MacCrellish & Quigley, Book and Job Printers, Trenton, N. J.

Court of Errors and Appeals.

Between

CHARLES MILLER,

Complainant,

and

THE HILLSBOROUGH MUTUAL FIRE ASSURANCE ASSOCIATION,

Defendants.

On Bill, &c.

AMENDED BILL AND AFFIDAVIT.

[Filed March 10th, 1887.]

In Chancery of New Jersey.

To His Honor, Theodore Runyon, Chancellor of the State of New Jersey:

Humbly complaining, showeth unto your Honor your orator, Charles Miller, of the township of Hopewell, in the county of Mercer and State of New Jersey, that one Runkle Rea, heretofore, to wit, on the fifth day of February, in the year of our Lord one thousaud eight hundred and eighty-one, was seized of a certain dwelling-house, wagon-house and barn in West Amwell township, in the county of Hunterdon and State aforesaid, then occupied by Augustus Rea, and continued so seized from the said fifth day of February until the fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

New Jersey State Library

That on the eleventh day of the month of February first aforesaid, The Hillsborough Mutual Fire Assurance Association, the defendants herein named, for the consideration of the sum of three dollars premium, made a policy of insurance with their conditions of insurance annexed thereto, sealed with the common seal of said Association, upon the said dwelling-house, for eight hundred dollars, and on the said wagon-house for two hundred dollars, and five hundred dollars on the said barn, and then and there delivered the said policy of insurance to the said Runkle Rea, which said policy of insurance is now in the possession of your orator and ready to be produced and proven, as this Court shall direct, and a copy of which is hereinafter given and made a part of this bill of complaint.

And your orator further showeth that afterwards, to wit, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-two, at West Amwell aforesaid, the said Runkle Rea sold and conveyed the premises in which the said dwelling-house was situated unto your orator by a deed of bargain and sale, duly executed and acknowledged, delivered and recorded in the clerks' offices of the counties of Hunterdon and Mercer. That said Runkle Rea did thereafter and thereupon, to wit, on the twentieth day of February last aforesaid, by deed of assignment, under his hand and seal, duly executed and delivered, bearing date the day and year last aforesaid, assign, transfer and set over unto your orator, all the said Runkle Rea's right, title and interest in said policy of assurance, and that the said assignment was duly approved by the Secretary of said Association, and (as your orator believes) recorded in the books of the corporation and certified on the policy, which said deed of assignment is annexed to the said policy and ready to be produced to this Court and proven, whenever it shall be necessary and proper so to do, and a copy of which said deed of assignment is hereinafter given and set forth. That the said policy of insurance, together with the said "Conditions of Insurance," deed of assignment and certificate thereof, and also a "Supplement to the Charter," "Classes of Hazards," and "Percentage Sum" were drawn up by means of and upon a

single sheet of partly printed paper, or blank form, provided and furnished by the defendants for that purpose, and commonly used by said defendants for making contracts of insurance, and that the said sheet of paper with its said contents was designated by defendants as "*Policy No. 34,439*," and that the said annexed conditions of insurance were wholly printed thereon, of which said policy of insurance with the annexed assignment, certificate of approval thereof, conditions of insurance, supplement to charter, classes of hazards, and percentage sum, the following is a true copy, to wit:

"No. 34,439." "For $1500."

"The Hillsborough Mutual Fire Assurance Association.

"This Policy of Assurance witnesseth, That The Hillsborough Mutual Fire Assurance Association have received of Runkle Rea, Flemington, Raritan To., Hunterdon Co., the sum of three dollars premium for assuring the sum of fifteen hundred dollars on the property hereinafter mentioned, according to the terms of the Constitution, By-Laws and Conditions of the said Association, viz.: Dwelling-house in West Amwell To., now occupied by Augustus Rea—16x42 ft., 2 stories, 2 chimneys, 2 fire-places, walls filled in, shed on end, 6x16 ft., shed front, 6x18 ft., shingle roof, eight hundred dollars. Wagon-house, 22x24 ft., 15 ft. posts, shingle roof, two hundred dollars. Barn, 24x42 ft., 16 ft. posts, shingle roof, five hundred dollars.

"Now, know all men by these presents, That, in consideration thereof, The Hillsborough Mutual Fire Assurance Association, according to the terms of their Constitution, By-Laws and Conditions, shall be subject and liable to pay, make good and satisfy unto the said assured, his heirs, executors, administrators or assigns, upon assignment made in conformity with said Constitution, By-Laws and Conditions, all such damage or loss which shall or may happen by fire to the property above described from the 5th day of February, one thousand eight hundred and eighty-one, to the full term of ten years, not exceeding the said sum of fifteen hundred dollars. The damage or loss to be esti-

mated according to the true and actual cash value of the said property at the time the same shall happen, unless the said Association shall, within thirty days after the proof of such damage or loss, give directions for putting the said property into as good condition as it was before it became so injured by fire, or shall make good the said loss or damage by paying according to the twelfth article of the By-Laws and Conditions of Assurance; and the award in writing of the directors or arbitrators shall be conclusive and binding on all parties.

"It is agreed that this Policy shall expire at 12 o'clock noon on the 5th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

"In testimony whereof the common seal of the corporation is hereunto affixed, and these [SEAL] presents are signed by the President and Secretary this 11th day of February, in the year of our Lord eighteen hundred and eighty-one.

"Attest: M. K. EVERITT, *President.*

"M. W. SCULLY, *Secretary.*"

"For value received I hereby assign, transfer and set over unto Charles Miller, of the township of Hopewell, Mercer Co., and his assigns, all my right, title and interest in this Policy of Assurance, and all benefit and advantage to be derived therefrom, having sold to him the property.

"Witness my hand and seal this twentieth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

"Witness present: R. REA. [SEAL.]

"J. A. BULLOCK.

"Office of the Hillsborough Mutual Fire Assurance Association, this twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-two.

"Approved, M. W. SCULLY, *Secretary.*"

"CONDITIONS OF INSURANCE."

12th By-Law.

I. There shall be no insurance taken by any surveyor of this Association on books of account, bills, bonds, ready money, jewels, plate, paintings, engravings, stacks of hay, grain stalks or straw, engine shops, lumber yards, coal yards or factories of any nature, kind or character, machine shops, hay presses, distilleries, ardent spirits, liquorice mills, snuff mills, potteries, tile kilns, powder mills, planing mills, drug stores, gas houses, ice houses, nor contents in any of the foregoing, except ice houses and contents for the use of private families, nor buildings unfinished, nor any building or buildings wherein steam engines or boilers are used, dwelling-houses heated by steam excepted.

15th By-Law.

II. This Association will not pay for any merchandise of any nature, kind or character stolen at any fire which may happen to any person or persons insured under any policy issued by this Association.

16th By-Law.

III. Any member desiring additional insurance by another corporation or person upon property insured by this Association shall, before procuring such additional insurance, have the consent of a surveyor of this Association endorsed on the policy, and send the same to the Secretary for his approval, specifying the name of the company and the additional amount of insurance allowed. Any person insuring property in this Association already insured by another corporation or person, shall, when he applies for insurance by this Association, give notice to a surveyor of this Company, in writing, of such prior insurance, stating the name of the corporation or person, and the amount of insurance, and a failure to give such notice shall render the policy of this Association null and void; neither shall the whole insurance exceed three-fourths the actual cash value

of either buildings or contents so insured. In all cases where property insured by this Association is also insured by some other corporation or person, this Association, in case of loss or damage, shall only be liable for a ratable proportion of such damage or loss.

17th By-Law.

IV. All policies issued by this Association shall have the corporate seal of the Company impressed thereon, and be signed by the President and Secretary, bearing date of the day the survey was made, and shall be in strict conformity to the Charter and By-Laws to be valid against this Association. When a survey has been made by any surveyor of this Company, and the premiums are paid to him (and not before), the doings of the surveyor shall be binding on this Association until the insured shall receive notice that said survey has been rejected, and all moneys paid by him refunded, and it is hereby made the duty of the President and Secretary to reject any risk, if, in their opinion, such risk has been improperly taken by the surveyor, and to notify said surveyor, by mail or otherwise, of said rejection, and the surveyor shall forthwith give notice of said rejection to the applicant, and refund all moneys by him received of such applicant for said survey, and the policy shall then be void against the Association; in this case the surveyor shall receive no compensation for the taking of said survey.

18th By-Law.

V. Where the risk is increased after the survey is taken, it vitiates the policy until notice is given by the insured to a surveyor, whose duty it shall be to examine the building or buildings immediately, and report the situation of affairs to the Secretary, who shall approve and endorse on the policy and on the record the increase of risk, if so recommended by the surveyor. Should any doubt arise in the mind of the Secretary as to the true action of the surveyor, he shall, within five days, notify a Director to view the same, whose action shall be binding on the Company and

on the insured. Where the value is increased without increasing the risk, no notice need be given, unless more insurance is wanted. Any surveyor called in accordance with this article shall receive of the member for his services the sum of one dollar and fifty cents.

19th By-Law.

VI. A policy on building or buildings insured in this Association for more than three-fourths of the actual cash value thereof, by error of a surveyor or by depreciation in value, may be reduced by any two directors with the President, with or without the consent of the policy holder or holders; but such reduction shall not be made until twenty days' notice has been given to the insured of the time and place when and where the reduction shall be considered and made; and in case the policy be held as collateral security, he, she or they shall be entitled to a like notice. When a reduction is ordered, the original policy shall be cancelled from record, and a new policy issued for such reduced amount as they shall direct, without cost to the insured. In case the member or policy holder refuse to accept the new reduced policy, he shall be liable for a fair proportion of all losses and liabilities up to the time of cancellation of his original policy.

25th By-Law.

VII. All persons returned by the surveyors as delinquents on any assessment, after being examined by a committee appointed by the Board of Directors, shall be immediately placed in the hands of a justice of the peace, except such as are, in their opinion, considered worthless.

32d By-Law.

VIII. Insurance on personal property shall cease to be valid on the removal of the property from the place where it was at the time it was insured, unless notice of such removal shall be given by the assured to a surveyor, and the approval of such surveyor shall be endorsed on the policy and signed by the Secretary.

37th By-Law.

IX. Any member sustaining loss by fire or lightning shall give immediate notice thereof to the Secretary, whose duty it shall be to notify three Directors residing nearest to the place of loss, that they may view and inquire into the circumstances of the same, and if the loss be partial or total, they shall endeavor to satisfy the insured for the same, and in case they agree, the Directors shall draw an order on the Treasurer for the amount agreed upon, payable ninety days after date; if they cannot agree as to the amount of the loss or damage, the matter may be submitted to arbitrators mutually chosen, whose award in writing, legally made, shall be final and conclusive on the parties; in case the loss or damage does not exceed three hundred dollars, the insured may notify the Director residing nearest to the place of loss, who shall, in such case, have power to perform all the duties imposed upon three.

40th By-Law.

X. Any member may withdraw by returning his, her or their policy to the Secretary for cancellation, and paying his, her or their proportion of all liabilities and expenses up to the date of cancellation, and twenty-five cents for cancellation.

43d By-Law.

XI. Whenever a policy shall be delivered to a surveyor for the purpose of having an assignment thereof approved by the Secretary, the surveyor shall be entitled to receive fifty cents from the insured for such service, one-half of which shall be paid to the Secretary as his fee for approving the same.

44th By-Law.

XII. Any member sustaining loss or damage on personal property insured shall, in all cases, be required to establish, by proof, under oath or affirmation, to the satisfaction of the Director or Directors viewing the same, the amount, quality, character and value of the property destroyed or damaged.

45th By-Law.

XIII. Notwithstanding the assignment of a policy as collateral security for the payment of a mortgage, and the approval of such assignment, the insured shall be deemed a member of this Association and entitled to all the rights and privileges, and subject to all duties as a member, and liable for his proportion of the losses, liabilities and expenses of this Association; and in case the building or buildings described in the policy or policies so assigned is or are wholly or partially destroyed by fire or lightning, the amount due on such policy or policies, shall be first applied to the payment of the mortgage, and the balance, if any, be paid to the insured.

46th By-Law.

XIV. If any member who has made an assignment of his, her or their policy as collateral security as aforesaid, shall neglect or refuse to pay the assessment against him, her or them, for sixty days after notice thereof, his, her or their policy shall thereby become null and void to such member, but the assignment may, at any time within thirty days after notice that such assessment is unpaid, pay the same, together with thirty-five cents for service of such notice, then, and in such case, such policy shall be good and valid to the assignee to the extent of his, her or their interest in the same, until a subsequent assessment is made; and in case any policy becomes void by the neglect or refusal of both the insured and his, her or their assignee to pay the assessment thereon, the assured shall remain legally liable for the assessment thereon, and payment thereof may be enforced by suit."

"*Supplement to Charter.*

"*And be it enacted*, That if any person insured by the said corporation shall convey or assign the property insured, it shall be lawful for such person to assign to the purchaser the policy of insurance, but the corporation shall not be bound by such policy after such assignment, unless such

assignment shall be recorded in the books of the corporation and certified on the policy within twenty days after the date of assignment."

"*Classes of Hazards.*

"First class—Buildings of brick or stone, covered with wood.

"Second class—Frame buildings, filled in with brick.

"Third class—Frame buildings, hollow walls or all wood.

"Fourth class—Stores, mills, joiners' shops, hatters' shops, taverns, stables and sheds belonging thereon.

"Buildings not herein specifically mentioned will be assured at special rates of premium.

"Percentage sum, $1,120.

"70 & 80c."

"*Indorsements.*

"Policy No. 34,439.

"The Hillsborough Mutual Fire Assurance Association .....To Runkle Rea.....Amount insured, $1,500.

"*On Buildings.*

"Feb. 20, 1882, sold and assigned to Charles Miller."

And your orator further shows and expressly charges that at the time he purchased and took the assignment of the said policy of insurance, to wit, on or about the twentieth day of February, in the year eighteen hundred and eighty-two, as hereinbefore stated, at Flemington, in the county of Hunterdon, New Jersey, your orator saw the said policy of insurance with the conditions annexed, as hereinbefore appears, and believed and understood the annexed conditions aforesaid to be a true and accurate statement of the conditions of the said policy or contract of insurance, and that the defendants themselves had caused the said condition to be so as aforesaid annexed to the policy for the very

purpose of being an entirely safe guide to your orator (as well as to the rest of their assured) as to what he should do or not do in order to keep the policy valid; and that the defendant company had caused the said body of annexed conditions to be prepared with all proper care and skill, and to be annexed to the policy, with the honest intention that they, the said body of annexed conditions, should be understood by your orator (and the rest of their assured) to be, and should be acted upon by your orator (and the others) as being, a true and honest and accurate statement of the conditions of insurance affecting the said policy, and a perfectly safe guide for your orator (and the others) in all respects, to enable him (and them) to keep the policy valid; that your orator was forced so as aforesaid to understand and believe, because he could not conceive of any other honest purpose or intention which the said defendants could have in so as aforesaid annexing the conditions to the policy; that your orator understood and firmly believed that the word conditions, wherever it occurred in the body of the said policy, had precisely the same meaning that it had in the words, "Conditions of Insurance," which constitute the title of the body of conditions so as aforesaid annexed to the policy, and that your orator so understood and believed, because he could not understand how the said word, "conditions," could have one meaning in the said title, "Conditions of Insurance," and a materially different meaning in the body of the policy; that your orator certainly knew that the said word, "conditions," in the said title, "Conditions of Insurance," meant "conditions annexed to the policy," and, therefore, understood and firmly believed the said word, "conditions," wherever it occurred in the body of the policy, to mean "conditions annexed to the policy," and so as aforesaid, understanding and believing it to be the purpose and intention of the defendants that the policy should be accepted and acted upon as subject to the annexed conditions, and to them alone, and that the word, "conditions," wherever it occurred in the body of the policy, had the same meaning as in the said title, "Conditions of Insurance," and certainly knowing its meaning in the said title to be "conditions annexed to the policy," and understand-

ing and believing that the body of conditions so as aforesaid annexed to the policy contained all the conditions of said policy, and that there was no other by-law or condition of insurance, the breach of which could in any way render the policy void, your orator purchased and took the assignment of the said policy on the distinct understanding that the said policy was subject to the annexed conditions, and to them alone, provided the defendants should approve and assent to such assignment; that immediately thereupon your orator caused the said policy to be sent to the office of the said defendants for the purpose of effecting an insurance with the defendants on your orator's buildings, described in said policy; that M. W. Scully, the then Secretary of the defendant Association, on the reception of said policy, to wit, on the twenty-third day of February, in the year eighteen hundred and eighty-two, at said defendant's office, in writing on the said policy under his own hand certified the defendant Association's approval of the said assignment to your orator, a copy of which approval is hereinbefore given, and also wrote on the said policy in his own hand, as your orator verily believes and expressly charges, the following words, abbreviation and figures, to wit: "Feb. 20–1882. Sold and assigned to Charles Miller," and delivered the said policy, with said annexed conditions, and with defendants' approval and consent so as aforesaid certified thereon, to your orator; and your orator expressly charges that when the defendants, by the hand of their Secretary, approved and certified the said assignment upon the said policy in the manner aforesaid, and delivered the said policy, with the said conditions thereto annexed, to your orator as aforesaid, they, the said defendants, did thereby ratify and confirm unto your orator the statement of "Conditions of Insurance" so as aforesaid annexed to the policy, and did thereby represent, declare and warrant unto your orator the entire truthfulness, honesty, accuracy and completeness of the aforesaid statement of conditions annexed to the policy, and did thereby confirm your orator in your orator's aforesaid understanding and belief, that the said policy was subject to the said annexed conditions, and to them alone, and that your orator, with said understanding

and belief so as aforesaid induced, accepted from the defendants themselves the said policy with the said conditions annexed, and with the said certificate of approval thereon, as being and containing the contract of insurance then and there made directly between the said defendants and your orator, and as being subject to the annexed conditions, and to them alone.

And your orator further shows and expressly charges that the said defendants did not, nor did any other person ever, at any time, give actual notice to your orator of any other condition of insurance affecting said policy than those so as aforesaid annexed thereto, and your orator never, at any time, had or received any actual notice, knowledge or information of any condition affecting said policy or contract of insurance, excepting those as aforesaid annexed to said policy, until after the destruction of said dwelling-house by fire, as hereinafter mentioned.

And your orator further shows and expressly charges that your orator, at the time when said policy was delivered by said defendants to your orator, and by your orator accepted, as above set forth, and from that time until after said destruction of said dwelling by fire, was, by the above-mentioned statement of conditions to the policy annexed, and by said approval of said assignment and certificate thereof written as aforesaid on said policy by said Secretary, and by the delivery of said policy, annexed conditions and certificate of approval by said defendants to your orator, and by the failure of said defendants to give your orator any notice or information of any other condition or conditions than those so as aforesaid annexed to the policy, as hereinbefore stated, caused and led to understand and believe, and did understand and firmly believe, that the said body of annexed conditions was a true, accurate and complete statement of the conditions to which said policy was subject, and that the said annexed conditions were the only conditions of said policy, and did implicitly rely on the correctness of said belief and upon said body of annexed conditions as a perfectly safe guide for your orator to follow in order to keep said policy valid, and did act on said belief; that your orator was very careful not to violate any

of said annexed conditions, and had perfect confidence that he was entirely safe in so doing; that on or about the first day of April, in the year eighteen hundred and eighty-two, the previous occupant of said dwelling-house vacated the same and delivered up the possession thereof to your orator, and your orator, not being able, without inconvenience and sacrifice, to get an acceptable tenant therefor, acting on said belief, suffered said dwelling house to be unoccupied by any persons as a dwelling-house theafter and continuously until the said destruction thereof by fire, and because, and only because, said dwelling-house was unoccupied so as aforesaid, your orator stored and kept therein fruit and some small agricultural implements; that at the time when said house was vacated, to wit, on the first day of April last aforesaid, and at all times thereafter till the said destruction of said dwelling-house by fire, your orator, acting upon said belief, and solely as the result of said belief, did not procure any other or further insurance on said dwelling-house than that so as aforesaid effected with the defendants; that after the said vacation of said dwelling-house as aforesaid your orator, acting on said belief, and solely as the result of said belief, did pay to the said defandants sundry assessments, to wit, two several assessments for losses accruing after the aforesaid vacation of the said dwelling-house, levied by said defendants on your orator in accordance with the terms of said policy of insurance, and did in all respects rely on said policy of insurance as being a valid policy in full force and effect until after the said destruction of the said dwelling-house by fire, and that the two said assessments were as follows, to wit: one assessment ordered June 12th, 1882, on which your orator paid $5.75, and the other ordered September 5th, 1883, on which your orator paid $5.75. And your orator further shows that from the time of the aforesaid conveyance to him of the said dwelling-house and premises, to wit, from the fifteenth day of February, in the year eighteen hundred and eighty-two, until the said destruction of the said dwelling-house by fire, your orator was interested in the said insured dwelling to a large amount, to wit, to the amount of more than eight hundred dollars.

And your orator further shows, that afterwards, and before the expiration of the time limited in said policy, to wit, on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and eighty-three, the said dwelling-house was accidentally and by misfortune burned and totally consumed by fire, whereby your orator then and there sustained damage and loss to a large amount, to wit, to an amount more than the said sum of eight hundred dollars, of which said loss your orator gave immediate notice to the secretary of the said defendant association, and thereupon and thereafter, to wit, on the tenth day of December next following the said loss or damage, a committee of three persons, whom your orator believes and charges to have been the three directors residing nearest to the place of the loss, visited and inquired into the circumstances of the same, the said three persons being M. K. Everitt, the then President of the said defendant Association; Peter W. Young and Oliver Kugler.

And your orator further shows, that although the said Runkle Rea and your orator have in all things conformed themselves to and observed all and singular the said stipulations and conditions, matters and things which on their part were to be observed and performed according to the effect of the said policy of insurance, and of the said Constitution, By-Laws and conditions thereto annexed; and, although thirty days after the proof of such damage or loss had expired before the filing of this your orator's bill of complaint, yet your orator further shows that directions have not been given for putting the property in as good a condition as it was before it became injured by fire, nor has any order been drawn on the treasurer of the said Association for the amount of said loss or damage, or for any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to him, contrary to the force and effect of the said policy of insurance and the said conditions, and of the covenants of the said Association therein in that behalf made as aforesaid.

And your orator further shows, that after the said dwelling-house was, as aforesaid, destroyed by fire, and after the said Association had neglected and refused to pay and satisfy

your orator for his said loss or damage resulting therefrom, and after having been requested so to do, and on or about the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty-four, your orator, for the purpose of recovering to himself payment for the loss occasioned by the destruction of the said dwelling-house by fire as aforesaid, not exceeding the amount of the aforesaid insurance thereon, to wit, to an amount not exceeding the sum of eight hundred dollars, with interest, instituted an action in the Supreme Court of Judicature of the State of New Jersey, in a plea of covenant, against the said The Hillsborough Mutual Fire Assurance Association, the defendants in this suit, and on the twenty-first day of February, in the year last aforesaid, duly filed his declaration in said court in said action; and thereafter, to wit, on the eleventh day of November, in the year eighteen hundred and eighty-five, filed his amended declaration therein, setting out, among other things, the execution and delivery of the said policy to the said Runkle Rea; the sale of the insured premises and the assignment of the said policy of insurance by the said Runkle Rea to the plaintiff therein, your orator; the destruction of the said dwelling-house by fire as aforesaid; performance of the covenants on the part of the said Runkle Rea and your orator; and the refusal of the said Association to pay the said loss, and making the said policy of insurance a part of the said declaration; and further, that such proceedings were, and have been had, in such action in said court on behalf of and by said Association, the defendants in this suit, that afterwards, and on or about the ninth day of December, in the year last aforesaid, the said Association caused to be filed therein a plea of *non est factum* to the declaration of your orator, the plaintiff therein; and, also, a further and second plea, in which they set out that by their act of incorporation, passed and approved on the fourth day of March, in the year of our Lord one thousand eight hundred and forty-four, it was, among other things, enacted, "That all persons who should insure in or with said Association shall be deemed and taken as members of said corporation"; that in the exercise of the power conferred upon them by their charter, they, the said Associa-

tion, on the twentieth day of March, in the year eighteen hundred and seventy-eight, adopted to go into effect at once, among others, a certain by-law or condition of insurance, which reads as follows: "Art. 33. No surveyor shall take any insurance on any unoccupied house, nor shall any policy be valid against this Association where a dwelling remains unoccupied more than thirty days. Out-buildings belonging to an unoccupied house shall be included in this restriction;" that the said portions of the charter, and the said article of the by-laws above quoted were in full force and effect at the time when the said policy was issued, and from thence until the commencement of the said suit at law; that upon taking the assignment of the said policy, your orator, the plaintiff in said action at law, became a member of the defendant company, and then and there had notice of the said provision of the said charter and of the said by-law or condition of insurance above set out; but that notwithstanding the said notice, and notwithstanding he continued to be a member of said company, the said plaintiff, for more than thirty days before the said time when the said dwelling was consumed by fire, well knowing the said provisions of the said charter and the said by-law or condition of insurance to be still in force and binding upon him, suffered and permitted said dwelling to be unoccupied without the consent of these defendants, and thereby the policy became invalid.

And also a further and third plea, in which they allege that your orator, the plaintiff in said action at law, for a long time next before, and at the time of the said fire, had stored and kept, and continued to store and keep in said dwelling-house fruit and small agricultural implements, and thereby increased the risk, contrary to the intent of the 18th By-Law or Condition of Insurance annexed to the policy, and that thereby the said policy became void. And your orator further shows that such proceedings were, and have been had, in said action at law on behalf of and by your orator, the plaintiff therein, that afterwards and on the eleventh day of December last aforesaid, he caused to be filed his replications and demurrer to the defendants' aforesaid pleas, to wit, a similiter to their first plea, to their said

second plea a general demurrer, and taking issue on their third plea aforesaid; and further, that the defendants in said action at law caused their joinder in said demurrer to be filed on the seventh day of January, in the year eighteen hundred and eighty-six, as by the said declaration, pleas, replications, demurrer and joinder therein on file in said court, reference being thereto had when duly proven, will fully appear; and further, that one of the causes of demurrer, on which the plaintiff relied upon the hearing thereof, was, that the aforesaid condition of insurance in the defendants' second plea set up, "Never became and never was a condition of the contract declared on;" that the said demurrer was brought on for argument at the next following February term of said Court, and that said Court were of opinion that the said demurrer should not be sustained; and your orator avers that the said condition set up as aforesaid in said defendants' second plea, and said storage of fruit and agricultural implements set up as aforesaid in said defendants' third plea, in said action at law, constitute the only possible bar to your orator's said suit at law. And your orator further shows and expressly charges that your orator never, at any time, saw or heard of, or had any actual notice, knowledge or information of, the existence of the alleged condition contained in Article 33, set up and quoted in the said defendants' second plea in the said action at law, until after the said destruction of your orator's dwelling-house by fire; that your orator has no means of knowledge as to the existence or non-existence of said condition, without very great inconvenience and great expense of time and money, excepting through the information given him by the officers and agents of the said Association; that said officers and agents at all times until after the fire aforesaid, did withhold from your orator all information whatever of any such condition; that, if such condition was really in existence, as the said defendants, in their said second plea in said action at law alleged, then, and in that case, your orator expressly charges that the said defendants, in annexing the said body of Conditions of Insurance to the said policy, did withhold from said body of conditions so annexed, said Article 33 of the By-Laws or Conditions of

Insurance as aforesaid set out in the defendants' second plea, whereby said By-Law or Condition of Insurance was not included therein, and did not appear in said policy or annexed thereto, at the time of the making thereof, or at the time of the said assignment thereof to the plaintiff, your orator, or at the time of the delivery thereof to your orator by the defendants, and that the said defendants did so withhold said By-Law or Condition of Insurance with intent that said body of Conditions of Insurance so annexed to the policy should be understood and acted on as being and including all the conditions of said policy, and your orator expressly charges that it was so understood and so acted upon by your orator as hereinbefore set forth; and further, that the said condition contained in said Article 33, was fraudently concealed from your orator by the defendants, at the time when the defendants approved the assignment of said policy to your orator, and certified the same on said policy, and delivered said policy to your orator, as hereinbefore stated, to wit, on the twenty-third day of February, in the year eighteen hundred and eighty-two, and from that time continuously until after the aforesaid destruction of said dwelling-house by fire, but whether said last-named condition was so as aforesaid concealed, with intentional fraud, covin and deceit on the part of the defendants, or by mistake, through the gross negligence of the defendants, your orator has no means of knowing or of proving; but your orator further shows and expressly charges that the said M. W. Scully, Secretary as aforesaid of the defendant Association, had two very favorable opportunities of disabusing your orator's mind of the false impression made upon him by the said body of annexed conditions, and did not do it; that about the time of, and during the negotiations for, the purchase of the said policy of insurance, as hereinbefore stated, at Flemington aforesaid, and about eight days prior to the approval and certification of the said assignment by the Secretary as aforesaid, the said Runkle Rea and the said Secretay were present, and your orator, in the presence and hearing of the said Secretary, asked the said Runkle Rea if it was all there, referring to the policy, and meaning by the question, if the

paper, called the policy, contained all the contract of insurance, and thereupon, and in answer to that question, the said Runkle Rea, in the presence and hearing of the said Secretary, said "Yes, it is all there;" and the said Secretary made no reply whatever to the said question of your orator, or to the said Runkle Rea's answer thereto, but on the contrary, permitted your orator to understand and believe that the said body of conditions of insurance contained all the conditions that could in any way affect the said policy; that at the time and place of, and during the last-mentioned interview, your orator informed the said Runkle Rea and the said Secretary that said dwelling-house would probably not be occupied as a dwelling-house after the first of April then next, as your orator would probably not be able to get an acceptable tenant for it, and yet the said Secretary then and there withheld from your orator all knowledge of the said condition in said Article 33 contained; that again, when the said Secretary, eight days later, wrote and signed the Company's approval of the said assignment of said policy to your orator, and delivered the said policy to your orator, as hereinbefore mentioned, he, the said Secretary, though so recently informed of your orator's intention to leave the said dwelling-house unoccupied, as hereinbefore mentioned, did not, even then nor at any other time, tell your orator of the existence of the said condition contained in said Article 33, or that your orator was in any danger of invalidating his policy by leaving his said dwelling-house so unoccupied, but delivered said policy to your orator as aforesaid, suffering and permitting your orator to accept the said policy in the firm belief that every condition that in any way affected or could affect said policy was annexed thereto, as hereinbefore stated.

And your orator further expressly charges that the said body of annexed conditions is a false, misleading and fraudulent statement by the defendants of the conditions affecting your orator's said policy, by reason of the omission therefrom of the said condition contained in said Article 33, but that your orator has no means of knowing or of proving whether the said condition was omitted from the said body of annexed conditions by the defendants with the intention

of annexing to the policy a false and misleading statement of conditions for the purpose of entrapping and defrauding those who might insure in the defendant company, or was omitted by mistake, through lack of proper care and skill, or through gross negligence in the preparation of the said policy and its annexed conditions.

And, further, your orator expressly charges that your orator's said policy, or contract of insurance, is, and was at the time of the execution and consummation of your orator's said contract of insurance with the defendant Association, to wit, on the twenty-third day of February, in the year eighteen hundred and eighty-two, a fraudulent policy by reason of the said false, misleading and fraudulent body of conditions thereto annexed, in connection with the fraudulent concealment of the said condition in the said Article 33 contained, as hereinbefore alleged and set forth; and, further, that the said policy was, by reason of the said false and fraudulent body of annexed conditions, a fraudulent policy at the time of the sealing and delivery of the said policy to the said Runkle Rea, as hereinbefore stated, to wit, on the eleventh day of February, in the year of our Lord one thousand eight hundred and eighty-one, but that the said Runkle Rea is deceased, and your orator has no means of knowing or of proving whether the said Runkle Rea knew of its fraudulent character, and for that reason was enabled to protect himself against any actual fraud, or whether, not knowing of its fraudulent character, he yet had actual knowledge of the said condition contained in said Article 33, and for that reason could protect himself against actual fraud, or whether he was actually deceived and misled by the said false and fraudulent body of annexed conditions in the same manner as your orator was misled, or whether he was acting in collusion with the said defendants by means of the said body of fraudulent annexed conditions and the aforesaid fraudulent concealment of the said condition contained in the said Article 33, to cheat, deceive and defraud your orator; but your orator does aver and expressly charge that under any and every of the foregoing suppositions, and in every and any case, by means of the said fraudulent character of the said policy, which

said fraudulent character existed, as hereinbefore stated, at the time of the consummation of the said original contract between the defendants and the said Runkle Rea, as aforesaid, and still existed at the time of the consummation of the said new contract between the defendants and your orator, and by means of the said false, misleading and fraudulent body of annexed conditions, and of the aforementioned fraudulent concealment of the alleged condition contained in Article 33, your orator was deceived and misled and induced to permit his said dwelling-house to be unoccupied, as alleged in the said defendant's second plea in said action at law, and to store and keep in said dwelling-house fruit and small agricultural implements, as in the defendant's said third plea in said action at law alleged, and that, if said condition in said Article 33 contained had been included in said body of conditions annexed to the policyt or if your orator had known of the existence of the said condition, your orator would not, at any time, have suffered or permitted said dwelling-house to be unoccupied, as alleged in the defendant's said second plea, nor have stored or kept in said dwelling-house any fruit or agricultural implements, as alleged in the defendant's said third plea, and that the said condition in said Article 33, and the said fact that your orator stored and kept in said dwelling-house fruit and small agricultural implements, ought not, nor either of them, to be used by the said Association at all in the said action at law to affect the right of your orator to recover therein, and that any such use thereof, and any attempt so to use the same, is a fraud upon the rights of your orator.

And your orator further shows, that he is advised by his counsel that it is necessary for the safety and security of your orator, in the prosecution and trial of said action at law, that your orator's said policy of insurance be reformed and made subject to the conditions annexed thereto, and to no other condition, or made to express the exception of the last above-mentioned condition from the operation and effect, limitation and conditions of said policy, or in some other way be so reformed that the said condition shall not, and cannot, in any way affect your orator's right to recover in

said action at law his loss and damage occasioned by the said destruction of his said house by fire, according to the understanding of your orator when he accepted the said policy from the defendants, and from that time until after the said destruction of his said house by fire, and that the said Association be restrained by the order and injunction of this Honorable Court from so using the said condition, and the said fact that your orator stored and kept in said dwelling-house fruit and agricultural implements. And your orator well hoped that the defendants would have complied with the reasonable requests of your orator, as in equity and good conscience they ought to have done, yet the said defendants, though often requested so to do, have wholly neglected and still do neglect and refuse to pay your orator said loss or any part thereof, and to refrain from setting up said condition, and said fact that your orator stored and kept in said dwelling-house fruit and small agricultural implements, in bar of your orator's right to recover in said action at law, and to reform said policy, or to have the same reformed so that the said condition shall not bar, defeat or affect your orator's said action; but they sometimes pretend that the said body of conditions of insurance annexed to said policy does not contain all the conditions that are binding on your orator, but that there are other conditions not so annexed by which he is bound, and that he is bound by the aforesaid condition of insurance contained in the said Article 33, and that they did not intend your orator to understand and act upon, and that your orator did not understand and act upon, nor purchase said policy as subject to said annexed conditions only; and at other times they pretend that your orator had actual notice of the said condition of insurance when he purchased the said policy, and that your orator, in fact, well knew said condition to be in force and binding upon your orator when he suffered his said dwelling-house to remain unoccupied; while at other times they pretend that not only those conditions which were made known to your orator were binding upon him, but that all the conditions of insurance of the said Association were binding upon him whether the same were annexed to the said policy or not; or whether they were made known

to your orator or not; and whether they had been fraudulently concealed from your orator by the said defendants or not; or by them withheld from your orator by mistake or not; and whether they were different from or contrary to the conditions annexed to the said policy or not; or whether the said defendants misinformed your orator concerning their conditions or not; or whether the said body of annexed conditions were intentionally made false, misleading and fraudulent or not; or whether the said defendants acted in collusion with the said Runkle Rea to delude, ensnare and defraud your orator or not; or whether your orator was deceived and misled to his own injury by the false and fraudulent misrepresentations of the defendants or not; *whereas*, your orator charges the contrary thereof to be the truth, and says that your orator is bound by the conditions annexed to the policy, and by no others, and particularly that he is not bound by the said condition contained in the said Article 33; and that the defendants in annexing to the said policy their "conditions of insurance," and withholding the said condition therefrom, thereby intended that your orator should understand and act upon said policy as subject to said annexed conditions only; and that your orator did understand and act upon and purchase said policy, and accept said policy directly from the defendants as subject to the annexed conditions only, as is hereinbefore stated; and that your orator had no actual notice or knowledge whatever of said condition in Article 33 contained, either when he purchased said policy or when he accepted it from the defendants, or when he suffered his house to be unoccupied as aforesaid, or at any time until after the said destruction of his house by fire; that your orator had no practicable means of obtaining information concerning the conditions of insurance of said Association excepting through its officers and agents, and had a right to rely upon, and did rely upon such information as they gave him; that said officers and agents gave your orator the said statement of annexed conditions as a true and accurate statement of the conditions of said policy, and as a perfectly safe and reliable guide to your orator, and gave your orator no other information respecting said conditions, and withheld and fraudulently concealed

from your orator all information of the last aforesaid condition until after the said fire, and always, until after the said fire, represented to your orator that the said policy was subject to the said annexed conditions alone; that said policy is, and always was, a fraudulent policy; that said body of annexed conditions is a false, misleading and fraudulent statement of the conditions of said policy, and was annexed to said policy by the defendants at the time when they originally executed the said policy and delivered it to the said Runkle Rea, and was so annexed when said defendants delivered said policy to your orator as aforesaid; that, when said defendants so as aforesaid delivered said policy to your orator, they represented, declared and warranted unto your orator the absolute truth, accuracy, completeness and reliability of said statement of conditions of insurance so as aforesaid annexed to the policy; that by means of the said annexed false, misleading and fraudulent statement of conditions of insurance, in connection with the aforesaid fraudulent concealment of the said condition in Article 33 contained, your orator was deceived and misled, and induced to permit his said dwelling-house to be and remain unoccupied as aforesaid, and to store and keep therein fruit and small agricultural implements as aforesaid; that, if the said last-mentioned condition had been included in the said body of annexed conditions, or if your orator had known of the existence of said last mentioned condition, your orator would not have suffered or permitted said dwelling-house to be so as aforesaid unoccupied, nor have stored or kept in said dwelling-house any fruits or agricultural implements as aforesaid; and that said defendants should be estopped from setting up said last-mentioned condition, and the said fact that your orator stored and kept in said dwelling-house fruit and agricultural implements in bar of your orator's claim for his said loss or damage.

All which actings, doings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury and oppression of your orator in the premises. In tender consideration whereof, and for as much as your orator is remediless in the premises at and by the strict rules of the Common Law,

and is relievable only in a Court of Equity, where matters of this kind are properly cognizable and relievable. To the end, therefore, that the said The Hillsborough Mutual Fire Assurance Association may, without oath, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and they distinctly interrogated thereto, and that the said The Hillsborough Mutual Fire Assurance Association, their officers and attorneys, agents, solicitors and counsellors, may be restrained and enjoined by the order and decree of this Honorable Court from setting up and giving in evidence upon the trial of said action at law whenever or wherever the same shall be had, in bar or defence of said action, the said condition of insurance contained in said Article 33, and in their said second plea in said action at law set up, and the said fact that your orator stored and kept, and continued to store and keep in said dwelling-house, fruit and agricultural implements, in their said third plea in said action at law set up, and may be restrained from further proceedings in said action at law until they, the said defendants, shall have fully answered the bill of complaint, and your Honor shall make other order to the contrary, and that the policy of insurance may be reformed by the order and decree of this Honorable Court so as to make it subject to the conditions annexed thereto, and to no other conditions, and so that it shall not be subject to the last aforesaid condition, and so that your orator's said claim in said action at law shall not be at all barred, hindered, delayed or affected by said condition; and that said last-mentioned condition may be exscinded from said contract as having been fraudently introduced therein, and that your order may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the State's writ of injunction issuing out of and under the seal of this Honorable Court to the said The Hillsborough Mutual Fire Assurance Association, their agents, attorneys, officers, solicitors and counsellors. restraining them from any further attempts to

bar your orator by means of the said condition in said Article 33 contained, or by means of the said fact that your orator stored and kept, or continued to store and keep in said dwelling-house, fruit and agricultural implements, from having or maintaining his said action at law against the said Association, and from setting up or giving in evidence the same, or either of the same, on the trial of the said action at law, in bar or defense of the same, whenever the said trial shall be had, until this Court shall make order to the contrary, and from further proceedings in said action at law until they, the said defendants, shall have fully answered the bill of complaint, and your Honor shall make other order to the contrary; but also, the State's writ of subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said The Hillsborough Mutual Fire Assurance Association, commanding them, by a certain day and under a certain penalty therein to be expressed, to be and appear according to law before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, and abide by, and perform, such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator, as in duty bound, will ever pray, &c.

CHARLES MILLER.

GEO. S. GROSVENOR,
Solicitor and of Counsel with Complainant.

STATE OF NEW JERSEY,
COUNTY OF MERCER. } *ss.*

Charles Miller, the above-named complainant, being duly sworn according to law, on his oath says, that he has heard the above bill of complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters that are therein stated to be on his information and belief, and, as to those matters, he believes it to be true. And, further, that during the negotiations for the purchase of said insured premises and the policy from Runkle Rea, as stated in said bill, M. W. Scully was present and took part in the conversation and heard the same; that

then and there this deponent, referring to the said policy of insurance, said to Runkle Rea, "Is it all there?" that Mr. Rea replied, "Yes, it is all there;" and that M. W. Scully made no reply, though he must have heard both the question and the answer; that at the same interview this deponent said to them both that he did not think he would be able to get such a tenant as he wants for the house for some time after the then next first of April, and that neither Mr. Runkle nor Mr. Scully made any reply to that remark, or then or at any other time told this deponent that the policy would not be good if he did not get a tenant, or anything whatever to that effect, but were both of them entirely silent about it; that this deponent then knew that the said M. W. Scully was the then Secretary of the said defendant Association, and that the conditions of insurance were annexed to the policy, and supposed the conditions were all there, and bought, and thereafter accepted from the defendants, the said policy with that understanding, and never knew or suspected anything to the contrary until after the house was burned, as mentioned in said bill of complaint; that this deponent, from the time he bought the policy until after his house was burned, believed the policy to be subject to the annexed condition, and to no others, and during all that time relied upon and acted upon said policy as so subject, and only so subject; that, because of said belief and of such reliance, he allowed the house to be unoccupied as a dwelling, and stored and kept therein fruit and small agricultural implements in the manner stated in the said bill of complaint, and did not get any other insurance on it, believing that this policy was good, and paid to the defendants two assessments for losses of five dollars and seventy-five cents each, both of which assessments were ordered during the time when the house was so unoccupied, and your orator was storing therein fruit and small agricultural implements; that one of these assessments was ordered on June 12th, 1882, and the other on September 5th, 1883; that this deponent did not at any time until after the said fire have any actual notice, knowledge or information whatever of the condition contained in the said Article 33 of the By-Laws or Conditions of Insurance set up in the

defendant's second plea, or that there was any condition making the policy void if the house should be unoccupied as a dwelling-house for thirty days or for any other time; that if said condition had been annexed to the policy with the other conditions of insurance, or if this deponent had known of said condition, he would not have permitted the said house to be so unoccupied without getting other insurance, and would not have stored therein fruit and agricultural implements, and would not have paid the two assessments, as aforesaid, and that from the time he bought the policy to the time of the fire he always relied upon the policy as a valid policy, and in no way affected by the fact of the house having been so unoccupied and used; that this deponent had no practicable means of learning what the said Association's conditions of insurance were, except through its officers and agents, and was obliged to rely, and did rely, on the information given and the representations made by them, and that the only information so given and representation so made was the statement of "Conditions of Insurance," annexed to the policy, and the assurance by them that it was a true and accurate statement of the conditions of the policy, and, relying solely on such information and representation, bought and always understood and acted upon such policy as subject to the annexed conditions only, and not at all as subject to the said condition in said Article 33 contained, and that the said Association and its officers and agents, at all times, until after said fire, withheld from this deponent all actual notice, information and knowledge of the last-named condition.

CHARLES MILLER.

Sworn and subscribed before me this 5th day of March, A. D. 1887.

WM. M. LANNING, *M. C. C.*

DEMURRER TO AMENDED BILL.

[Filed April 18th, 1887.]

The demurrer of the defendants to the amended bill of complaint of Charles Miller, complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's amended bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the complainant hath not, in and by his said amended bill, made or stated such a case as entitled him in a Court of Equity to any discovery from these defendants, or any relief against them as to the matters contained in the said amended bill, or any of such matters.

Whereupon, and for divers other good causes of demurrer appearing in the said amended bill, these defendants do demur thereto, and humbly pray the judgment of this Honorable Court whether they should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

J. D. BARTINE,
Solicitor for and of Counsel with Defendants.

I certify that I have perused the complainant's amended bill in the above stated cause, and that the demurrer is well founded in point of law.

J. D. BARTINE,
Of Counsel with Defendants.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF SOMERSET, }

Michael W. Scully, of full age, being duly sworn, upon his oath saith that he is Secretary of The Hillsborough Mutual Fire Assurance Association, that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

M. W. SCULLY.

Sworn and subscribed before me, April 15th, A.D. 1887.

GEO. V. VANDERVEER,
M. C. C. of N. J.

DECREE SUSTAINING DEMURRER AND DISMISSING BILL.

[Filed August 3d, 1887.]

This cause coming on to be heard, on bill and demurrer, in the presence of George S. Grosvenor, of counsel with the complainant, and John D. Bartine, of counsel with the defendant, and the pleadings having been read and the arguments of the respective counsel heard and considered, and it appearing to the Court that the said demurrer ought to be sustained, it is, on this third day of August, 1887, on motion on behalf of defendants, ordered that said demurrer be and the same is hereby sustained with costs, and it is further ordered and decreed that the complainant's bill of complaint be and the same is hereby dismissed with costs.

ALEX. T. MCGILL, *C.*

Respectfully advised,

JOHN T. BIRD, *V. C.*

APPEAL.

[Filed August 8th, 1887.]

The complainant hereby appeals from the final decree made in this Court in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

Dated August 8th, 1887.

GEO. S. GROSVENOR,
Solicitor for and of Counsel with Complainant.

I conceive there is good cause for appeal in the above-stated cause.

GEO. S. GROSVENOR,
Of Counsel with Complainant.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The humble petition of Charles Miller, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Alexander T. McGill, Chancellor of New Jersey, bearing date the third day of August, in the year eighteen hundred and eighty-seven, wherein the said petitioner was complainant and the said The Hillsborough Mutual Fire Assurance Association were defendants, in this respect, to wit, that the said decree adjudges that said demurrer be sustained and the bill dismissed. And your petitioner humbly appeals from that part of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the said demurrer should not have been sustained and the bill dismissed, but said demurrer should have been overruled, and the defendants required to answer the bill. Your petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GEO. S. GROSVENOR,
Sol. of and of Counsel with Appellant.

RULE FOR HEARING.

[Filed October 20th, 1887.]

It appearing to the Court that the appellant in the above stated cause did, within the time limited by law for making an appeal, file with the Clerk of this Court a petition of appeal, and did duly serve a copy thereof on the solicitor of the respondents within thirty days after filing the said petition, and did, also, within the same time, deposit with the Clerk in Chancery one hundred dollars to answer the costs of the appeal; and that the respondents did not file an

answer to the petition of appeal within thirty days after service of a copy of the said petition and making the deposit aforesaid. It is ordered, on motion of George S. Grosvenor, solicitor for and of counsel with the appellant, that this cause be set down for hearing on the first day of the next stated term of this Court, to be held at the State House, in the city of Trenton, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard thereon.

CONCLUSIONS.

[Filed June 21st, 1887.]

BIRD, V. C.

The history of this case, in detail, appears in the Opinion of Chancellor Runyon, filed February 17th, 1887, with the exception of one allegation, which has since been made by an amended bill. That additional allegation is, in substance, that the defendant company issued a policy of assurance with several important conditions annexed thereto; that that policy was afterwards (February 22d, 1882,) assigned to the complainant, and that from April 1st, 1882, to November 28th, 1883, the premises (a dwelling-house) remained unoccupied; that while so unoccupied he was twice assessed and twice paid assessments, and that on the said 28th day of November, 1883, the said premises were consumed by fire; and that said company refuse to pay the value of said loss on the ground that said house was unoccupied, one of the conditions, as expressed in the by-laws of said company, being that the assured forfeits all right to any assurance if he suffers the premises assured to remain unoccupied, and this last condition or by-law was not one of the conditions so as aforesaid annexed to and made part of the policy of assurance; and that thereby, *i. e.*, by annexing several conditions to the policy, and not annexing one so important and vital, the complainant was deceived and misled and defrauded; that is, by presenting a policy with certain conditions annexed, he was assured in the law, if not in fact, that those were the only conditions, and that, in

truth, he accepted the assignment of said policy and had the said assignment approved by the Secretary of the company with the full understanding, conviction and belief that the said conditions so as aforesaid annexed to the said policy were the only conditions imposed upon any of the members of said company, and that, up to the time of said loss, he did not know of any other condition, or that one condition was that said dwelling should be occupied in order to secure a recovery.

The Chancellor decided in very plain terms that no one of the officers of the company could bind the company in such case. But the complainant now seeks to go a step further, and to overcome the views of the Chancellor by alleging that the *company* itself in issuing such a policy (with only a portion of the conditions annexed) committed a fraud upon every innocent holder.

But on this very point the Chancellor has provided an answer, very complete, and which, I think, is undisputed law everywhere, by declaring that every policy holder in such company (being a mutual insurance company) is presumed to know the by-laws and conditions of assurance in the company. This being the law, it certainly applies to this case, in which the complainant held the policy so assigned to him from February 22d, 1882, to 28th of November, 1883, during which period he had the amplest opportunity to learn all about the rights and liabilities of the insured and the conditions upon which his rights could be made secure. Clearly it is not for me to review the Chancellor. Clearly, also, the law is that the complainant is presumed to have known all of the conditions and by-laws on which mutual assurance companies issue their policies. I must sustain the demurrer with costs.

MacCrellish & Quigley, Book and Job Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

Between

CHARLES MILLER,

Appellant,

and

THE HILLSBOROUGH MUTUAL FIRE ASSURANCE ASSOCIATION,

Respondents.

On Appeal from Chancery.

BRIEF OF GEORGE S. GROSVENOR FOR APPELLANT

I.

The bill shows an attempted fraud by the defendants upon the complainant, by means of a false statement of the conditions of insurance annexed to the policy, in connection with the fraudulent concealment of the condition, the breach of which is set up in bar of the action at law.

(1.) If it had been the defendants' deliberate purpose to ensnare their assured, they could hardly have devised a method more likely to succeed.

(*a.*) Any man would unquestioningly accept the annexed statement of conditions as a perfectly safe guide.

(*b.*) Any man would understand the word "conditions," in the body of the policy, to mean the same thing as the

same word in the title of the annexed conditions, that is, "conditions annexed to the policy."

(*c.*) The peculiar designation of the annexed conditions, viz., 12th By-law as Condition 1, 15th By-law as Condition 11, and thus through the list, is an unequivocal representation that the defendants have culled out from the By-laws and annexed to the policy all those containing conditions, and that the By-laws not so annexed do not contain conditions.

(2.) The case has all the elements of an estoppel in *pais*.
Mutual Life Ins. Co. of N. Y. v. *Norris*, *4 Stew. 585*;
Woodruff v. *Norristown Institution for Savings*, *7 Stew. 180*.

(3.) The contract of insurance is eminently one of good faith (*uberrimæ fidei*) as to both parties. It was the duty of the defendants to make known to the complainant all their conditions, and he had a right to rely on the information they gave him without further inquiry, and by concealing one of those conditions, whether intentionally or by mistake, they became guilty of actual fraud.

Willard's Eq. Jur. 168; *2 Pom. Eq. Jur.* §§ *847*, *888* (6), *901*, *902*, *907*.
Story Eq. Jur. 193, *387*, *1538*, *1548*;
Wood's Ins. § *59 and pages 1163*, *1164*;
Keen v. *James*, *12 Stew. 540*, *&c.*;
Hill v. *Millville Ins. Co.*, *Id. 74*, *75*;
Harris v. *The Columbian Co. Ins. Co.*, *18 O. 122*;
Keller v. *The Equitable F. Ins. Co.*, *28 Ind. 174*;
Botsford v. *McLean*, *45 Barb. 478*;
Nicholson v. *Janeway*, *1 C. E. Gr. 287*;
Leslie v. *Knickerbocker Ins. Co.*, *63 N. Y. 33*;
Bargate v. *Shortridge*, *5 H. L. 318*.

Our Courts do not favor forfeitures. *Corson* v. *Jersey City Ins. Co.*, *14 Vr. 304*.

II.

The respondents by this demurrer make a most extraordinary claim. It is that they, as a corporation, have power to issue a policy of insurance, annex to it a false statement of

conditions, fraudulently conceal one condition, and by these means induce their assured to violate the concealed condition, and then enforce a forfeiture of the policy because of that violation.

Whence do they derive such a power?

The powers of a corporation are twofold; those that are derived from express grant, and those that are incident and necessarily appertain to it, whether expressed in the grant or not. *Gregory* v. *Jersey City, 5 Vr. 430.* The respondents under this demurrer do not claim this power under *express* grant. And they cannot have it as *incidental* because it is contrary to the law of the State, and interferes with the rights of the assured. *Taylor* v. *Griswold, 2 Gr. 235, 236, 249; N. Y., L. E. & W. R. R. Co.* v. *Haring, 18 Vr. 138.*

The defendants, however, claim this power by virtue of the principle that the members of a mutual insurance company become such by the fact of insurance, and are charged with knowledge of, and bound by, its charter, by-laws and rules.

The Vice-Chancellor errs in holding that this principle is applicable to this case. (*Case, page 34, l. 22.*) It is plainly no answer to the complainant's claim for relief from a fraud practiced upon him by the company by means of an actual concealment from him of one of the conditions of his policy, and a false statement of its conditions.

(*a.*) This is a claim of the power incident to all mutual insurance companies to defraud their members. The mere statement of the claim is its own refutation. And further, the cases last cited are conclusive against such a claim, holding, as they do, that no power to wrong an individual is incident to any grant of power to a corporation.

(*b.*) No case has been cited by the respondents, nor can any case be found, to sustain such a claim. Such of the respondents' cases as bear upon this case at all are in the appellant's favor. Such are *Belleville Mu. Ins. Co.* v. *Van Winkle, 1 Beas. 340, 341, 342.* *Redstrake* v. *Cumberland Ins. Co., 15 Vr. 303.*[a] In the other cases the question of fraud does not occur.

(*c.*) The appellant, as a contractor with the company, has all the rights, including the right to be relieved from the

[a] This case, I submit, decided the very point in question, against the Co. So in Lycoming &c v. Woodworth,

company's fraud that a stranger would have. *Stratton* v. *Allen*, *1 C. E. Green 232*. *Revere* v. *Boston Copper Co.*, *15 Pick. 363*. *Great Falls Mu. F. I. Co.* v. *Harvey*, *45 N. H. 292*, and cases last cited. It is as corporator, he is bound by the by-laws; as contractor he sustains the same relation to them as a stranger. *1 Mor. Corp.* §§ *500a*, *501*; *Ins. Co.* v. *Conner*, *17 Penn. St. 142*, and cases last cited. Even as corporator he, if innocent, is not bound by illegal proceedings. *Stetson* v. *Kempton*, *13 Mass. 282*, and authorities cited *infra* (*e*). In this case all his rights and liabilities as a member arise from the contract of insurance and in no other way. It is simply the case of fraud in a deed. Every party to a deed is presumed to know, and is bound by its terms. The presumption and the obligation is the same in both cases. It is a presumption, *not of knowledge*, *but of assent*. *1 Mor. Corp. 500a*, *501*; *Ang. & Ames Corp.* § *359*; *Stetson* v. *Kempton*, *13 Mass. 282*. It is not *conclusive*, but is *overcome* by proof of fraud. *Ex-parte Briggs L. R.*, *1 Eq. 483*, *487*; *Directors Cent. R. R. Co.* v. *Kisch L. R.*, *2 H. L. App. 118*, *120*. There can be no presumption of assent to a fraudulent concealed condition.

(*d.*) A corporation is as much bound by its fraudulent acts as an individual. "Whatever fraud creates, justice will destroy." *Vreeland* v. *N. J. Stone Co.*, *2 Stew. 19*. The only false representations which are not binding on the company are those that are contrary to the charter. *Ang. Fraud 71*. And mutual companies are just as much bound to act in good faith as any others. *2 Pom. Eq.* § *819*, and cases cited *supra* (*b*). This is not the case of a waiver by an agent or officer, but of estoppel arising from the act of the company itself. See *Redstrake*, *&c.*, *supra* (*b*).

(*e.*) The alleged by-law, containing a condition, and being withheld from the annexed statement of conditions, and being fraudulently concealed from the appellant till after the fire, and now set up to bar the appellant's action at law, because of its breach induced by the respondents themselves, is, as to the appellant, an unreasonable by-law, and unreasonably exercised, and contrary to the laws of justice and equity, and therefore void. *The Vestry of St. Luke's Ch.* v. *Mathews*, *4 Desaussure 578*, *585*; *Ang. &*

Ames Corp. § *342, citing Slee* v. *Bloom, 19 Johns. 456, 478;* See also, *Dayton* v. *Quigley, 2 Stew. 77.*

(*f.*) The Vice-Chancellor errs in holding (*p. 34, l. 25*) that the appellant had opportunity to learn about his rights, liabilities and conditions. The contrary is alleged in the bill, page 18, l. 27; see, also, *Masters* v. *Madison &c. Co., 11 Barb, 632; Kerr F. & M. 79.* Such a holding would make it necessary for every person insuring in a mutual company, either personally or by attorney, to visit the company's office and examine all its minutes, and even loose resolutions. He could no more rely on the information given him by any person in attendance at the office than upon their express statement of conditions on the policy. *Falsus in uno, falsus in omnibus.*

Even if the appellant had had the opportunity of learning the truth at the office, that fact would not help the respondents' case. They can not complain that he believed their statement of conditions.

They having delivered to the appellant a distinct statement of the conditions, he is not chargeable with knowledge of, nor bound by, the concealed condition, though contained in a by-law.

Ex-parte Briggs (*supra*), *L. R. 1 Eq. 483, 487;*
Directors Cent. R. R. Co. v. *Krisch, L. R. 2 H. L. App. 120;*
Kerr F. & M. 78, 79, 81, 243 at 8, 257; Big. Fraud, 68, 69;
1 Story Eq. Jur. (*13th Ed.*), § *193, last column of note page 215;*
2 Chit. Cont. (*11th Am. Ed.*) *1041 and note c, 1042, 1043;*
Spunnar v. *Walsh, 10 Ir. Eq. 399;*
Rawlins v. *Wickham, 3 DeG. & J. 304;*
Jones v. *Smith, 1 Phil.* (*19 Eng. Ch.*) *252;*
Converse v. *Blumerich, 14 Mich. 109, 120.*

If the claim of the respondents is good, then no confidence whatever can be placed in the statement of conditions on the policy of a mutual insurance company, and mutual insurance becomes a gigantic scheme of legalized fraud.

III.

The respondents claim that by this assignment the appellant took the place of Rea. The Chancellor so held under the allegations of the original bill. But this is no answer to the equity of the amended bill, even if the company could have made this defence against Rea.

(*a.*) The amended bill charges and shows that the defendants themselves deceived and misled the complainant to his damage. He therefore does not stand in Rea's place. The contract is a new contract between the respondents and appellant; (*p. 12, l. 9, et seq.*)

2 Pom. Eq. §§ *704, 820*; *2 Mor. Corp.* § *604.*
In re Agra & Masterman's Bank, 2 L. R. Ch. App. 397.
2 Chit. Cont. (*11th Am. Ed.*), *1359, 1369;*
Woodruff v. *Norristown Inst. for Savings, 7 Stew. 179;*
Lane v. *Winthrop, 1 Bay* (*S. C.*) *118;*
Thompson v. *Emery, 7 Foster* (*N. H.*) *273;*
Elliott v. *Callan, 1 Penna.* (*Pen. & Watts*) *24, 30;*
Flannagan v. *Camden Ins. Co., 1 Dutch. 506.*

(*b.*) As the case stands on this demurrer, the respondents could not set up this condition even against Rea. The amended bill charges that the defendants delivered the annexed false statement of conditions to him (*p. 21, l. 17*). Such a false statement destroyed the presumption of Rea's knowledge, and shifted upon the defendants the burden of proving beyond the possibility of a doubt that Rea knew that statement to be false.

Kerr Frauds and Mis., 78, 79 and cases cited under II (*f*).

IV.

The policy may be reformed and injunction granted.

(*a.*) The amended bill shows it to have been fraudulent as against Rea, and the burden of proof is on the defendants to show that it was not. See III (*b*) and authorities there referred to.

(*b.*) It may be reformed as being an original contract

between Miller and the company. The amended bill so charges (*pp. 12 and 13.*) See also, *Flonagan* v. *Camden &c. Ins. Co., 1 Dutch. 506; Wood Ins.* (*2d Ed.*) § *110; May Ins.* § *378.*

(*c.*) Should the Court have doubt as to the complainant's right to reformation, adequate relief may be granted by injunction, as was done in *Green* v. *Morris & Essex R. R. Co., 1 Beas. 173, 174,* affirmed on appeal, *2 McCart. 475.* Indeed, the remedy by reformation might not be complete without the injunction, because of the defense set up in the third plea.

V.

The complainant has no adequate remedy at law.

(1.) The amended bill charges that the policy was fraudulent both as between the company and Rea, and as between the company and the complainant, and, because the fraud is in the contract itself, the plaintiff's *only* remedy is in equity.

Stryker v. *Vanderbilt, 1 Dutch. 492;*
Dewees v. *Manhattan Ins. Co., 6 Vr. 371;*
Franklin F. Ins. Co. v. *Martin, 11 Vr. 574.*

The Chancellor's decision to the contrary was based on the ground that the original bill showed no fraud in the contract between the company and either Rea or Miller. The amended bill shows both.

(2.) If, in a court of law, the plaintiff, a member of a mutual insurance company, is (as is claimed by the defendants) conclusively presumed to know, and to be bound by, all the conditions of insurance contained in the company's by-laws, notwithstanding a fraudulent concealment by the company of part of those conditions, that fact alone shows an inadequate legal remedy.

(3.) The Supreme Court has held the condition in question to be a part of the contract, and its breach a bar to an action on the policy in a court of law.

(4.) If there be even a doubt whether the complainant has a perfect remedy at law, he is entitled to the protection of this Court. To oust this Court of jurisdiction, the remedy at law must be obvious, adequate and complete.

Green v. *Morris & Essex R. R. Co.*, *1 Beas. 173, 174; Foley* v. *Kirk*, *6 Stew. 175.*

GEO. S. GROSVENOR,
Sol'r for Appellant.

THE CHRONICLE PRINTERY, BOUND BROOK, N. J.

New Jersey Court of Errors and Appeals.

Between

CHARLES MILLER,

Complainant,

and

THE HILLSBOROUGH MUTUAL FIRE ASSURANCE ASSOCIATION,

Defendants.

On Demurrer to Bill.

BRIEF FOR DEFENDANTS.

On the 11th day of February, 1881, the defendants issued a policy of insurance on certain buildings in Hunterdon county to Runkle Rea, who was their treasurer.

The policy was assigned to complainant February 20th, 1882, in these words:

For value received I hereby assign, transfer and set over unto Charles Miller of the township of Hope-

well, Mercer county, and his assigns, *all my right title and interest* in this policy of assurance, and a benefit and advantage to be derived therefrom—having sold to him the property.

This assignment was approved by the compan February 23d, 1882.

November 23d, 1883, the dwelling house, one of t insured buildings, was destroyed by fire.

Miller sued in covenant on the policy, the defend pleaded its 33d by-law, the plaintiff demurred and t court held the plea good.

Miller v. Hillsborough Mutual Fire Assura Association, 18 Vroom, 393.

In the opinion Justice Dixon says: This langu (of the policy) imports that legally all the consti tion, by-laws and conditions of the association fo part of the contract. If the legal effect of the poli was to make the by-laws of the association a part it, then the defendant would not be attempting vary that contract by offering parol proof that the fendant knew what those by-laws were, nor could be estopped by the fact that some conditions were nexed to the policy from relying upon whatever *conditions* were legally incorporated in the contr according to its terms.

The plaintiff then amended his declaration by nexing a copy of the policy, and defendant ag pleaded the by-law in question and the plaintiff murred. The court overruled the demurrer with hearing the defendant.

The complainant then filed his bill in this asking that the defendant be enjoined from se

up in the suit at law the said 33d by-law as a defence to said action, and that the policy be reformed accordingly.

The defendant demurred to the bill and the court allowed the demurrer.

Miller v. Hills. Mut. Ins. Co., 15 Stewart 459.

EXTRACTS FROM OPINION OF THE CHANCELLOR.

The association was a *mutual* company. Rea was a member and officer thereof. It is not alleged in the bill that he was *not* aware of the existence of the by-law in question. Indeed, as a member of the company, he is presumed to have known of its existence. There is no allegation of any *mistake* on his part in reference to the conditions of insurance.

It is obvious, therefore, that the prayer of the bill for a reformation of the contract could not be granted.

2

As assignee of the policy the complainant became a member of the company and as such is presumed to have known when he took the assignment of the existence of the by-law in question.

3

Rea's statements were *no more binding than those of a stranger*. Cites—

Barnes v. Trenton Gaslight Co., 12 C. E. Green 33.

Neither Rea nor the secretary could bind the com-

pany by declarations or silence in respect to the matter in issue.

4

The officers of a mutual insurance company *cannot* dispense with the terms and conditions of insurance which by-laws of the company impose, unless they are authorized to do so. Cites—

Hale v. Michigan Ins. Co., 6 Gray 169.
Baxter v. Chelsea Mut. Ins. Co., 1 Allen 294.

5

The charge of fraud on the part of the association is unaccompanied by *any* act to support it. It rests on the mere circumstance of the *omission* of the condition in question from the conditions stated in the policy. It has been substantially decided in this case (18 Vroom 393) that the condition is binding at law, notwithstanding the fact that it was not in the policy, because by the policy it is declared that the insurance is accepted according to the terms of the constitution, by-laws and conditions of the association.

6

If the *omission* would create an estoppel in equity it would equally do so at law.

7

It is clear that a member of the company is chargeable with *notice of all the by-laws of the company* and of the conditions of insurance adopted by the company, whether contained in the by-laws or in resolutions, *and the complainant being a member of the company by virtue of the assignment to him is chargeable with such notice.*

8

As the policy was not a fraud on Rea, to whom it was issued, and as he could not complain of the enforcement of the by-law against him, so the complainant, who stands in his place, cannot be relieved from the operation thereof.

9

As the company would not be estopped from setting up the by-law against Rea, it cannot be estopped from setting it up against Rea's assignee.

10

No estoppel is created by the silence of the secretary when Rea made declaration to complainant.

The complainant then amended his bill and the defendant again demurred, and the Vice Chancellor sustained the demurrer.

Miller v. Hills. Ins. Co.

The Vice Chancellor, after stating the allegations in the bill, says :

"The Chancellor decided, in very plain terms, that no one of the officers of the company could bind the company in such case, but the complainant now seeks to go a step further and to overcome the views of the Chancellor by alleging that the company itself, in issuing such a policy with only a portion of the conditions annexed, committed a fraud upon every innocent holder. But on this very point the Chancellor has provided an answer very complete and which, I

think, is undisputed law everywhere, by declarin that every policy holder in such company (being mutual insurance company) is presumed to know th by-laws and conditions of insurance in the compan This being the law, it certainly applies to this case, i which the complainant held the policy so assigned t him from February 22d, 1882, to November 28th, 18 during which period he had the amplest of opportuni ty to learn all about the rights and liabilities of th insured, and the conditions upon which his right could be made secure. Clearly it is not for me to re view the Chancellor. Clearly, also, the law is tha the complainant is presumed to have known all of th conditions and by-laws on which mutual insuran companies issue their policies. I must sustain th demurrer, with costs."

The court committed no error in sustaining th demurrer.

I.

By this assignment the complainant took the plac of Rea. If the defendant could have pleaded the by law in question as a defense to a suit at law by Rea it can plead it as a defense to a suit by his assignee It is not necessary to refer to authorities for this gen eral principle. The rule is that the assignee acquire the rights, neither more nor less, of the assignor, an stands in his exact position.

II.

The policy set out in the bill contains the following "That the Hillsborough Mutual Fire Assurance Asso ciation have received of Runkle Rea, Flemington Raritan township, Hunterdon county, the sum o three dollars premium for assuring the sum of fifteen

hundred dollars on the property hereinafter mentioned *according to the terms of the constitution, by-laws and conditions of said Association*" and "that in consideration thereof The Hillsborough Mutual Fire Assurance Association, *according to the terms of their constitution, by-laws and conditions*, shall be subject and liable to pay," etc.

Such is the contract made with Rea and assigned to complainant.

III.

The complainant insists that the defendants, having annexed *some* of the conditions of insurance to the policy, are estopped from setting up any of the other conditions as a defense.

The annexed conditions *show on their face* that they are *not all* of the by-laws. The first by-law so annexed is entitled the *twelfth*, the second is entitled the *fifteenth*, &c. Fourteen conditions only are annexed and the last is entitled the *forty-sixth*.

But that defense, if any, would be available at law. It has been so held in a recent case in this court involving the construction of the same by-law.

Wood v. The Hillsborough Ins. Co.

At law the question has already been decided in this case. The court held that the defendant could not be estopped by the fact that some of the conditions were annexed, from setting up other conditions which were legally incorporated in the contract according to its terms.

Miller v. Hills. Fire Ins. Co., 18 Vroom 393.

IV.

The policy does *not* state that the insurance was effected according to the terms of their constitution,

by-laws and conditions *annexed* to the policy. It is true that certain conditions are annexed, but it does not state that they are *all* of the conditions of insurance of defendants. On the contrary the policy expressly states that the insurance is effected *according to the terms of the constitution, by-laws and conditions* of defendant, and this includes each and every by-law and condition in force at the time the policy was issued, and by-law 33 was one of them.

When the policy is made in express terms subject to the constitution, by-laws and conditions of the company they form part of the conditions on which the policy was issued, in the same manner as if they were introduced into the body of the policy.

Flanders on Fire Ins., p. 217.
Marshall v. Columbia Ins. Co., 7 Foster 157.
Holmes v. Charleston Mutual Ins. Co., 10 Met. 211.
Fabyan v. N. H. Ins. Co., 33 N. H. 203.
Houghton v. Mfgs. Mutual Ins. Co., 8 Met. 114.
Amesbury v. Bowditch Ins. Co., 6 Grey 202 3.
Eastern R. R. Co. v. Relief Fire Ins. Co., 98 Mass. 426.

No case can be found in the books which holds that a member of a mutual company is not bound by the constitution, by-laws and conditions thereof when they are made a condition of the policy.

V.

The defendant is a mutual company. The members of a mutual company become such by the mere fact of insurance, *and are charged with knowledge of its charter, by-laws and rules.*

Wood on Fire Ins. p. 4, § 1, last part, and authorities cited in Note I, and p. 871, § 509.
Flanders on Fire Ins., p. 18, and authorities cited in Note I.
Angel, § 10.

Bellville Ins. Co. v. Van Winkle, 1 Beas. 333, 342-3.

Mutual Ass'n v. Korn, 7 Cranch. (U. S.) p. 396.

Redstrake v. Cumberland Ins. Co., 15 Vr. 294, 302.

Mitchell v. Lycoming Ins. Co., 51 Penn. St. 402.

Coles v. Iowa State Mutual Ins. Co., 18 Iowa 426.

Dechl v. Adams Co. Mutual Ins. Co., 58 Penn. St. 443.

Woodfin v. Asville Mutual Ins. Co., 6 Jones' Law, N. C. 558.

In *Redstrake v. Cumberland Ins. Co.*, Judge Magie says (15 Vr. p. 302): "*The insured is a member of the company, and bound by its rules of which he is presumed to know.*"

In *Bellville Ins. Co. v. Van Winkle, it is held that all persons applying to become members of an incorporated insurance company must be presumed to have known the terms of its charter and by-laws.*

When the policy contains the words "according to the provisions of the act of incorporation and by-laws of the company," it is held as binding as if recited in full in the policy. This policy contains these words.

Fabyan v. Union Fire Ins. Co., 33 N. H. 203.

In *Simreal v. Dubuque Ins. Co.*, 18 Iowa, 319, by the terms of a policy the assured undertook to pay assessments made pursuant to the articles of association and by-laws, and the company agreed to pay according to the provisions of said articles. It was held that the articles of association and by-laws were to be regarded as a part of the policy as much as though written therein.

It will be remembered that in the suit at law *defendant pleads the by-law, and that plaintiff knew it.* Also that plaintiff was a member of defendant company, and as such is charged with knowledge of the rule and by-laws of the defendant.

VI.

The complainant also insists that defendant should be estopped from pleading said by-law because at the time the assignment was made he asked Rea "*if the policy contained all the contract of insurance*" to which Rea answered: "*Yes, it is all there.*"

The answer was litterally true. The policy *does* contain all the contract of insurance. There is no reference in the question or answer to the conditions annexed to the policy. He did not ask Rea whether the annexed conditions were *all* the conditions of insurance and Rea did not tell him whether they were or not. Neither was Rea or Scully, the Secretary, who was present, bound to tell him that the policy was subject to the constitution, by-laws and conditions of the company because the express language of the policy told him that. Neither were they bound to tell him that the conditions annexed to the policy were *all* the conditions of insurance: 1st. Because he did not ask it. 2d. Because that was apparent on the face of the annexed conditions, and 3d because the defendant is a mutual company and complainant was a member and bound by its rules and by-laws of which he is presumed to know.

Bellville Ins. Co. v. Van Winkle, 1 Beas. 333, 342–3.

But complainant's contract was with Rea and *not* with the Company. Rea was acting for himself in this matter and could not bind the company by anything he said or neglected to say. If complainant has any ground of complaint it is against Rea, and not the company, which had nothing whatever to do with the contract of assignment, except to ratify the assignment of the *written* policy.

Rea had no power to make any agreement different from that in the policy that would effect the Company if he had chosen to do so.

In *Redstrake v. Cumberland Ins. Co.*, Justice Magie says:

"If the question were whether an agreement might be made to dispense with the performance of such a condition I should doubt the existence of any power in the *officers or agents* to thus alter the fundamental rule of the company. Such is the view taken in Massachusetts where such conditions and by-laws seem common."

Hale v. Michigan Ins. Co., 6 Grey 169.

Brewer v. Chelsea Mutual Ins. Co., 14 Grey 203.

It was there held that there was no power in an officer or agent of the company to waive a condition required by the by-laws, in the face of an express provision for the alteration of the by-laws in a specified mode. This is in accord with the view that no waiver can be claimed from the acts of an agent in the face of an express limitation of his power in that regard.

Caton v. American Life Ins. Co., 4 Vr. 487.

The member of such a company is in my judgment debarred from insisting on the validity of a contract with his company which is different in its form from that prescribed by the rules governing him and his fellow members.

VII.

The complainant also asks that the policy be reformed so as to make it subject to the annexed conditions only.

The contract was made between the defendant and Rea. There is no charge in the bill that Rea did not have full knowledge of all the by-laws, including the one in question. There is no charge of fraud or misrepresentation by the parties to the contract or either of them. Rea in making the assignment to complainant was acting for himself and not as an officer of the company. He could not have bound the company if he had desired to do so. Complainant asks to have the policy reformed because Rea thus acting for himself failed to inform complainant that there were other conditions of insurance than those annexed to the

policy. The written policy assigned to him contai
the condition that the contract was subject to the co
stitution, by-laws and conditions of the company a
he asks to have it reformed because Rea did not te
him it was a different contract. Rea had no power,
he had chosen to do so, to bind the company by a
agreement with complainant that would alter or var
the written contract between him and the company a
expressed in the policy. That contract the Suprem
Court held included *all* the constitution, by-laws an
conditions of the company, and that defendant is no
estopped from pleading those not annexed to th
policy. To reform the policy as asked by complain
ant would be to change a written agreement and mak
it different from that agreed upon or even contemplat
ed by the original parties to the contract or either o
them. We submit that no case can be found in th
books where such a contract has ever been disturbe
by a court of equity.

J. D. BARTINE,
Solicitor of and of Counsel with Defendant