause? A. No, sir.

“Q. Neither of you made any attempt to find out whether or not that clause had been inserted? A. No, sir; never knew that until yesterday.

“Q. Until yesterday? A. Yes, sir.

“Q. How did you come to know it yesterday? A. When I was subpoenaed to come in this Court here.

“Q. Did the fact that you were given a subpoena remind you that it wasn’t in there, or how did you discover it? A. When I see the policy.

“Q. So that the first time that you examined that policy since it was issued was yesterday? A. Yes, sir.

“Q. And it is a year and nine months that the policy has been issued. A. Yes, sir.”

Cantore testifies further that, about the middle of February, 1917, Caffaro gave him the policy and the Bill of Sale for the purpose of having the new owner's (Giammare's) name inserted in the policy together with an endorsement of the newly created chattel mortgage interest of Caffaro (p. 29, l. 10). He makes no mention of having received the chattel mortgage which Caffaro says he also gave him (p. 36, l. 35), (p. 46, l. 10). Recounting the manner in which he performed his trust, Cantore testified that he took the policy and Bill of Sale to the office of the defendant, Edgar, spoke there to a young lady who, he concludes, "had charge of the office," a Miss Powers, (p. 29, l. 30), and told her to insert the name of the new owner and to embody a chattel mortgage clause. Pressed for a reason for bringing the Bill of Sale to Edgar's office, he answered "that was the first time" (p. 35, l. 18). What occurred at that time is testified to by Cantore as follows (p. 30, l. 10):

"Q. What, if anything, did the stenographer, Miss Powers, Mr. Edgar's stenographer, say to you? A. I don't remember she said anything.

"Q. Did she write down the information that you had given to her? A. I don't recall that.

"Q. Did you leave the policy and the Bill of Sale at Mr. Edgar's office? A. Yes, sir.

"Q. With the stenographer? A. With the stenographer, yes.

"Q. Did you ever see that policy and bill of sale again? A. Mailed to me about two or three days later.

"Q. Did any letter accompany the enclosure? A. No, sir."

He does not state that Edgar's assistant promised to make such endorsements on the policy as Cantore claims to have requested.

This time Cantore again failed to read the policy (p. 36, l. 15) but delivered it with the Bill of Sale to Caffaro although Giammares was, of course, the one entitled to the Bill of Sale (p. 35, l. 30).

The transaction relative to the sale of his store by the complainant Caffaro to the complainant Giammares was, as above stated, consummated in the office of George L. Burton, a practicing attorney, formerly of New Brunswick, who represented both parties to the transaction. Burton had associated with him at that time one Horace E. Barwis who appears as the witness to the execution of the Bill of Sale, Exhibit C-2 (p. 79) and the chattel mortgage C-3 (p. 82) and is the officer who took the acknowledgment to the chattel mortgage (pp. 82, 84). Mr. Burton testified that it was *he* who sent the policy of insurance to the office of the defendant Edgar, for the purpose of having endorsed thereon the change of ownership and the existence of the chattel mortgage interest. His testimony is as follows (pp. 51, 52):

“My recollection is that at the time this bill of sale was executed and the chattel mortgage was executed that I suggested that the insurance policy be delivered to the agent for a change of ownership and for the attachment of a chattel mortgagee clause. I am under the impression that I had that done myself. Possibly I am wrong. I have made an examination of my office to see if I can find any letter which was mailed out to the agent and I can't find it, so it

is possible if I did it, it was sent by messenger. I also have a recollection of the policy coming back to me with the change of ownership on it, but not with the mortgagee clause. I have also searched my office to see if I can find any letter by which it was returned to me and I can't find any. This is my impression of the matter.

“By the Court: Q. If it was sent to the agent by you it would have been sent with directions to insert the chattel mortgage clause? A. Yes, sir.

“Q. What is your recollection as to what you did after the policy was returned to you without the mortgagee clause? A. I don't remember; I can only give you my impression of it; I must have returned it to Mr. Caffaro and I told him here was the policy with the change of ownership and no mortgagee clause.

“Q. Wouldn't have been likely you would have agreed to have it inserted if it had gone thru in that way? A. No, I don't think so, because it strikes me further I had an impression that the company wouldn't attach it and that I was not very much surprised when it came back to me having understood that the insurance companies wouldn't recognize chattel mortgagees. At that time I was very busy and a great deal of work was done by a lawyer in my office who might have had more to do with this than I did.”

It may altogether be fairly deduced from the testimony that the entire conclusion of the details of the transaction was left to Burton and it may be equally assumed that to him was left the

duty of having endorsements made on the policy as well as the recording of the chattel mortgage (p. 44, l. 40). The witness, who must be borne in mind as the *attorney for the complainants*, explains the absence of copies of his letters relative to the changes in the policy by stating the fact that he had moved his offices from New Brunswick to South River and that he destroyed at that time a great deal of correspondence which he conceived to be of no further use (p. 54, l. 17).

Burton testifies further that when he got the policy back from Edgar's office and discovered that the mortgagee clause had not been endorsed or appended he must have reported that fact to Caffaro (p. 68, l. 15).

Burton's testimony relative to *his* having ordered the changes in the policy are corroborated by the testimony of Miss Powers, a clerk in the office of the defendant Edgar, who is the only witness having an apparently clear and concise recollection of what occurred. She is a trained stenographer who, up to the time of the hearing of this matter, had been employed by the defendant Edgar for almost three years and for a year prior to the time that the policy in question was first issued (p. 61, l. 25). Her testimony is positive as to Cantore's having ordered the policy from her personally (p. 61, l. 38, *et seq.*); his giving her personally all of the details for the issuance of the policy and as to the fact that nothing was said concerning the non-ownership of the land by the insured (p. 62, l. 28). She testifies further that the change of name from Caffaro to Giammares was effected by her personally at the direction of Burton and not of Cantore; that she was not requested to endorse any chattel mortgage interest; that the defendant insurance com-

pany does not permit the endorsement of chattel mortgage interests on its policies; that she would not have suffered the policy to leave her office with the knowledge that there was a chattel mortgage on the insured property (p. 64); that she learned for the first time of the existence of the chattel mortgage interest after the occurrence of a fire and finally, that neither the Bill of Sale nor the chattel mortgage were delivered to her (p. 63, *et seq.*). Cross-examination did not in any wise shake nor alter her testimony.

The defendant Edgar also contradicted the witnesses for the complainants, testifying that Cantore did not speak to him personally in relation to the policy in question (p. 55, l. 26); that he had no knowledge as to the true ownership of the land on which the insured property stood (p. 57, l. 26); that he had no knowledge of the change of ownership nor of the creation and the existence of the chattel mortgage, and that the endorsement of the change of insured was signed by Miss Powers who had authority to do so (p. 60, l. 30).

The policy of insurance, Exhibit C-1 (p. 69) contains *inter alia* provisions to the following effect:

“1. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any Court of Law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire (p. 75, l. 20).

“2. This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the

insured in the property be not truly stated herein (p. 72, l. 32).

“3. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on the ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage” (p. 73, l. 1-3 & 19-25).

The action at law on the policy was commenced by the complainants three days before the limitations mentioned above expired and the equity action was instituted several months thereafter, following the defendants' motion to strike out the Complaint in the law action—decision on the motion being reserved pending the termination of the equity suit to reform the policy. Caffaro attempts to explain the unwarranted delay by the statement that he had placed the matter in the hands of an attorney, one Russell E. Watson of New Brunswick who advised him about the defects in the policy in that it failed to mention the facts relating to the non-ownership of the land and the existence of a chattel mortgage interest, but who kept the policy in his office for five months and then informed Caffaro that nothing could be done about the matter. Pursuing his explanation he states that he then went to Burton who advised him a month or two later that he could do nothing in the premises and so finally the complainants' present attorneys were consulted (p. 48). It is apparent however that, even if complainants did not, as they insist, know, before

the fire, of the non-inclusion in the policy of the clauses in question, they did know within a month after the fire and yet they waited for a year and several months after that before seeking reformation—and then only after their law action was about to be dismissed.

Following the filing of the Bill of Complaint, the writer moved for an order to strike it out upon the ground that it failed to establish a case in which equity could afford relief. Decision on the motion was reserved pending the final hearing at which time the application was denied.

B. FINDINGS OF THE VICE CHANCELLOR

The learned Vice Chancellor appears, in his oral conclusions (p. 85) to accept in its entirety the testimony of the complainant Caffaro and of the latter's broker Cantore and ignores apparently the many discrepancies in and the vast improbabilities of their respective stories, totally rejecting the testimony of Burton, Caffaro's own attorney, the defendant, Edgar, and the wholly disinterested Miss Powers. Proceeding further the learned Vice Chancellor refers to a supposed conversation which he conceives to have been had by Caffaro with Edgar and which alleged conversation though nowhere testified to goes to the very meat of the case, and is to the following effect (p. 86, ll. 19-23):

“Caffaro testifies to a conversation on the street with Edgar in which the fact that his building was erected on leased ground (that he didn't buy the land) was adverted to.”

The writer has vainly searched the record for any such conversation or adversion and it is al-

together likely that this mistaken conception on the part of the learned Vice Chancellor may have influenced his decision. The only conversation with Edgar testified to by Caffaro occurred after the sale of the insured property and relates only to the change of ownership (p. 42, l. 10) ~~is~~^{as} hereinafter quoted.

The learned Vice Chancellor continuing on this point finds that (p. 86, l. 24):

“There is no improbability in this. Edgar knew Caffaro for some years and such a conversation is very likely to have taken place. It is very unlikely that Caffaro would have been able to, out of his own mind, create this story and not, in some respect, be shaken by cross-examination. Edgar doesn't deny that such a conversation took place; he says he doesn't recollect it. I am convinced that the policy when issued by Edgar originally either was issued by mistake omitting the provision with respect to leased ground, or, that the agency deliberately issued it omitting that provision in which case there would be fraud.”

It is clearly to be observed that the learned Vice Chancellor erred in this finding and that there is no basis for such a conclusion. Edgar of course “doesn't deny that such a conversation took place” because he was not asked as to whether it ever took place, and when he says that “he doesn't recollect it” he refers to the other conversation at page 42 of the printed state of the case.

Again, the Vice Chancellor finds that “the broker agrees with Caffaro” (p. 87, l. 12), on

the minor question of whether Caffaro gave the broker the chattel mortgage, Bill of Sale and policy as he says he did (p. 40, l. 32) while the broker insists that he received only the Bill of Sale and the policy (p. 29, l. 1).

POINT ONE

The Court of Errors and Appeals will intervene and review the lower Court's findings of fact for the purpose of adjudging the competency, legality and sufficiency of the evidence adduced, determining the weight or preponderance thereof and to preclude the possibility of injustice.

The Court of Errors will review the conclusions of the Court below on mixed questions of law and fact when they appear to be plainly erroneous.

Stout vs. Leonard, 37 N. J., L., 492.

The Court of Errors will intervene and determine questions of fact for the purpose of preventing injustice.

Moore vs. Galupo, 70 N. J. Eq., 801.

The Appellate Court will review the lower Court's findings of fact insofar as it may be necessary to determine whether the evidence adduced in the Court below is competent and legally sufficient to support them.

Voorhis vs. Terhune, 50 N. J. L., 147.

Where it appears to a reasonable degree, that the Trial Court erred in its findings of fact a reversal on questions of fact is justifiable.

Brown vs. Ramsey, 26 N. J. L., 117.

The findings on conflicting evidence will be set aside when clearly erroneous, unwarranted or against the weight of the evidence.

Holmes vs. Holmes, 18 N. J. Eq., 141;
Clark vs. Condit, 21 N. J. Eq., 322;
Davis vs. Elliot, 55 N. J. Eq., 473†;
Van Ness vs. Van Ness, 32 N. J. Eq.,
669.

In the recent case of *Sloss-Sheffield Steel & Iron Co. vs. Aetna Life Ins. Co.*, 75 N. J. Eq., 545, an analysis and application of which will be found under a subsequent point herein, this Court reversed the decision of the lower Court upon questions of fact solely.

The writer has pointed out in subdivision (B) hereof, *supra*, some of the egregious errors into which the learned Vice Chancellor fell in the enunciation of his conclusions. It is apparent that, in at least two vital essentials, the Vice Chancellor's findings are based either upon evidence not actually adduced or clearly misinterpreted. It is submitted therefore, that the principal conclusions are contrary to the great weight and preponderance of the evidence and tend to work hardship and injustice upon the defendants. The decision of the lower Court ought, in this respect, to be reversed.

POINT TWO

A provision in a policy of insurance prescribing a limited period in which suits at law or in equity may be brought thereon is a bar to a suit in equity to reform the policy or to enjoin the insurance company from setting up certain defenses, instituted after the limitation has elapsed.

The lower Court ruled that the present suit was not barred by the one year limitation expressed in the policy prohibiting the institution of any suit at law or in equity after the expiration of one year following the occurrence of a fire. In support of its dictum the Court cites several decisions of other States and two supposed authorities in this State.

The writer has fine-combed the various digests and decisions of this State in a vain effort to locate a single authority in point. The learned Vice Chancellor cites (p. 92) *Kelsey vs. Agricultural Ins. Co.*, 78 N. J. Eq., 378 and *Kupferschmidt vs. Idem*, 80 N. J. L., 441, but even a cursory examination will indicate their inapplicability. In the former case (*Kelsey*) the issue of laches came up on a motion to strike out the bill and the Court held at page 383 that "the matter is one which can be properly determined only at final hearing and then the bill may be dismissed for laches if the facts warrant it—if the facts demonstrate that it is the proper disposition of the case." The suit did not apparently proceed to final hearing and thus no ruling on the question was enunciated. On the other hand, contractual limitations were not urged in that case as they are in the case *sub judice* but only ordin-

ary laches involving a lapse of time (four years) merely.

The Kupferschmidt case does not deal with the question of laches or limitations at all—turning solely on the proposition that evidence dehors a written contract cannot be introduced in a law action for the purpose of establishing that the intention of the parties thereto was to include a third person as a party. No element of laches was introduced at any point in the proceeding.

It is clear therefore that this Court will have to establish a ruling authority governing the question. The lower Court, following the decisions of certain other States, declares a suit in equity to reform a policy of insurance to be an action merely in aid of an action at law and not a suit on the policy within the meaning of the clause quoted above. It must be borne in mind that the law action between these parties was brought only three days before the one year limitation expired and the equity suit was instituted several months thereafter. By entertaining the bill the worthy object of the prohibitive clause which is intended primarily to encourage reasonable promptness in the assertion of alleged rights and to discourage needless circuitry and continuity of actions, and to apprise the company of the claimants' attitude, is defeated.

POINT THREE

The failure of the lower Court to dismiss the Bill of Complaint upon the ground of laches irrespective of the provisions of the policy constitutes reversible error.

An almost indispensable requisite in any application for equitable relief is the measure of

promptness with which it is made. *Vigilantibus non dormientibus aequitas subvenit* is an ancient maxim in equity designed to provoke diligence, punish laches and to discourage the assertion of stale claims.

Bispham's Principles of Eq., p: 60.

The lower Court dismisses the appellants' contention in this behalf in a short paragraph (p. 93) citing the case of *Kelsey vs. Agricultural Ins. Co. supra*, which ~~is~~^{as} indicated above under Point two, is not definitive of laches at all. The question of laches was introduced on a motion to strike the bill but was declared by the trial Court to be a matter which should be held over until the hearing.

Vice Chancellor Garrison in defining the elements constituting laches in a case of this sort, observes in *Kelsey vs. Agricultural Ins. Co.*, 78 N. J. Eq., 378, 383, that:

“None of the ordinary reasons which induce a Court to dismiss a case for laches are present; that is, no witnesses have died, or papers been lost, or such time elapsed as to make it difficult or burdensome for the defendant to present its whole case with respect to the subject-matter involved; nor are any rights altered. The only possible injury or damage which could result to the defendant by reason of the delay of the complainant in seeking to have the instrument reformed would be that it claims that it had the right to cancel the insurance on ten days' notice, and that a loss has occurred, and that if the policy is now reformed so as to make Kelsey a party to the contract, it is in a different position than it would have been if he had

been diligent in having the policy reformed earlier and before the loss."

It is respectfully urged that, in the case at bar, nearly all of these elements are present, to wit, (1) such time has elapsed as to make it difficult or burdensome for the defendant company to present its whole case with respect to the subject-matter involved because of the impairment of the memory of its main witness, Edgar; (2) the position of the defendant company has been materially altered in that it has been precluded from availing itself of the provision of the policy relative to cancellation thereof upon five days' notice; (3) following the company's refusal to recognize liability and the subsequent failure of the complainants for more than a year thereafter to bring the present action or in any other wise indicate their desire or intention to prosecute the matter further, the defendant company was justified in assuming that the complainants would abide by their loss with the result that, with the lapse of time, the company has been unable properly to assess the loss—for no fair and proper assessment can be made at a period of two years after the occurrence of a fire; (4) essential papers, to wit, the copies of letters sent by attorney Burton in Caffaro's behalf to the insurance agent requesting changes in the policy have been lost or destroyed. Thus the *Kelsey* case, so far from being an authority in support of the decision of the lower Court, is in fact a controlling authority in the appellants' behalf.

"Lapse of time alone is a sufficient ground of estoppel where the Court cannot feel confident of its ability to ascertain the truth, as well as it could when the sub-

ject for investigation was recent and before *the memories of those having knowledge of the material facts have become weakened by time*, and to constitute an estoppel by lapse of time. it is not essential that any actual loss of testimony through death or otherwise, or means of proof, or changed relations to the prejudice of the adverse party should have occurred."

United Bosboard & Paper Co. vs. McEwan Bros. Co., (N. J. Ch.) 76, Atl. Rep., 550.

In *Paulison vs. Van Iderstine*, 28 N. J. Eq., 306, the Court makes replacement into *statu quo* the test for affording relief. That is to say, has the negligence of the complaining party in failing promptly to seek relief or his rights, so operated as to preclude such replacement? Says the Court in its opinion,

"one must have been diligent and have made such inquiry and investigation as circumstances reasonably permitted and suggested. Means of knowledge are equivalent to knowledge."

Eight months' retention of a policy alleged to mis-describe through the agent's mistake the interest of the insured as that of absolute owners instead of as commission merchants was held to bar reformation in a line of cases reported in 67 L. R. A., 731.

The rule as enunciated in *Bostwick vs. Mutual Life Ins. Co. of N. Y.*, 67 L. R. A., 205, is that the assured upon discovering an error or variation in the terms of an instrument "must immediately rescind or draw the insurer's attention to it."

It is respectfully submitted that, in view of the facts and of the preponderance of authority, the discretion of the Chancellor in affording relief in the premises has been unwarrantably exercised and his decision should therefore, in this respect, be reversed.

POINT FOUR

An insured person is presumed in law to have read his policy and to be cognizant of the limitations therein expressed and his retention of the policy without objection or exception to the form or any provision thereof until after the occurrence of a fire, constitutes a ratification and acceptance of the policy in the form in which it is issued.

The lower court observes the wide divergence of foreign authority on this question but thinks (p. 100) "The rule to be applied in this State is to be gathered from a consideration of the following cases," to wit:

Lloyd vs. Hulick, 69 N. J. Eq., 786.

Seymour vs. German American Ins. Co., 83 N. J. Eq., 37.

Kelsey vs. Agricultural Ins. Co., 78 N. J. Eq., 378.

Koch vs. Commonwealth Ins. Co. of N. Y., 87 N. J. Eq., 90.

None of these cases are however applicable, much less ruling authorities, on the question.

In *Lloyd vs. Hulick* a clear case of premeditated fraud on the part of the defendant was established in that the latter, contrary to the terms of a pre-existing written agreement, inserted certain re-

strictive covenants and forfeiture clauses in a deed which the complainant accepted believing it to follow the terms of the written agreement. But there is no proof nor finding of fraud on the part of the agent Edgar. The case (*Lloyd vs. Hulick*) deals entirely with an element of simple mistake on the one hand and outrageous fraud on the other and is therefore, not analogous to the case *sub judice* because there is no element of fraud in the latter. The total premium for the policy amounted to \$20.48 and the agent's commission would probably be about 20% or \$4.00. It is inconceivable that a reasonable man would be inclined to commit such gross fraud as to intentionally and dishonestly issue an improper policy for the sake of profiting to the extent of \$4.00 or less.

In *Seymour vs. German American Insurance Co.*, a renewal policy forming the basis of the suit was palpably different from the expired policy, though both the expired and the renewal policies were to be identical in every way except as to date of expiration. Another element entering into the facts in that case to the case at bar and the objectionable matter which had been inserted in the renewal policy with a rubber stamp was "very much blurred and almost unreadable." The insurance agent in this case was familiar with the premises, had issued prior policies insuring them and had office records sufficient to indicate the desires of the insured. There is no similarity of the facts in that case to the case at bar and the decision there proceeds upon an entirely different theory and basis than can be applied here.

The *Kelsey* case has not, as elucidated in the second paragraph under Point Two, any applicability to the case at bar. The pronouncement of the Court in that case is not decisive of any of the

questions raised, of which that of laches was paramount. The issues were presented on a motion to strike the bill and were held over pending the final hearing. So much of the Court's opinion as is pertinent is sufficiently alluded to under Point Two.

The Trial Court seems apparently to have misapprehended the decision in the case of *Koch vs. Commonwealth Insurance Co. of N. Y.*, *supra*. The Court cites this case as an authority in support of its decision to grant relief whereas relief in that case was actually denied for the very reasons that relief should here be denied. The facts developed in the *Koch* case indicate that a broker who acted for the defendant insurance company's agent had knowledge of the change of the insured premises from a store and dwelling to a printing shop and yet the Court refused to charge the company with such knowledge and accordingly denied the relief. The opinion of Vice Chancellor Leaming (87 N. J. Eq., 90, 95) is pertinent:

“But although the remedy of reformation appears at times to have been awarded in such circumstances, it must be conceded that some difficulty is encountered even in such cases in reaching a wholly satisfactory conclusion that the insurer can be said to have in fact made or to have intended to make a contract other or different from the one written, or that *rescission rather than reformation may not in such circumstances be the appropriate and only remedy.*”

The defendant insurance company in that case had been insuring the same premises for several years during which they were occupied as a store

and dwelling. The insured conveyed the property to another person who installed a printing shop. The new owner, honestly and innocently believing that it was not necessary to notify the insurance company of a change accepted and retained the renewal policy. It will be observed therefore, that the facts go much farther in that case than in the case at bar yet the Court there denied the relief holding that (p. 98):

“The policy which was issued was exactly as the insurer intended to issue it. On no sound theory can it be said that the defendant company ever contracted to insure complainant's building while in use as a printing establishment.”

The Trial Court holds here in conclusion that, inasmuch as the complainants, Caffaro and Giammares, could not read English, “the delivery of the policy following the oral application was a representation that the policy conformed to the facts stated in the oral application.” But the Court overlooks the fact that Cantore, the complainants' agent, was able to read English and his failure is chargeable to his principal. Neither does their own illiteracy excuse them from the duty of having the policy examined by someone else in order that they might ascertain whether certain clauses which they considered so important that they told the agent to insert them, as they contend, were actually inserted. And if, in a moment of inadvertence, they neglected to examine or to have the policy examined when it was originally issued, why did they again fail to examine or have the policy examined when they had requested the change of ownership and, as they insist, the endorsement of the chattel mortgagee's

interests. A leading case on this subject and one followed by many of the State Courts of the country is that of *New York Life Insurance Co. vs. Fletcher*, 117 U. S., 519, decided in the United States Supreme Court. In this case, involving similar issues as the case at bar, the Court held, *inter alia*, that "a party insured is presumed to have read his application and to be cognizant of the limitations therein expressed," and furthermore, "that a retention of the policy was an approval of its contents." The reasoning of the Court is that "the duty devolves upon the insured to read the policy and that the company has a right to assume that he has done so *regardless of his instructions to or conversations with the company's agent.*"

"The consequences of such tacit approval cannot after the insured's death (or by analogy, fire) be avoided." *Idem.*

The Court, in the enunciation of this principle, adopts the reasoning of the Supreme Court of the State of Missouri as set forth in the case of *American Insurance Co. vs. Neilberger*, 74 Mo., 167. In the last named case the insured had agreed with the company's agent that the former was to have the right to cancel the policy in one year but the policy did not contain that clause. The insured failed to examine his policy until "several months" later and then offered to return it. "In such case," ruled the Court, "It will be the duty of the insured, when he receives the policy, promptly to examine the same and, if it does not contain the stipulations agreed upon, to at once notify the company of that fact and of his refusal to accept the policy." Having retained the policy for *four months* he was held to have waited too

long to elect and that "after such delay will be deemed to have accepted the policy as issued."

Likewise in the case of *Richardson vs. Maine Ins. Co.*, 46 Maine, 394, where the application for fire insurance was filled out by the company's agent, signed by the latter and embodied the statement that no mortgages existed on the property. The policy subsequently issued contained the usual clauses regarding its invalidity if the situation, value, risk, ownership, etc., were not as represented. The company defended the action on the ground of the existence of the mortgage. The Supreme Court of Maine, following the rule in the *Fletcher* case held that the assured, by accepting and retaining the policy was bound by its covenants and that he must be deemed to have waived any provisions or conditions not embodied therein.

The case of *Voorhis vs. Murphy*, 26 N. J. Eq., 434, involved the question of a mistake concerning the provisions contained in a mortgage relative to the payment of interest and default thereof. The defendant, in resisting the action, alleged mistake—that he was under the impression until after the suit was begun that the time limited in the provision relative to the payment of interest, was thirty days instead of ten days as stated in the instrument. It appeared that the defendant by examining a receipt which had previously been given him for the payment of prior interest, would have discovered the fact that interest became due not as he supposed but as the mortgage provided. He failed, however, carefully to examine the receipt and so was held to the strict letter of the mortgage. "Such carelessness will not be regarded in equity as mistake," is the dictum of the Court citing *Graham vs. Berryman*, 4 C. E. Greene, 29; *Hagerty vs. McCanna*, 10 C. E. Greene, 48.

A leading authority in this State followed in the *Voorhis* case is that of *Graham vs. Berryman*, *supra*, holding that mistake of which the Court of equity can take cognizance and afford relief from must be of a fact, not only not known to a party but one which he could not, by *reasonable diligence* have ascertained. Moreover, where a party, ought, in the exercise of ordinary prudence to have made inquiry and neglects to ascertain the facts upon which his contract is based or embodied therein, in cases where it is not necessary to repose confidence in the other party, or where it is as much his duty as that of the party with whom he deals to know the facts, equity will not relieve against his own negligence.

The *Graham vs. Berryman* case was subsequently reversed but upon other grounds, the principle last above mentioned being preserved intact.

21 N. J. Eq., 370.

In *Hagerty vs. McCanna*, 25 N. J. Eq., 48, a situation of "great hardship" was presented. The defendant therein mistakenly believed that the widow whom he married was the owner of certain property whereas her interest therein was merely that of dower. Laboring upon this misapprehension he expended vast sums of money in improving and developing the properties. The defendant, seeking to resist ejection brought by his step-daughter upon her arriving at maturity invoked the aid of the Chancery Court to prevent "so flagrant a wrong" basing his claims to relief on the ground of mistake. But, the Court rules in denying relief,

"an error which is the result of inexcusable negligence is not a mistake from the con-

sequences of which equity will grant relief."

It is the sense of the Court that the defendant had no right to assume that the widow's interest was in fee and that he was duty bound to have made inquiry in order to ascertain the facts.

The Court differentiated *Hagerty vs. McCanna* from *McKelway vs. Armour*, 2 Stockt., 115, wherein the mistake was one which "might occur to the most careful and diligent man," and related to the location of a certain lot plotted out on a map.

"The mistake here (*Hagerty vs. McCanna*), was one from which the most ordinary care would have guarded the defendant. No relief can be afforded him on the ground of mistake.

"A mistake will not be relieved against if it is the result of the party's own negligence or that of his attorney or if it is occasioned by the forgetfulness of the party or of his agent. And under the same head should be classed mistakes into which a person has fallen, because he has not made use of the means of inquiry which are open to him, as, for instance, where he has not taken the trouble to read the paper which he was executing."

Bispham's Principles of Equity, 8th Edition, pp. 301, 302.

"Equity will not relieve a person from the effects of a mistake which is the result of his culpable negligence.

"Equity will not assist a man whose condition is attributable to his failure to ex-

ercise that diligence which may be fairly expected from a reasonable person.”

Dillett vs. Kemble, 25 N. J. Eq., 66.

“Against a party seeking reformation, broadly speaking, it is a good defense to set up and prove that the mistake charged was due to the complainant party’s own negligence.

“Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may fairly be expected from a prudent and reasonable person.”

34 Cyc., 948 and notes.

The general rule, as the writer conceives it, is laid down by Pomeroy in his treatise on “*Equity Jurisprudence*,” paradigm 856 (note), as follows:

“If the party could by reasonable diligence have obtained knowledge of the facts, equity will not relieve; also when means of information are equally open to both parties, and no confidence is reposed, and there is no violation of a duty to disclose, equity will not relieve,” citing English ruling cases.

“Where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a Court of Equity will not interpose its relief.”

Pomeroy, p. 322.

In *Henderson vs. Stokes*, 42 N. J. Eq., 586, complainant sought to reform an agreement to convey lands. The agreement was executed in the form of a receipt for a deposit paid and contained a provision for the conveyance of certain two lots. Complainant expected to receive in addition, a portion of a third lot. He retained the receipt for a short time and then asked the defendant to include the extension. It was shown that the defendant had promised to do so but subsequently tendered the deed without the addition. The Court however denied relief, ruling that the defendant by paying the money and accepting the receipt ratified the agreement therein.

The rule is further expounded in the notes to the case of *Bostwick vs. Mutual Life Ins. Co. of New York*, 67 L. R. A., 705, in the following words:

“The principles of *caveat emptor* apply to the sale of an insurance policy with as much rigidity as in the case of a sale of merchandise; that the insured is under obligation to inspect it within a reasonable time after receipt, to ascertain whether or not it corresponds to his ‘order,’ to wit, his application; that, if a fraud or mistake in the preparation of the policy has occurred, rendering it different in terms from that ordered, and is discoverable upon a reasonable inspection, the insured must immediately rescind or draw the insurer’s attention to it; that retention after receipt is ‘evidence of assent, regardless of the fraud, or, if not such, of inexcusable negligence, waiving judicial remedies for fraud’; that the only circumstance which will excuse such retention is a misleading statement or representation on the part of the insurer

at the time of the delivery of the policy, reasonably justifying the insured for a failure to inspect it; that the ground of the rule is a public policy, 'not based upon any consideration for the party who has been guilty of the false representations, to whom no duty is owing, but upon the conviction that the interests of society are best served by the application of the rule, *Vigilantibus, et non dormientibus, succurant jura.*' "

Following the decision of the *Fletcher* case, *supra*, it has been held that failure of the insured to ascertain from the policy and application in his hands that the amount of incumbrances on the property was not truthfully disclosed renders him "constructively a participant in the original fraud of the agent," where the policy had been in his hands "some months" before loss.

"Upon receiving the policy with indorsements thereon, the plaintiff is legally chargeable with notice and knowledge of the entire terms of the insurance contract, and he is estopped from denying such knowledge. It was the plaintiff's duty to have taken steps at once, upon receiving the policy, to have the same corrected or rescinded."

65 L. R. A., 737.

The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes or as to the legal result of an act which he performs is no ground either for defensive or affirmative relief. If there were no elements of fraud, concealment, mis-representation, undue influence, failure of confidence re-

posed or of other unequitable conduct in the transaction, *the party who knew or had an opportunity to know* the contents of an agreement or other instrument cannot defeat its performance or obtain its cancellation or reformation because he mistook the legal meaning and effect of the whole or of any of its provisions.

Pomeroy's Equity, 4th Ed. (1918), p. 843.

In the case of *Travelers' Ins. Co. vs. Henderson*, 69 Fed., 762 (Circuit Court of Appeals, 8th Circuit, 1895), the assured applied for an accident policy, stating that he was likely to be intentionally injured by an enemy and that he desired a policy to cover such a risk. Upon inquiry the assured was informed by the agent that the policy issued contained the requested provision. The policy however contained a provision stating that it did not cover death resulting from intentional injuries inflicted by another person. The assured was assassinated and his beneficiary sought to reform the policy on the ground of mutual mistake in reducing the oral agreement between the assured and the insurer to writing. The agent testified, *inter alia*, that the policy which was issued was the policy which he intended to issue and that it was his belief that it covered the intended risk. The Court, in denying reformation, said in part:

"If Kepler (the assured) acted under a mistake, it is evident that it consisted in failing to comprehend the class of risks that were covered by the policy, but a mistake of that kind accompanied though it may have been by some misleading statements as to the risks covered by the policy, is surely not sufficient to warrant a reformation of the

policy, especially where no fraud was practised or intended to be practised upon the assured. It frequently happens that knowledge of material facts communicated to the agent of an insurance company by the assured, either prior or subsequent to the issuance of a policy, has the effect of waiving particular provisions found therein or of estopping the company from claiming the benefit of such provisions; *but where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions.* * * * In construing the provisions of a written agreement and in determining its legal effect, the parties hereto act at arm's length if the agreement is couched in plain language and no fraud or deceit is practiced. It is the duty of a person, when he becomes a party to a written contract, to examine its provisions, and determine for himself what obligations and what liabilities it imposes, and if need be, to seek legal advice on that subject. *This duty is equally imperative when a policy of insurance is taken out; and courts of equity cannot undertake to reform such an instrument merely because the legal effect of its provisions was misunderstood by the assured, nor even on the ground that an agent of the insurer erroneously represented, that the policy covered risks which the language of the instrument clearly shows that it did*

not cover, if the agent acted honestly, without artifice or any intent to defraud."

Application was made to the Supreme Court in this case for a writ of certiorari to review the decision of the Circuit Court of Appeals and the writ was denied. (163 U. S. p., 708.)

In *New York Life Insurance Co. vs. McMaster*, 87 Fed., 63, the deceased made an application to the agent of the insurance company for a policy of life insurance. He said that he wished it to cover a period of thirteen months. When the policy was actually issued, it covered a period of twelve months and seventeen days only. Prior to the commencement of the action the policy became void because the second annual premium had not been paid within that time. The Court held that since the assured took the policy and had an opportunity to read it and since there was no fraud on the part of the insurance company's agent, there could be no reformation.

An application for a writ of certiorari was made to the Supreme Court in the case last above cited and denied. (See 171 U. S., 687.)

In *Wilson vs. National Life Insurance Co.*, 65 N. Y. Supp., 550 (1900), (affirmed without opinion, 67 N. Y. Supp., 1150), a special agent for a life insurance company verbally represented to the plaintiff that the policy issued by the defendant, known as a "twenty year installment bond policy" contained an option to the insured that upon payment of the premium thereunder for ten consecutive years, he might have such policy converted into a paid up policy, payable upon his death. The policy did not contain any such provision. It was issued to the plaintiff, who received and held it for over ten years, before he discovered that the option clause was not contained

therein. A bill in equity was then filed to have the policy reformed on account of an alleged mutual mistake of facts.

At page 553 the Court said:

“The evidence convinces me that the instrument which it is sought to reform is in strict accordance with the provisions of the written applications made by the plaintiff therefor, and which formed the basis of the agreement to insure his life; that he knew the contents of the application; that the statements and representations therein contained formed the basis of the contract of insurance between him and the defendant. It was his duty to ascertain whether the papers referred to contained the terms of the alleged agreement between him and Robbins, and it was also his duty, by an inspection of the installment bond in question, before he accepted it and paid the first and subsequent installments thereon, to inform himself as to whether it did or did not contain the terms of the agreement upon which he claims he was induced to insure in the defendant's company.

Avery vs. Equitable Life Assur. Co. Soc., 23 N. E., 3 (Court of Appeals, N. Y., 1889) was an action to reform a tontine insurance policy brought after the tontine period had expired. Plaintiff alleged that the agent had declared the cash value of the policy would amount to \$7,170 at the end of the tontine period while, in fact, the sum was much less. In refusing reformation the Court said at page 4:

“When the assured accepted the policy he was chargeable with the knowledge of its

terms and provisions * * * the assured was bound to know that the liability of the company, on that plan of insurance was contingent upon several elements and indeterminate in advance.”

Another case which closely parallels the case at bar is that *Cary Mfg. Co. vs. Merchants Insurance Company*, 59 N. Y. Supp., 7, (1899) which was an action to reform policies of insurance on the ground of mutual mistake. The insured had an interview with the agent of the company during which he asked that a removal clause be inserted, by endorsement, in his policy without a time limit. The clause was inserted with a time limit of ten days. These endorsements were returned to and accepted by plaintiff's agent and then received by the plaintiff without objection. The Court held that this did not show a mutual mistake and would not entitle the plaintiff to relief, saying at page 9:

“The policies, with the indorsements as made upon them were returned to, and not only were they accepted by the plaintiff's brokers, but they seem to have come into the possession of the president of the plaintiff. The amount of the reduction of premium was paid or credited by the underwriters to the plaintiff's brokers, and the completed transaction, therefore, at least so far as the underwriters are concerned stood upon the acceptance by the plaintiff's authorized agents of the indorsement as a contract superseding the binder, and in the shape and form in which it was written upon the several policies.”

The trial court observed at the hearing that in-

sured persons upon procuring a policy frequently lay it away among their valuable papers and "forget" about it until need arises to have recourse thereto. Granting the general truth of this observation the fact remains that the circumstances of this case made such procedure dangerous. Caffaro and his agent, Contore, were aware of the fact that they were asking for a policy which would not be in the usual and standard form—else why did they, as they insist, tell Edgar or his office assistant that the insured building stood upon leased land and why do they so distinctly remember having done so? Conceding, for argument's sake, the truth of that insistence, it became their absolute duty to examine the policy to see whether or not the unusual clause was inserted, but they frankly acknowledge that they made neither investigation, examination nor inquiry. Thereafter, they instructed Edgar or his office assistant, as they insist, to endorse a change of ownership and the existence of a purchase money chattel mortgage. The policy was returned with the change of ownership endorsed but without any reference to the chattel mortgage and again no attempt was made to verify the correctness of the endorsements or the lack of requested endorsements. In this case, as distinguished from the facts in many of the cases herein cited and probably cited by the respondents, the agent made no statements at any time by way of assurance that the clauses in question would be inserted in or endorsed upon the policy nor that the policy as issued contained either or both of the clauses relative to ownership in fee and the chattel mortgage interest. It may be true in a broad sense that the court would figuratively blink its eye at a failure minutely to

examine a policy of insurance issued in the general or standard form but it would and should place upon an applicant the duty and the obligation to examine his policy for the purpose of ascertaining whether any unusual, extraordinary or special clauses were indorsed thereon as requested by him.

It is the common practice, and it is submitted that the Court can take judicial notice thereof, that special indorsements regarding change of ownership, mortgage interests, extra hazardous risk, change in use of premises and the like, are "endorsed" on the standard form of policy by pasting "riders" thereon, just as in this case a "rider" noting the change of ownership was endorsed on the policy. Surely it cannot be construed as oppressive or unreasonable or as requiring too great a degree of care to hold that the insured must simply unfold the policy for the purpose of observing whether or not requested riders have been annexed thereto or not.

Whatsoever excuse complainants may have been able to devise for their failure initially to examine the policy for an endorsement of the less than fee ownership they cannot satisfactorily excuse their subsequent failure to look at the policy when they asked for the annexation of the other endorsements. It might well be and, for obvious reasons probably would be, that the insurance would have been rejected by the company and its agent were the fact of non-ownership in fee actually made known by the complainants when applying for the insurance or upon their subsequent insistence in demanding the insertions which they desired. Their failure both times to observe that the alleged requested indorsements were not annexed to the policy ^{and} of their continuous retention thereof

and failure for a period of almost two years to apply either to the company or to the court for relief, must be construed by the court as a ratification and confirmation of the contract in its present form and as a waiver of any provisions not contained therein.

POINT FIVE

A policy of insurance, being a written instrument containing a provision that its terms cannot be changed, altered or amended except by a written notation endorsed thereon or added thereto, the Court cannot, under the testimony adduced, reform the contract nor apply the doctrine of estoppel in pais.

The strong arm of the Chancellor should be interposed only in cases involving the clearest measure of proof and then only to the end that complete justice might be done to all parties concerned. Reformation of a written contract is one of the most extraordinary remedies that a court can, under our jurisdiction afford, because it operates not only as a *pro tanto* nullification or setting aside of the parol evidence rule, but in addition accomplishes the effectuation of an agreement different in vital particulars to the instrument exhibited. It follows therefore that the power of the Equity Court should be exercised with the greatest caution.

Van Houten vs. Van Houten, 69 N. J. Eq., 358.

The court below observes (p. 93) that, "while the precise question has not been settled by the

courts of this State yet I think there is authority clearly indicating how it should be determined," and then cites *Franklin Fire Ins. Co. vs. Martin*, 40 N. J. L., 568; *Sloss-Sheffield Steel & Iron Co. vs. Aetna Life Ins. Co.*, 74 N. J. Eq., 635; *Seymour vs. German American Ins. Co.*, 83 N. J. Eq., 37; *Koch vs. Commonwealth Ins. Co.*, 87 N. J. Eq., 90; *Martin vs. Jersey City Ins. Co.*, 44 N. J. L., 273; and *Lloyd vs. Hulick*, 69 N. J. Eq., 784; none of which cases are applicable to the case at bar as indicated under points two, three and four where they are analyzed. The learned Vice Chancellor doubts the relevancy of several authorities decided in the law courts of this State (pp. 95-96) yet nevertheless, cites *Lloyd vs. Hulick*, *Franklin Fire Ins. Co. vs. Martin* and *Martin vs. Jersey City Ins. Co.* all actions at law in suport of his dictum.

The learned Vice Chancellor refers (p. 96), to *Bostwick vs. Mutual Life Ins. Co.*, *supra*, and *New York Life Ins. Co. vs. Fletcher*, *supra*, and remarks that "it is impossible to reconcile the cases from other jurisdiction." The writer experienced the same difficulty but found however, that the preponderance of the cases cited in the note to the *Bostwick* case is against the lower Court's decision. On the other hand, it must be held that, because of the absence of positive authority in this State, and in the face of existing conflicting authorities in other States, complainants' application for relief should be denied. Absence or insufficiency of law or precedent is construed against the party invoking the Court's aid.

The lower Court cites also *Glens Falls Ins. Co. vs. Michael*, Ind. Supreme Court, 74 N. E., 964, 8 L. R. A. (N. S.), 708, but the attention of this Court is respectfully directed to the able dissenting opinion (8 L. R. A. [N. S.], 717).

It is true as the Court states in *Great Southern Fire Ins. Co. vs. Burns*, L. R. A., 1916, B. 1252, 1255, that:

“The decisions of the Courts of last resort of the various States are in irreconcilable conflict upon this question.”

Relief in the case of *Great Southern Fire Ins. Co. vs. Burns*, *supra*, was granted and reformation allowed because the objectionable clause was printed somewhere on the back of the policy where it was not readily visible to one who did not know of its existence. The Court proceeded on the theory that it would be requiring undue care and prudence to necessitate an assured's examining not only the context of the policy but even the backing.

It is respectfully submitted that the lower Court here erred in holding (p. 100), that,

“the insured in a fire case may safely assume that a policy issued is in accord so far as the description of the property and the insured interest therein are concerned, with the oral request. That he may safely assume that the policy is not, to the knowledge of the insurer, void, *ab initio*.”

POINT SIX

A policy of insurance inceptionally void is not validated by an assignment thereof with the insurer's consent.

It is an elementary proposition that an assignee acquires no greater rights or interests in the subject of the assignment than those possessed by

his assignor. When the policy was originally issued it was void as against the company by the terms thereof because the interest of the insured was not correctly stated. By his acceptance and retention thereof Caffaro, the original assured, ratified and confirmed the policy as issued. When therefore, he assigned the policy to the other complainant, Giammares, the latter took it with constructive notice of the provisions of the policy and actual notice of his own lack of fee ownership of the insured property. It follows, therefore, that Giammares cannot prevail, first, because he is the assignee of a contract void *ab initio* and second, because, having accepted and retained the policy in its present form until a year and a half after a loss and the defendant company's denial of liability therefor, he is presumed in law to have ratified and confirmed it as issued. The consent of the company to the assignment or, what is tantamount thereto, the substitution of another for the insured party, cannot be construed as the making of a new contract with the assignee establishing liability which did not theretofore exist or a greater liability than theretofore existed. There is ample authority for the rule in such cases that the company is free to interpose the same defenses against the assignee as existed against the assignor despite the consent to the assignment, since the former must be considered as standing in the place and stead of the latter.

Reed vs. Windsor Co. Mut. Fire Ins.
Co., 54 Vt., 412 (1881).

McCluskey vs. Providence Washington
Ins. Co., 126 Mass., 306.

Eastman vs. Carrol Co. Mut. Life Ins.
Co., 45 Me., 307 (1858).

Froehly vs. North St. Louis Mut. Fire
Ins. Co., 32 Mo. App., 302.

Citizens' Fire Ins. Co. vs. Doll, 35 Md.,
89 (1871).

Ellis vs. State Ins. Co., 27 N. W., 762
(1886).

Bergson vs. Builders' Ins. Co., 38 Cal.,
545.

Ins. Co. vs. Garland, 108 Ill., 220
(1883).

In *Citizens' Fire Ins. Co. vs. Doll, supra*, the
Court said in part:

“In this case, the risk contemplated by the policy never attached, because of the violation of the conditions, which were fundamental to the contract. The policy was void in its very inception. The parties making the assignment had no interest at the time in the subject of the policy, and having no interest themselves, they could assign none. The policy being void in their hands, it was equally so in the hands of the assignee, who is one of the parties to whom the policy issued, and by whose misrepresentation it was rendered void from the beginning. The mere assent of the assurers to the assignment gave no force and vitality to the policy that was before utterly void in the hands of the assignors. The policy was not assignable without such assent, and the object of obtaining it was simply to authorize the transfer for what the policy was worth. By such assent the assurers only agreed to substitute the assignee in the place of the assignors; but the causes that operated to render the policy

void in its inception still adhered to it, and affected it in the hands of the assignee. He could occupy no better position than the assignors, in reference to the policy, unless it be by special contract with the assurers."

POINT SEVEN

The agent had no actual or apparent authority to alter or waive any provision of the policy as issued unless such waiver or alteration were indorsed in writing upon the policy itself; and the insured, having constructive notice of the provisions of the policy in that respect, is bound thereby.

The policy contained a provision to the following effect:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have the power to waive any provision or condition of this policy except *such* as by the terms of this policy may be subject to agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It should be borne in mind in considering this case, that the complainants had possession of the policy continuously from the time of its issuance and were charged therefore, with notice of the foregoing provision. Conditions of this kind have been repeatedly sustained in our Courts as a valid limitation upon the authority of the agent.

See:

Cator vs. American Life Ins. & Trust Co., 33 N. J. L., 487 (Ct. of Errors and Appeals).

Redstrake vs. Cumberland Ins. Co., 44 N. J. L., 294.

Cannon vs. Farmers' Mutual Fire Assn., 58 N. J. Eq., 102.

It was held in the *Cator* case, *supra*, that where the policy contains a stipulation that the agent has no power to waive, modify or strike from the policy any of its printed conditions, the holder of the policy is estopped by accepting it from setting up or relying upon powers in the agent in opposition to limitations and restrictions contained therein.

“Where the company has prescribed that the terms and conditions of the policy shall be waived only by written or printed consent, it is a reasonable rule to guard against uncertainties of oral testimony and, by his assent thereto, the insured is bound.”

1 L. R. A., 219.

In *Belleville Ins. Co. vs. Van Winckle*, 1 Beas., 346, it was held that where the applicant for insurance or assignee has notice in the policy itself of an express limitation of the powers of the officers of a company either by its charter, by-laws,

or the policy itself, the general rule is that no waiver against the company in reference to the acts forbidden can arise from the acts of these agents themselves, whose powers are thus limited in attempting to waive the express provisions of the charter, by-laws or policy.

The sole cause of the difficulty in which complainants find themselves arises from the fact that, having possession for more than a reasonable length of time, of a policy which clearly stated the risks which it insured, the kind of property and the insured's interest therein and which also clearly stated that it embodied all agreements then existing between the assured and the company and which limited the right of any agent to waive or modify any of its provisions by parol, without endorsement thereon chose to "trust in Allah" instead of informing themselves of the situation.

The provision in the policy restricting the right of the agents to vary the contract by parol is an important one. Without it an insurance company could never determine the measure or extent of its liability, or exercise with any judgment its right of cancellation of insurance policies issued by its agent. The clause has indeed become a part of the standard form of policy adopted for use in this State and its presence in all policies is generally known. Under the guise of praying for reformation, the complainants seek to escape the operation of this provision of the contract.

POINT EIGHT

A written instrument cannot be reformed, except in cases of gross fraud, unless it appear that both parties agreed to something different from what is expressed in the writing and the proof upon this point must be clear and convincing.

It was held by Lord Thurlow in an early case (*Lady Shelbourne vs. Inchiquin*, 1 Bro. C. C., 338) that the testimony in such cases must not only be

“so clear and convincing as to leave no room for doubt, but must be proved as much to the satisfaction of the Court as if admitted, and must be practically irrefragable.”

“A fundamental rule in respect to this doctrine (of reformation) is that the evidence to show that a mistake had been made must be unquestionable.”

1 Story Eq., 2nd Ed., 157.

The eminent Judge Rapallo, writing for the affirmance of a judgment refusing to reform an insurance contract thus succinctly stated the rule in *Meade vs. Westchester Fire Ins., Co.*, 64 N. Y., 453, 455:

“The power of the Courts of Equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the Court in changing the language of the instrument sought to be reformed, except in case of fraud, it must be established that both parties agreea

to something different from what is expressed in the writing, *and the proof upon this point should be so clear and convincing as to leave no room for doubt.* Losing sight of these cardinal principles in the administration of this peculiar remedy would lead to the assumption of a power which no Court possesses—that of making an agreement between parties to which they have not both assented.”

“The familiar rule is that the proof of the mistake and of the actual meeting of the minds must be *clear and convincing.*”

Hupsch vs. Resch, 45 N. J. Eq., 657.

“The evidence which will warrant this Court in reforming an instrument in writing, in the correction of an alleged mistake, must establish the existence of the mistake *beyond reasonable doubt.*” *Idem.*

Practically every case decided in this State on the subject of reformation including all those cited in the opinion of the Court below and under preceding points of this brief are substantially to the same effect.

It has already been pointed out under Point One that not only is the testimony on the part of complainants far from clear, convincing and irrefragable but there are such discrepancies among their respective witnesses and the contradiction by the defendants' witnesses is so complete that a profound doubt must exist in the mind of the Court as to the propriety of granting the extraordinary relief. It must in addition be borne in mind that the complainants are both supposedly illiterate while all of the witnesses for the defendants are literate and essentially intelligent; and the liter-

ate person can be conceded as having generally greater regard and profounder scruples for truth and the sancity of an oath than an illiterate person. Besides, with the exception of Cantore, complainants are their own only witnesses and of course, deeply interested in the action while none of defendants' witnesses are in any wise interested therein—not even Edgar though he is made a party defendant, for the reason that complainants are seeking their remedies against the company and have joined Edgar as a matter of form solely.

Again, the Court may here justifiably weigh the preceptible probabilities springing from the complainants' testimony. Is it possible that neither Watson nor Burton, two reputable attorneys, whom appellees consulted at different times, would advise the institution of an equity suit for reformation if they had been told the same story that appellees told on the stand? Is it credible that both would, upon hearing such story advise that they "could not do anything" about the matter (p. 48)? Or is it not altogether probable that complainants' third version, the one inflicted upon the lower Court, is a fabrication of the whole cloth designed to bridge the abysmal gaps in the true state of facts as doubtlessly related to those other attorneys whose lips must obviously, be sealed on the subject?

It is respectfully submitted that for the reasons set forth herein, the decree of the lower Court should be set aside.

POINT NINE

The decree of the Chancellor is drastic, contrary to law, oppressive and confiscatory.

Because of the complainants' unreasonable delay and negligence, the defendant company has been deprived of every opportunity properly to meet the allegations in the action at law as to extent of damage, cause of destruction, pre-fire market value ~~to~~ the destroyed property, the amount of salvage, if any, etc. Under the circumstances of this case the defendant company had a right to assume that its denial of liability had, in view of the fact that no objection was made thereto by complainants either informally or by the institution of proceedings, been accepted, and thus after the great lapse of time it was deprived of all chance correctly to assess the loss. No fair valuation or approximation of the loss could possibly be made at a period of one year after the fire where the destroyed property consisted of personalty not obtainable on the open market and having no market price as such.

In addition, as already pointed out, under Point Three, the defendant company has lost the benefit of Edgar's fresh memory on the subject, the letters of the attorney Burton and of the provision of the policy giving the company the right to cancel it on five days' notice (Exhibit C-1, p. 74, l. 23).

In view of the fact that the proposed reformation, if allowed to stand, will operate in the nature of a mandatory injunction requiring the defendant company to pay the complainants' law action claim—since it will have been deprived of all defense thereto and even of an opportunity

to ascertain the extent thereof—the decree of the lower Court should be reversed. As the Court in *Westinghouse, etc., Co. vs. Remington Salt Co.*, 186 App. Div., 128; Affd., 189 N. Y., 515, unanimously, in *per curiam* opinion, observed,

“the proposed reformation would simply transfer this misfortune from the complainants to the defendants. Since the misfortune arose from the laches, neglect and inequitable conduct of the complainants, the law should leave the loss where it finds it.”

Respectfully submitted,

I. BENJ. GLUECKFIELD,
Solicitor for and of Counsel with
Defendants-Appellants.

New Jersey Court of Errors and Appeals.

Between :

JOSEPH GIAMMARES and TONY CAFFARO,
FARO,

Complainants-Respondents,

and

ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PA., a body corporate, and JAMES A. EDGAR,

Defendants-Appellants.

On Appeal
from a Decree of the
Chancellor.

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BRIEF FOR COMPLAINANTS-RESPONDENTS.

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The material facts for the complainants in this case ~~was~~^{were} clearly established by the preponderance of testimony and the decree of the Court of Chancery was therefore warranted.

The Facts.

The complainant, Caffaro, in 1916, leased a plot of ground on the corner of Jersey Avenue and Sanford Street in the City of New Brunswick, on which he erected a small building and installed therein a stock of confectionery, tobacco, provisions, etc.

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Subsequently, in the month of January, 1917, Caffaro went to one Nicholas Cantore (referred to as Cantre in the record), an insurance broker, to secure a fire insurance policy to cover said building and the contents (p. 39, l. 12; p. 40, l. 9). Cantore thereupon went to one James A.

40

Edgar, the general insurance agent of the defendant company, The Allemannia Fire Insurance Company of Pittsburg, Pa., and informed Edgar that Caffaro desired said building and contents insured against loss by fire, particularly stating to Edgar at the time that said building was erected on leased ground, for the purpose of having that fact noted on the policy (p. 27, l. 30; p. 10 28, l. 14). Edgar immediately thereafter issued said policy and mailed the same to Cantore and Cantore immediately delivered the policy to Caffaro (p. 28, ll. 12-29).

It is admitted that Edgar did not note on said policy the fact that the building and the contents thereof insured by said policy stood on leased ground. Edgar's testimony as to whether or not he was informed at the time the policy was issued that the building insured stood on 20 leased ground does not in any manner contradict the testimony given by Cantore in that respect. Note the following (p. 55, ll. 26-28):

"Q. Do you recall the circumstances concerning the issuance of the policy in question here? A. No."

On p. 55, ll. 28-29:

"Q. Did Mr. Cantre secure this policy through you personally? A. No."

Note the many contradictions in his testimony 30 (p. 56, l. 1; p. 57, l. 29). Note the following question and answer appearing on p. 56, l. 42, and p. 57, l. 4:

"BY THE COURT:

"Q. You mean to say that you are positive that you had no conversation with the witnesses who have testified here or that you don't recollect any such conversation? A. I don't recollect."

It is very apparent therefore that the insurance 40 company through Edgar, as its agent, knew at the time of the issuance of said policy that said

buildings stood on leased ground, and that the insured wanted the policy so issued, and that he, Edgar, deliberately issued said policy, omitting the provision with respect to leased ground. Such conduct was clearly a fraud on complainants, entitling them to relief in a court of equity.

Subsequently, on February 19, 1917, Caffaro sold said building and contents to the complainant Giammares, for \$1,750.00 (Exhibit C-2, p. 77) and a chattel mortgage for \$1,500.00 to secure part of the purchase price was accepted by Caffaro (Exhibit C-3, pp. 80-84). It is to be noted that the bill of sale contains a recital of said chattel mortgage and a further recital that the said building stood on leased ground (p. 78 l. 35, etc.).

Caffaro immediately took said policy and *bill of sale* to Cantore and requested the latter to have Giammares' name, as the new owner, endorsed thereon and to have a chattel mortgage clause annexed thereto in favor of Caffaro, as chattel mortgagee (p. 28, l. 34; p. 29, l. 25). Cantore immediately thereafter took the policy and bill of sale to Edgar's office, left both paper writings with Miss Powers, the clerk in Edgar's office, and then and there instructed Miss Powers to have both said endorsements noted on said policy (p. 29, l. 26; p. 30, l. 11).

It was established by the evidence in this case, that Miss Powers, as such clerk, issues approximately one hundred (100) policies each month for her employer, and that she was authorized by her employer to place endorsements on insurance policies and was further authorized by her employer to sign his name thereto (p. 59, l. 30, etc.).

Miss Powers testifies (p. 63, l. 20, etc.) that she was told when she first became employed in Edgar's office not to put chattel mortgage interests on policies, but it nowhere appears in the testimony that she so informed Cantore, Caffaro or Giammares.

10 She accepted the order given to her, by Cantore, for we find endorsed on said policy the said change of ownership, but she did not annex an endorsement in reference to said chattel mortgage. Cantore positively testifies that two or three days after he left the policy and bill of sale at Edgar's office, he received both by mail, and that there was no letter from Edgar, with said enclosures (p. 30, l. 21, etc.).

Note the effort on the part of Miss Powers to show that said policy was delivered to Edgar's office, by Mr. Burton, Caffaro's attorney, at the time the change of ownership was endorsed thereon, and not by Cantore. Note the following question and answer on p. 63, l. 1, etc.:

20 "Q. Who told you about it; who directed you, or requested you? A. I rather *imagine* Mr. George L. Burton did.

"BY THE COURT:

"Q. How did he do it? A. He was interested. I believe he had the paper to draw up."

On p. 66, l. 29, etc.:

"Q. How do you know it was Mr. Burton who sent it? A. Because I returned it to Mr. Burton's office."

30 An inspection of Miss Powers' testimony (p. 61, l. 20; p. 64, l. 32) discloses the fact that the testimony of Cantore as to what took place on his second visit to Edgar's office should be accepted for its accuracy and truthfulness. Miss Powers' testimony may also be discredited by the following: Miss Powers admits that she would note the change of ownership on a policy and issue it, even though she knew of a chattel mortgage, but says she would call the attention of the party in interest to the fact that the company would cancel the policy if a chattel mortgage clause was annexed (p. 64, l. 10, etc., l. 20).
40 In other words, she would leave a chattel mort-

gage clause off, deliberately, although she had been instructed to annex the same, thereby committing, as the representative of the insurance company, a gross fraud on the insured.

Note p. 63, l. 28, etc.:

“BY THE COURT:

“Q. Tell them what they could do? A. Would have to get insurance elsewhere, unless they wanted to take a chance on it, which, of course, they wouldn't do.” 10

It is apparent therefore, that if Miss Powers, acting for Mr. Edgar, as the representative of the defendant insurance company, had told Cantore that the chattel mortgage would cause the policy to be cancelled, he could have sought insurance elsewhere and would have done so, because the chattel mortgage was then an existing fact. He was led to believe, however, that he had secured a valid policy after he had done everything he could do to notify said company of every existing condition; and with notice of every existing condition, and notice also that the insured desired these conditions noted, said company issued said policy. 20

Mr. Burton, who acted as the attorney for Caffaro in the preparation of said bill of sale and chattel mortgage, does not in any way contradict Cantore. His testimony, as shown on p. 50, l. 17; p. 54, l. 25, is uncertain on the whole subject, as he most frankly and properly confesses. 30

P. 51, l. 4, etc.:

“I remember distinctly the drawing of this bill of sale, and I remember distinctly the drawing of this chattel mortgage. I have a recollection which is very, very, faint as to anything else that took place. I can testify and tell what that recollection is. There is a possibility I may be mistaken, that I am wrong. It is nearly two years since this took place, and I didn't pay any attention to it.” 40

Such testimony is of no probative force, as against the positive testimony of Cantore, as to what took place.

On the undisputed facts of this case, therefore, we respectfully insist, that the learned Vice Chancellor was right in holding that, to permit the defendant insurance company to take advantage of this course of conduct, to invalidate this policy would be to sustain the unheard-of proposition in a court of equity, that a party may take advantage of its own wrong.

It was uncontradicted that Caffaro does not read English (p. 46, l. 34) and Giammares never had the policy in his possession.

We think it is proper to state that the admission with reference to Giammares' testimony at the foot of p. 49, was because he does not speak English, and it was considered unnecessary to have him testify through an interpreter to prove his mere right to be a party to the suit which had already been proven by other witnesses.

The bill of complaint was filed for the reformation of the policy after the fire which occurred March 25, 1917 (p. 8, l. 10, etc; p. 10, l. 10, etc.). The amendment to the bill of complaint, p. 20, etc., is hereinafter referred to.

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POINT I.

The filing of a bill in equity for the reformation of an insurance policy or for an injunction restraining the insurance company from setting up inequitable defenses arising by reason of its conduct creating an estoppel *in pais* is a mere auxiliary and in aid of the action at law, and it is not necessary that such an action in equity be commenced within twelve calendar months next after the fire, if the action at law was commenced within time. 10

Doubtless one reason for this rule is that no one need assume that an insurance company intends to set up an unjust and technical defense to an action on its contract and it may, therefore, be necessary to see the answer in the action at law, before the plaintiff can tell whether he requires a suit in equity for reformation and injunction. 20

The bill of complaint (p. 9, l. 11, etc.) sets up the commencement of the action at law and the fact of the defendant's answer to the effect that the insurance company was not liable on the policy, because the building stood on leased land and also because the chattel mortgage interest of Caffaro was not noted. This paragraph, designated as paragraph 12 of the bill of complaint, is admitted in the answer (p. 16, l. 29, etc.). 30

In the case of *Abraham v. North German Fire Insurance Co.*, tried in the United States Circuit Court, Northern District of Iowa, and reported in 3 L. R. A., 188, the action being to reform a policy of fire insurance, the following appears in an opinion delivered by Justice Shiras: 40

“The object and purpose of the present bill

is to procure in proper form the evidence upon which the complainant relies to support his action at law. In this respect the proceeding is akin to obtaining evidence by a bill of discovery.

10 "To support the action at law, the plaintiff therein is compelled to invoke the aid of the court of equity in order to obtain the necessary evidence. A bill of discovery, in aid of an action at law, is sustainable on behalf of either plaintiff or defendant therein, and is deemed to be a dependent or auxiliary suit.

20 "The present bill is based on the allegations that a suit at law is pending; that the complainant needs a court of equity to perfect his evidence; and it is clear that if, upon the hearing upon the bill, it should be decreed that the policy should be reformed, such reformed policy would be adduced in evidence in the law action. The relief sought by the bill is of no value, except to supply complainant with evidence in proper form to be used on the trial of the law action.

"It is also urged that the complainant need not have commenced the action at law, but that he could have brought a bill for the reformation of the contract in the first instance, and in the same proceeding have asked a decree for the damages sought.

30 "Such a course was doubtless open to the party, but he was not compelled to adopt it at his peril. He had a right to sue at law in the first instance, and then to bring his bill to perfect his evidence. The latter does not abate the former. The bill, as filed, does not seek relief beyond the reformation of the policy of insurance. If that is secured the action at law remains to be heard."

In the case of *Rosenbaum Bros. v. The Council Bluffs Insurance Co.*, tried in the United States Circuit Court for the Northern District of Iowa, and reported in 3 L. R. A., 189, the opinion, delivered by Justice Shiras, reads:

40 "A bill for the reformation of a policy of fire insurance was filed in the United States

Circuit Court, for the Northern District of Iowa, to which a demurrer was filed.

"The second ground of demurrer is that by the provisions of the policy no suit or action thereon can be maintained, unless brought within six months from the happening of the loss, and that the lapse of time is therefore a bar to the proceeding.

"The filing of the bill for the purpose of perfecting the evidence to be used on the trial of the law action is not the bringing of a suit upon the policy *within the* true meaning and intent of the clause in question. 10

"The lapse of time can no more be relied on to bar this proceeding than it can be relied on to prevent taking testimony, by commission, in aid of the law action. * * *

"The lapse of time cannot be relied upon to bar a suit in equity to reform a policy of insurance which is auxiliary to an action already commenced at law upon the policy, if the latter was brought within the time limited. 20

"The demurrer is, therefore, overruled." 20

It will be observed that in the last-mentioned case the action at law was continued by the law court for the purpose of enabling complainants to file a bill in equity to procure a reformation of the contract. The Court must have had knowledge of the limitation in the policy. It is proper to state, at this time, that no question was raised in this case as to whether or not the complainants had been negligent in not reading the contract. 30

"To render a limitation in an insurance policy applicable, the action in which it is asserted must have been one on the policy proper to recover for a loss and not an action on a mere collateral matter growing out of the policy (*Davis v. Stewart*, 26 Ohio State, 643)"

"Nor does a condition endorsed on an insurance policy that 'any proceedings to be taken against the company thereon with respect to any loss sustained by the assured 40

shall be instituted within six months after such loss shall happen' apply to a case where the company refused to complete the policy and a bill was filed to compel them to execute it or pay the amount of the loss sustained by reason of the destruction by fire of the insured property (*Penley v. Beacon Assurance Co.*, 7 Grant Ch. (U. C.) 130.)

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"And a limitation in an insurance policy against bringing suit thereon unless commenced within six months from the happening of the loss does not apply where an action at law was brought within the time limited to a bill brought in aid thereof for the purpose of reforming the policy, as such a bill is not a suit upon the policy within the meaning of the limitation (*Rosenbaum v. Council Bluffs Insurance Co.*, 37 Fed. Rep., 724; 3 L. R. A., 189)."

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The above notes appear in *Harrison v. Hartford Fire Insurance Company*, 47 L. R. A., 711.

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In the case of *Kelsey v. Agricultural Insurance Company*, 78 N. J. Eq., 378, a bill was filed in the Court of Chancery to reform an insurance policy. The fire took place in the month of December, 1908. An action was commenced for the recovery of the loss, and said action continued in order that Kelsey, the complainant, could file said bill. No contention was made that the bill should have been filed within twelve calendar months next after the fire and it is apparent the Court decided that the suit for reformation is merely auxiliary to and in aid of the action at law.

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Vice Chancellor Garrison said (p. 384):

"It is contended that because Kelsey brought a suit at law upon the policy that he is now estopped to apply in equity to have the policy reformed. It is claimed by the defendant that there was an election of remedies and that by electing to proceed at law he has waived his right to proceed in equity. I do not think that this is so, or

that any doctrine of election applies to this case.

“It is true that Kelsey mistakenly supposed that the law court would hold that he was a party to the contract because his name appeared on the bottom thereof, and not in its proper place; and that the law court would find from the writing that his name was intended to be at such place in the contract as would make him a party to it, but this was entirely consistent with the position that he takes in this court and the fact that he began his suit at law upon the unreformed contract, and subsequently had to come to this court *to prevent what would be an injustice* if this case is proven, does not invoke the doctrine of election of remedies, as I understand that doctrine. 10

“As I have before pointed out, this action is not one to recover upon the policy; its sole purpose, besides incidental injunctive relief, is to have the policy written as the complainant says it was intended to have been written and to rectify a mutual mistake.” 20

POINT II.

The failure of the complainants to read the policy is not, as a matter of law, such negligence as precluded them from having a decree in their favor under the facts established by the testimony.

The learned Vice Chancellor on this part of the case properly took the view that the rule in this state is to be gathered from the case of *Lloyd v. Hulick*, 69 N. J. Eq., 784-786, in which the Chief Justice wrote the opinion of this Court. 30

We cite the following additional authorities:

“The negligence of the plaintiff in not discovering the change, and laches in not sooner seeking relief, are questions which make the propriety of granting relief, in a given case, discretionary. The Court below upon the 40

findings of fact, we think properly exercised its discretion in this case in granting relief. Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when for the first time he was informed of the peculiar terms of this provision (*Hay v. Star Fire Insurance Co.*, 77 N. Y. Rep., 239)."

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"The rule that the carelessness or negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, however, does not apply in an action for relief on the ground that the contract was obtained by fraud, or entered into by mutual mistake."

Story v. Gammell, 68 Neb., 709; 94 N. W., 982;

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Colorado Investment Loan Co. v. Beuchat, Colo., 111 Pac., 61.

"And the mere fact that a party to a contract was negligent in not making an examination of it to see if there were omissions, will not prevent relief in equity; whether or not the Court will or will not correct a mistake must depend upon the circumstances of each case (*Boulden v. Wook*, 96 Md., 332; 53 Atl., 911; *Shautz v. Keener*, 87 Ind., 258)."

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"And a contract may be reformed for mutual mistake, though a party neglected to read it (*Smelser v. Pugh*, 29 Ind. App., 614; 64 N. E., 943)."

"An insurance company issuing a renewal policy, and promising that the renewal policy should be on the same terms with the old one, however, is not in a position to charge the insured with neglect in not discovering that it was not the same (*Palmer v. Hartford Fire Insurance Company*, 54 Conn., 488; 9 Atl., 248)."

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"And where an insurance policy expired, and the assured applied for a renewal in the same terms, and a policy was given him, sup-

posed by him to be a renewal on the same terms, and he omitted to examine the policy until after the loss of property by fire, several months later, when, on reading it, he discovered an improper variance from the former policy, materially affecting his right of recovery, the existence of which would have prevented him from accepting the policy had he known it, he will not be regarded as guilty of laches in not examining the policy and applying earlier for its correction, since he had a right to believe it to be in all essential respects like the former policy (*Palmer v. Hartford Fire Insurance Company, supra*).”

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“Nor does the mere failure of an insured person to read the application or the copy of it on the policy, or to read the policy constitute such negligence as will deprive him of the right to a reformation of the policy to correct a mistake of the agent (*Fitchner v. Fidelity Mutual Fire Association, 103 Iowa, 276; 72 N. W., 530*).”

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“And where a policy of insurance was issued in renewal of an old policy, materially changing its terms, and this policy was renewed from time to time and the insured person did not discover the change until after a loss, the only effect of the negligence of the insured in not discovering the change, and in not sooner seeking relief, is to make the granting of relief discretionary with the Court (*Hay v. Star Fire Insurance Company, 77 N. Y., 235; 33 Am. Rep., 607*).”

The above appears in notes in re *Dolvin v. American Harrow Co.*, 28 L. R. A. (N. S.), 883-885-891). 30

“The issuance without written application to a life tenant of a fire insurance policy without inquiry as to the state of the title, no representations being made by assured upon that question, and the assured paying the premium and accepting the policy without notice of a provision in the policy that it shall be void if the interest of the assured is other than unconditional and sole ownership waives such provision (*Glens Falls Ins.*

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Co., Appellant, v. George W. Michael and wife, Ind. Supreme Court, 74 N. E., 964; 8 L. R. A. (N. S.), 708)."

In that case Justice Montgomery said, page 712:

10 "If an insurance company elects to issue its policy without an application or any representation in regard to the title to the property upon which the insurance is effected, the company cannot complain after the loss has ensued that the interest of the insured was not correctly stated in the policy or that an existing encumbrance was not disclosed."

20 The same Court, referring to the case of *Manhattan Fire Insurance Co. v. Weill*, 28 Gratt. (Va.), 389; 26 Am. Rep., 364, held that, although it was provided in the policy that in case of any omission to make known every fact material to the risk * * * or if the interest of the assured in the property * * * be not truly stated in the policy it should be void, yet an omission to disclose, in the absence of any inquiry, an encumbrance in the form of a deed of trust subsisting on the property at the time the insurance was affected, did not vitiate the policy.

30 "The making of contracts is generally preceded by some negotiations culminating in a meeting of the minds upon terms mutually agreeable and understood, which are then reduced to writing, and the agreement formally executed. Insurance policies are prepared in advance by insurance and legal experts, having in view, primarily, the safeguarding of the interest of the insurer against every possible contingency. The insurer not only fully knows the contents of the writing but also adequately comprehends its legal effect. The insured has no voice in fixing or framing the terms of his policy, but must accept it as prepared and tendered, usually without knowledge of its contents, and often without ability to comprehend the

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legal significance of its provisions. The meeting of the minds ordinarily deemed essential to a valid contract, as to many of its terms and conditions, is wanting in fact, and a mere fiction of law."

But in this case every fact was actually disclosed to the defendant insurance company, the insured omitting nothing that he could have done.
~~done.~~

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"An insurer issuing a standard policy upon parol application in which no reference is made to encumbrances upon the property waives a provision printed on the back of the policy making it void if the property is encumbered by a chattel mortgage."

Great Southern Fire Insurance Co., Applt. vs. J. L. Burns, et als, Ark., 175 S. W. 1161 [1916 B (L. R. A. N. S.) 1252].

In that case Justice Harte said:

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"It is admitted that Doctor Burns knew there was a chattel mortgage on the rice at the time he applied for the insurance, and that he did not make any disclosures concerning it because he was not asked about it and did not know that it was material to the risk. He never read the policies after they were issued and *neither he nor his partners knew that the policies contained the clause above quoted until after the loss had occurred.*

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"The defendant requested the Court to instruct the jury to return a verdict in its favor. This the Court declined to do, and over the objections of the defendant instructed the jury to return a verdict in favor of the plaintiffs from the judgment rendered, the defendant has duly prosecuted an appeal to this Court."

In the case of *Phoenix Insurance Co. vs. Public Parks Amusement Co.*, 63 Ark. 187 (37 S. W. 959), the Court held that a condition against encumbrances is waived by the acts of the agents

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of the insurer who having authority to waive conditions and knowing that the property was encumbered attached to the policy permits for additional concurrent insurance upon which additional policies were issued.

10 The Court in the case of the *Southern Fire Ins. Co. vs. Burns*, hereinbefore referred to did not consider the fact that the plaintiffs failed to read the policy an act of negligence sufficient to bar a recovery, although in said case the insurance company was not informed through its agent of the existing encumbrance.

20 In the case at hand, the facts established, and the Court so found, that Edgar, the agent of the defendant company, was informed that the buildings and contents on which insurance was desired stood on leased ground and that a chattel mortgage, a lien thereon, was held by one of said complainants.

POINT III.

30 **The insurance company, by issuing the policy, after the notice to Edgar, its agent, of the fact that the property stood on leased ground and again of the fact that a chattel mortgage had been given by Giammares, the new owner, to Caffaro, and, with said knowledge, having noted a change of ownership on the policy, waived the provisions of the policy and is estopped to set up that the policy is not valid. To hold otherwise would be to permit the company to ^{perpetrate} gross fraud, which a court will not tolerate or permit.**

40 In the case of *John Leisen, Respt. vs. St. Paul Fire & Marine Insurance Co., Applt., N. D., 127 N. W. 837, [30 L. R. A. (N. S.) 547]* Justice Fisk says:

“The agent of a fire insurance company may by issuing a policy with knowledge of the facts waive a condition that the policy shall be void if the property insured be encumbered and a note of the encumbrance be not endorsed upon the policy notwithstanding a provision in the policy that no agent of the company shall have power to waive any such condition except by written endorsement. (*Skinner vs. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776 (59 N. E. 309.) That the rule of the New York cases is supported by the overwhelming weight of authority must be conceded. (Citing numerous cases supporting above rule 30 L. R. A. N. S. 547 etc.)”

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“If an insurance company insures vacant premises knowing or not caring that they are vacant, but provides in the policy that the insurance shall be void if the premises become vacant, etc., it must be presumed that this provision was waived and the Company is estopped from taking advantage of it.”

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Short vs. Home Insurance Co., 90 N. Y. 797.

“Knowledge by the company of the existence of a subsequent insurance, followed by any words or acts on the part of the company by which the insured is induced or permitted to believe that the contract of insurance is still subsisting and the property of the insured is still protected is a waiver of the condition or an estoppel against an assertion that a forfeiture of the policy has occurred because of a failure of the insured to comply with the condition to give notice of such subsequent insurance and have it endorsed upon the policy or acknowledged in writing.”

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Martin vs. Jersey City Insurance Co. 44 N. J. L. 274.

“An insurance company may waive any condition of a policy inserted therein for its own benefit. Forfeitures are not favored in

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the law, and courts are always prompt to seize hold of any circumstances to indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted.

10 "It is always open on behalf of the insured to show a waiver of the conditions or a course of conduct on the part of the insurer from which might be justly and reasonably inferred that a forfeiture would not be exacted."

Graham, et als, vs. The Security Mutual Life Insurance Company, 72 N. J. L. 298.

20 "But a contract clearly expressed in writing must be enforced in a court of law according to its terms, and this without reference to the real but unexpressed intentions of the parties to it. If it is, in any respect, to be modified resort must be had to a court of equity."

Bennett vs. St. Paul Fire & Marine Ins. Co., 55 N. J. L. 377-378.

In the case of *The Franklin Fire Insurance Co. vs. Martin*, 40 N. J. L. 568-574, Justice Depue says:

30 "If the proposal for insurance be prepared by the agent of the company, and he mis-describes the premises with full knowledge of their actual condition, and there is no fraud or collusion between the agent and the insured the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as they were known to the agent (citing cases). But in an action at law upon the policy, the rights of the parties must be determined by the contract of insurance which cannot be altered or modified by extrinsic evidence of a different agreement, to be established from a knowledge of the insurer or its agents of the actual condition of the property insured. (*Deweese vs. Manhattan Ins. Co.* 6 Vroom 366.)"

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“Reformation of a contract of insurance can be decreed, in the absence of fraud, only where a mutual mistake has been made in writing out the agreement of the parties; such reformation must be such as to make the instrument correspond with the agreement on which the minds of the parties have met.”

Koch vs. Commonwealth Ins. Co. of New York, 87 N. J. Eq., 90.

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“The general rule of equity is that, to warrant the reformation of a contract for mistake, the mistake must be mutual, while in the case of a unilateral mistake the remedy is rescission; but equity will reform a contract in the case of a mistake of one party accompanied by fraud or other inequitable conduct by the other party.”

Chelsea National Bank vs. Smith, 74 N. J. Eq. 275.

There was a clear case of fraud upon the insured, since the company issued this policy with full knowledge of all the facts intending the insured to believe that they had a valid policy. This constituted waiver and estoppel under the above authorities.

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“When stipulations are kept out of a contract by fraud, such contract will be reformed in equity, and specifically performed.”

Cubberly vs. Cubberly, 39 N. J. Eq. 514.

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The cases under Point III of this brief are also incorporated herein for the purpose of showing that in every instance the party seeking reformation of a contract could have ascertained the mistake, fraud, or inequitable conduct of the defendant if he had inspected the contract so sought to be reformed. We do not find that there is any contention in any of said cases that the complainant seeking reformation would be barred therefrom because of not having read the contract.

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In this case neither Caffaro or Giammares could read English but relied entirely upon the representation of the company to give them a valid policy after doing everything they could do to inform its ^{we} agent of the situation and to secure a valid policy.

10 "A policy of insurance provided that 'if a building is insured that is on leased land, the same must be specifically represented to the company and expressed in this policy in writing; otherwise the insurance shall be void.' A building insured was on leased land, and this fact was not expressed in the policy; it was known however to defendant's agent, to whom application for the policy was made. Held, that the policy was not thus made void."

Van Shoick vs. Niagara Fire Insurance Co. 68 N. Y. Rep. 432.

20 Justice Folger in said last mentioned case, says:

"There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby. (*Rowley v. Empire Ins. Co.*, 3 Keyes, 557; *Plumb v. Catt. Co. Mut. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Ames v. N. Y. Ins. Co.*, 14 N. Y. 253).

30 "There are others, where the fact fell within the condemnation of some condition of the policy; yet as the fact as it existed was known to the company it was held to be estopped from setting up the condition against a recovery. (14 N. Y. supra; *Bidwell v. N. Y. Ins. Co.* 24 Id. 302; *Bodine v. Exchange Ins. Co.*, 51 id. 117; 10 Am. Rep. 566).

40 "There are others in which there was a suit in equity, seeking a reformation of the contract, and it was held that the facts showed unmistakably that the parties never meant to enter into a contract with such a condition or description in it as was set up against a

recovery. (*Cone v. Niagara Falls Fire Ins. Co.*, 60 N. Y. 619; *Maher v. Hibernia Ins. Co.*, 67 id. 283.)

"In the latter case, the facts made a clear estoppel *in pais* ^{against} the company.

"It has also been held that a warranty, part of the printed matter of the policy, has been dispensed with by the oral agreement of the parties made before the delivery of the policy. (*McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505.)" 10

POINT IV.

Inequitable conduct may be such as to amount to a fraud and, in such case, the injured person is entitled to a decree of a court of equity enjoining the defendant from setting up in an action at law defenses which will give it advantage derived from such conduct. 20

The learned Vice-Chancellor before the commencement of the trial permitted an amendment to the bill of complaint on due notice to the defendants which supports the decree, with respect to the restraint imposed upon the defendants from setting up their inequitable defenses. (Page 20 line 20.)

The case of *Halloway vs. Appleget*, decided by this Court in 55 New Jersey Equity 583 is a leading authority on this subject. On page 585 it is stated 30

"There is no reason why a Court of Equity should not use its injunctive power to disarm a defendant from using the Statute of Limitations fraudulently in an action at law * * *

"It seems clear that the Court of Equity will interfere although the cause of action may not have arisen out of a technically fraudulent act if the defendant has employed any means to mislead the plaintiff."

It surely misled the complainants in this case to have the defendant insurance company issue 40

to them a policy without informing them that it was not issued according to their instructions and purporting to be valid after they had given full instructions and notice of all the facts and circumstances for the purpose of having these facts noted on the policy to make it valid, and that conduct was sufficient to support that part of the decree appearing on page 108.

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POINT V.

There is no element of laches in this case.

It is well settled that mere delay in bringing a suit will not deprive a party of his remedy unless such delay has so prejudiced the other party by the loss of testimony, means of proof or changed relations, that it would be unjust to permit him to exercise his rights.

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Tynan vs. Warren, 53 N. J. Eq. 313;
Holzer vs. Thomas, 69 N. J. Eq. 515;
Lutjen vs. Lutjen, 55 N. J. Eq. 773.

It may well be doubted if a court of equity will ever permit a party to avail himself of laches where the action at law is not barred by the Statute of Limitations.

“Laches is allowed in analogy to the Statute of Limitations.”

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Lutjen vs. Lutjen, 55 N. J. Eq. 781.

The complainants in this case exercised all diligence. They submitted their proofs of loss, brought their action at law within one year from the date of the fire, as required by law, and filed this bill about fifteen months after the fire, as soon as they had notice that the defendant sought to avail itself of its inequitable and fraudulent conduct.

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None of the defendant's witnesses had died, no papers had been lost that would have been

available to the defendant within the year. It does not appear when the complainants first had notice that the defendant denied their claim prior to the bringing of said suit. Negligence or laches is not to be assumed.

On the contrary it is to be assumed that for the year complainants were doing everything they possibly could to secure a settlement without suit. The memory of the witness Edgar has not been impaired, so far as appears. It is apparent that his testimony was given with the thought of making it appear that the minds of the parties never met, in the expectation that he would then be able to stand on the proposition which he doubtless thought would arise, in the case, that thereby no mutual mistake could be shown, he having overlooked entirely the doctrine of estoppel *in pais* and a waiver on the ground of inequitable conduct and fraud. Edgar nowhere denies the statements of complainants' witnesses. He fails to contradict the complainants' witnesses because he says he does not know.

The defendant has not been prejudiced in any way by the delay.

Edgar is a man with full possession of his faculties. If he had forgotten, that of itself would not make it a case for the application of the doctrine of laches, otherwise laches might be applied in every case, for some witnesses are unable to give accurate testimony as to very recent events.

The rule for the application of laches is applied when the Court feels uncertain of its ability to ascertain the truth because the memory of those who had knowledge of material facts had become faded and weakened by time.

Lutjen vs. Lutjen, supra.

There is nothing to indicate that the memory of Cantore or Caffaro has become "faded or weak-

ened". On the contrary their testimony is very positive and direct. So with regard to the claim that the defendant is now unable to fairly and to properly assess the loss. They have the complainants' proofs of loss submitted within the time required by law, and if there is any dispute about that the complainants are as likely to suffer by reason of the delay to which the defendant insurance company has subjected them by this litigation.

Counsel for the defendant insurance company refers to what he calls the misapprehension of the learned Vice-Chancellor in regard to certain New Jersey cases.

In *Koch vs. Commonwealth Insurance Co.*, 87 N. J. Eq. 90, Vice-Chancellor Leaming had no doubt that if the insurance company had had knowledge that the property was actually used for a printing office he would have decreed the reformation of the policy. In that case the printing office was installed in the dwelling insured, increasing the hazard, without notice to the insurance company.

So, every case cited by the counsel for the defendant insurance company will be found to have some distinguishing feature, we believe, that puts each case upon a very different basis from the principles upon which the decree in this case is based.

It is, therefore, respectfully submitted that the decree of the Court of Chancery should be affirmed, with costs.

GEORGE J. PLECHNER,
Solicitor for Complainants-Respondents.

FREEMAN WOODBRIDGE,
Of Counsel.

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Southwestern Book