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New Jersey Supreme Court.

THE JERSEY CITY INSURANCE COM-
PANY

ads.

DAVID CARSON, who sues for the use
and benefit of ISRAEL BALDWIN.

In Case.
Defts' Brief.

The above action was brought on a policy of insurance against fire, written by the Jersey City Insurance Company, on a grist mill, machinery, engine and boiler owned by David Carson, and situate near Windsor, in the County of Mercer. The facts are briefly as follows:

Carson and Baldwin are brothers-in-law. Baldwin had endorsed for Carson, and otherwise become responsible for him to the amount, including interest, of about \$2,100.

See Carson's sworn statement, Exhibit E.

Under this state of facts an application was made to the Jersey City Insurance Company, in Carson's name, for a policy of \$2,500 on the mill, machinery, engine and boiler, as follows: Buildings, \$1,000; machinery, \$1,000; engine and boiler, \$500.

This application was authorized by Baldwin, and made through Thomas C. Pearce, an insurance agent in the vicinity, who had effected Baldwin's insurances for ten years.

See case, p. 8, l. 33 ×.

See case, p. 15, l. 24 ×.

The application was partly printed and partly written, and is marked B by the Chief Justice.

It begins as follows: "Flouring mill survey, Jersey City Insurance Company. The applicant will answer *particularly* the following questions, and sign the same, as description of the premises, and forming a part of the contract of insurance and a *warranty* on his part. Give clear and definite answers to all the questions."

Then follows a number of questions, to most of which answers were written. It was dated January 3d, 1880, and signed David Carson, applicant. There is no dispute that the signature is genuine.

Among other questions and answers are the following:

<p>" 19. Is there any incumbrance " on the property?</p> <p>If mortgaged state the amount?</p> <p>' Is there any other insurance?</p>	<p>" 19. Expects to borrow \$2,500, " and use this policy as a collateral. " ral.</p> <hr style="width: 50px; margin: 0 auto;"/> <p>" No."</p>
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The Jersey City Insurance Company did not issue a policy of \$2,500 on the property, but did write one for \$500, and sent it to Pearce. Pearce delivered it within a week to Mr. Baldwin, together with four other policies on the same property, to whom the loss, if any, was made payable.

See case, pp. 12 and 13.

POLICY.

The total premium was \$75. For this Pearce took Carson's note, with Baldwin's indorsement, and payable to himself or Baldwin, he does not remember which.

Case, p. 13.

This note Pearce got discounted at the Hightstown Bank, and the proceeds were passed to his credit. The defendants knew nothing of his taking a note until after the fire.

Case, pp. 13 and 14.

Baldwin swears that he had taken notes for premiums before, but that he had never told the defendants of his so doing, and that they did not know that he did it, and that, to his knowledge, they never knew of his trusting for premiums until they learned of it after the fire in this case.

Case, pp. 15 and 16.

Dr. Foote, the President of the Company, swears that he never knew of Pearce taking notes for premiums until he learned it in this case after the fire.

Case, pp. 19, 20.

The opening words of the policy are as follows :

“By this Policy of Insurance The Jersey City Insurance Company, in consideration of fifteen dollars, *and of the agreements and conditions herein contained*, do insure.” After stating the property and amounts, it continued in these words : “For a more particular description reference is had to the application and survey, No. 11,803, filed with this company, *which is a warranty on the part of the assured, and is hereby made a part of this policy.*”

The policy contained a number of conditions, among them the following :

“ 1. Matters Avoiding the Policy. If
 “ an application, survey, plan, or description of
 “ the property herein insured is referred to in this
 “ policy, *such application, survey, plan, or de-*
 “ *scription shall be considered a part of this con-*
 “ *tract, and a warranty by the assured and*
 “ *any false representation by the assured*
 “ *of the condition, situation, or occupancy of*
 “ *the property, or any omission to make known*
 “ *every fact material to the risk, or an over-valua-*
 “ *tion, or any misrepresentation, whatever, either*
 “ *in written application or otherwise ;” * * * **
 “ then, and in every such case, this policy shall be
 “ void.”

“ 2. Property not Covered by Policy.
 “ This company shall not be liable, by virtue of this
 “ policy, or any renewal thereof, for any loss that
 “ may occur before the premium has been actually
 “ paid to this company.”

“ 4. Interest of the Assured in Prop-
 “ **erty.** If the interest of the assured in the prop-
 “ erty be any other than the entire unconditional
 “ and sole ownership of the property for the use
 “ and benefit of the assured * * * it must be
 “ so represented to the company and so expressed
 “ in the written part of this policy otherwise the
 “ policy shall be void.”

“7. Relative to Issue and Cancellation of Policy. If any broker or other person than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, he shall be deemed to be the agent of the assured and not of this company, in any transaction relating to the insurance.”

“8. Statement by Insured in Case of Loss. Persons sustaining loss or damage by fire shall forthwith give notice of said loss in writing to the company, and within thirty days after the fire render a particular account of such loss signed and sworn to by them stating * * * * the actual cash value of the property and their interest therein, and encumbrances thereon.” * *

“Proofs of Loss to be made by the Owner.” * * * “All fraud or attempt at fraud by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.”

“Value of Property. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.”

“11. Limitation as to Suit or Action.

“It is furthermore hereby expressly agreed that no
 “suit or action against this company, for the recovery of any claim by virtue of this policy shall be
 “sustainable in any Court of law or equity, until after
 “full compliance by the assured, with all the foregoing requirements.”

“Agent no Authority to Change Conditions. And it is hereby understood and agreed
 “by and between this company and the assured,
 “that this policy is made and accepted upon the
 “foregoing terms and conditions, which are hereby
 “declared to be a part of this contract, and are
 “to be used and resorted to in order to determine
 “the rights and obligations of the parties hereto,
 “in all cases not herein otherwise specially provided for in writing.

“No agent of this company is authorized in any
 “respect to change the terms or conditions of this
 “policy; and they shall neither be changed nor
 “waived, except in writing, signed by the President
 “or Secretary of this company.

The policy was dated 8th of January, 1880.

At and before the time the application was signed and delivered, and at the time the policy was delivered there were upon the property four mortgages which were recorded and were liens thereon, in all of which David Carson was mortgagor, and which were as and in the order following:

Mortgagee.	Date.	Amount.
1. Jonathan D. Hutchinson.	6 April, 1847..	\$1,500
2. Ezekiel Cubberly.....	1 April, 1867..	1,000
3. John Taylor.....	31 March, 1877..	1,200
4. Israel Baldwin.....	30 Dec. 1879....	2,100

At the time the application for the policies was made Carson did not expect to borrow \$2,500, nor did he expect to give the policy as collateral. That statement in the application was false.

Carson's sworn statement.

On February 15, 1880, the mill was destroyed by fire.

Case, p. 2.

Within two weeks after the fire Baldwin paid to Pearce the amount of the note which had been given for the premiums on the five policies, and Pearce then took up the note and gave it to Baldwin, and after that sent the companies checks less his commissions, and in a day or two went to Jersey City and saw Dr. Foote, the President of the Jersey City Company. The checks were first received by Dr. Foote on the morning of February 17, and a few hours later he saw Mr. Pearce himself.

The Doctor refused to receive the checks, on two grounds. First, Because the premium not having been paid before the fire he would not complicate the matter by receiving it then. Second, Because of the peculiar character of the fire. But at Pearce's request they were left with Mr. Pearson, the Secretary of the company, with the understanding that he (Pearce) could get them whenever he called for them. They have never been used.

Case, pp. 18, 19, 13.

Three papers denominated in the case as proofs of loss have been furnished. The first early in March, the second on or about the 20th of March, and the third on or about the 31st March.

Case, pp. 6, 9, 10.

On 24th February, prior to the furnishing of any of these, Dr. Foote had seen Carson and from his

interview with him was led to believe that the fire was an incendiary one caused by Baldwin the beneficiary, each of the proofs of loss was defective, and in each case he refused to accept it, and stated to the person bringing it that the company would waive none of the conditions of the policy.

See Dr. Foote's testimony, case pp. 18-24.

Subsequently to the application for the policy and before the fire, four judgments were entered against Carson which were liens on the property, two in the Supreme Court and two in Mercer Circuit, aggregating upwards of \$2,100.

Case, pp .17-18.

In none of the proofs of loss was any mention made of any of these judgments: In all of them are substantial defects.

In the final proofs the value of the engine and boiler is stated to be \$1,500, and that they were a total loss; the earlier proofs omit to state their value.

Exhibit 3.

This was not true; the damage to the engine and boiler was \$200 not to exceed \$400.

See Carson's sworn statement Ex. E.

Under this state of facts the companies all refused to pay, and suits were brought against them all. This one was first tried, and is now here under the arrangement detailed on page 26 of the case.

We respectfully contend that the plaintiff is not entitled to recover for the following reasons.

I.

Because: the loss occurred before the premium had been actually paid to the company.

By the second condition of the policy it is expressly stipulated that the company shall not be liable by virtue of the policy for any loss that may occur before the premium has been ACTUALLY PAID TO THE COMPANY.

But the conditions of insurance annexed to the policy are by the terms of the policy made part of the contract between the parties, and have the same force and effect as if contained in the body of the policy.

Dewes *vs.* The Manhattan, 5 Vroom, 248.
Franklin F. I. Co. *vs.* Martin, 11 Vroom,
573.

Every condition expressed in a fire policy if not complied with defeats the insurance.

Idem, 249.

There is no dispute, that no money ever came to this company, and that no bill of exchange or other valuable thing came to them until after the fire, nor is it disputed that when tendered after the fire they stood upon their rights under the policy and refused to receive Pearce's check and never did receive it. See quotations above.

The defendants contend that this defence is overcome by the giving of the note to Pearce, its payment after the fire, and his subsequent tender of his check for the amount to the company.

Our answer to this is :

1. Pearce was not the company's agent, but that of the assured, and that the delivery of the note to him was no payment.

See Policy, Condition 7, Clause 1.

See Pearce testimony case, page 16, 134X where he says, "I did not myself issue policies for the
"Jersey City Company; if I received an appli-
"cation I would send it to the company. It

“ was subject to the company’s approval; if approved by the company, the policy would be forwarded to me.

“ Q. Your duty then was to do what ? A. Collect the premium—deliver the policy and collect the premium. I never had an authority to deliver the policy on credit.”

See also Dr. Foot e, case, p. 19.

2. Even if he had been an agent of the company he had no authority, to change the terms or conditions of the policy; this could only be done by the president or secretary of the company and not by them unless in writing.
3. Even if Pearce were an agent the giving of a note to him was not payment, but only a promise to pay, and was not ACTUAL payment to the company within the terms of the policy.
4. In point of fact Pearce had no authority to take a note, and the company were ignorant of his doing it.

In every view therefore it seems to be clear that the defendants are not liable for this loss, under the policy sued on, because it occurred before the actual payment of the premium to the company.

II.

Because, the policy itself was rendered void by false representations and omissions to make known material facts in the application.

By the first condition in the policy it is provided that every such false representation or omission shall avoid the risk.

By the same condition of the policy the application is made a part of the contract and a warranty by the assured.

In the stating part of the policy this application is mentioned and stated to be a warranty on the part of the assured, and that it was thereby made a part of the policy.

In the statement of the consideration it is said, that the insurance was in consideration of \$15 AND OF THE AGREEMENTS AND CONDITIONS HEREIN CONTAINED.

(See Policy.)

In the application itself the applicant is required to answer particularly the questions and sign the same as descriptive of the premises *and forming a part of the contract of insurance*, AND A WARRANTY ON HIS PART.

See Application.

Language can hardly be more explicit, nor the stress laid upon this particular increased. The assured cannot complain that he was not informed. At the very threshold of the transaction he is met with it.

He cannot look at the instructions given, as to what he is to do in applying, without learning that he is required to give certain information, and that that information is to form part of the contract of insurance and be a warranty on his part.

But this warranty was false.

1. It answered untruly when in answer to question nineteen it said expects to borrow \$2,500 and use this policy as a collateral.

Carson says he did not expect to borrow anything at that time.

See Carson's Testimony.

2. It answers untruly in that to the question "19
"Incumbrance. Is there any incumbrance on

“the property. If mortgaged state the amount.
 “It answers “Expects to borrow \$2,500 and
 use this policy as a collateral.”

3. But this warranty omitted to make known facts material to the risk.

At the time it was signed and afterwards, and at the time of the fire there were on the property four mortgages, amounting to \$5,800—yet when explicitly asked whether the property was mortgaged, not one of these mortgages was disclosed, but an evasive answer, which was itself false in fact, was given.

See application, Question and Answer 19.

In addition to this condition the fourth condition of the policy also covers this same ground and provides, “if the interest of the assured in the property be other than the entire unconditional and sole ownership of the property for the use and benefit of the assured it must be so represented to the company *and so expressed in the written part of the policy*, otherwise the policy shall be void.”

In this case it is clear that the interest of the assured was not entire, unconditional and sole, but that it was on the contrary only an equity of redemption after the four mortgages, amounting to \$5,800, all executed by the assured, yet not one mentioned in the application or the policy.

Certainly if anything can avoid a policy, it must be this.

But the whole property, building, land, machinery, engine and boiler, all were not worth much over \$6,000.

McGalliard the assessor says: the mill property was assessed before the engine and boiler were put in at \$4,000; after the steam fixtures were put in, it was assessed perhaps \$1,500 higher, that is \$5,500, add one third, and you have \$7,333, but that includes twenty-five acres of land.

Case, pp. 3 and 4.

The Court will perceive that to an assured, whose property was so incumbered, or to him, whose mortgage was last, and for whose benefit the policy was issued, the temptation to have a fire occur would be very great.

It is to avoid just such fires that these clauses were introduced into the contract.

The law on this point seems to be very clear.

1. Every condition expressed in a fire policy, if not complied with, avoids the policy.

Dewees v. Manhattan, 5 Vroom, 247.

Franklin F. Ins. Co. v. Martin, 11 Vroom, 573.

2. That when inquiry is made concerning the interest of the proposed assured, or when he undertakes to make a disclosure of his interest to operate upon the insurer, in settling the insurance, his representations must be substantially correct or the policy will be void.

Ins. Co. v. Woodruff, 2 Dutch, 550.

3. A warranty is part of the contract, and the validity of the entire contract depends upon the truth of the warranty, and a non-compliance is a breach of the contract itself, and makes the contract void.

Dewes v. Manhattan, 5 Vroom, 247.

4. The application when referred to in the policy is a warranty.

City Ins. Co. of Pittsburgh *v.* Bricker, 9
Ins. Law Journal, 784, Sup. Ct. of Penna.,
10 Nov., 1879.

Foot *v.* Etna Ins. Co., 4 Ins. Law Journal,
260; N. Y. Ct. of Appeals, January,
1875.

5. A misrepresentation in reply to a specific question is per force material, the fact of the question renders it so.

Dewes *v.* Manhattan, 5 Vroom, 247.

6. A misrepresentation in regard to incumbrances is material to the risk, and avoids the policy, and this, whether it denies the fact of their existence or omits to disclose them, or falsely states their amount.

Byers *v.* The Farmers Ins. Co., 9 Ins. Law J., 743; Ohio Sup. Ct., January Term, 1880.

Schumitsch *v.* American Ins. Co., 9 Ins. Law J., 56; Wisconsin Sup. Ct.

Gottzman *v.* Penna. Ins. Co., 56 Penna. State, 210.

Cox *v.* Etna Ins. Co., 29 Ind., 586.

Rohrback *v.* Germania Fire Ins. Co., 62 N. Y., 47.

Boffitt *v.* The Liv. Lon. & Globe, 1 Ins. Law J., 596; North Carolina Sup. Ct., January Term, 1872.

Savage *v.* Howard Ins. Co., 2 Ins. Law J.; N. Y. Ct. of Appeals, May, 1873.

- Etna Ins. Co. *v.* Resh. 8 Ins. L. J., 271 ;
Mich. Sup. Ct., January Term, 1879.
Southern Mu. Ins. Co. *v.* Yates, 6 Ins. L.
J., 625. ; Virginia Sup. Ct., 1877.
Bates Dig. of Fire Ins. Decisions (3d Ed.),
pages 248 to 263 inclusive.

III.

Because no proper proof of loss has ever been furnished as required by Condition 8 of the policy.

The paper delivered March second contained almost none of the requisites.

That of March twentieth, was also very defective, and especially so, in that it contained no reference to incumbrances.

That of March 31st, was also defective, and especially did not state the incumbrances truly. It referred to the four mortgages, but omitted all reference to the four judgments.

These judgments were all entered after the date of the application and amounted in the aggregate to upwards of \$2,100, which added to the mortgages was more than the whole property was worth.

This omission was a substantial one, and concealed a fact which it was very important the company should know.

As has been before remarked, this matter of incumbrances is one of the most fruitful causes of incendiary fires.

It is surprising how much oftener a heavily incumbered building burns than one which is unincumbered, and the reason of this clause, is, that the company may be informed on this subject, to the end that they may investigate the causes of the fire when such a building burns.

We submit that the attempted concealment of the fact of these judgments brought the case within the terms of the third clause of Condition 8 and wrought a forfeiture of all claim on the company under the policy.

IV.

The plaintiff was guilty of fraud and attempt at fraud by false swearing, in that he swore in his proofs of loss, that the engine and boiler were worth \$1,500, and they were a total loss.

See Schedule A. of the third proofs.

This was false, McGalliard, the Justice who made the first certificate of loss, says (Case, p. 3, l 34 t.) the engine and boiler were not totally destroyed, they were only a partial loss.

Carson, in his sworn statement, says in answer to the question whether the statement on this head in the proof of loss was true. "No, sir; it is not true; the damage to the engine and boiler is from \$200 to \$400.

Yet here is a falsehood in a most material respect, to wit, the amount of loss he was seeking to recover, and a claim is made for a sum three times as great in this item as that actually suffered.

Certainly, if there is any force in contracts of insurance, this presents a case where there is fraud and attempt at fraud sufficient to work a forfeiture of all claim upon the company.

We are aware that the plaintiff will answer that this was accident.

Our reply to this is : 1. Such accidents should not occur, and 2, however innocent Carson may have been, Baldwin, who procured the insurance, who caused the proof of loss to be prepared, who was to receive the fruits of the fraud, was neither ignorant nor innocent, and he cannot shield himself from the consequences of his fraud, by pleading the ignorance of his tool.

V.

Because this suit is prematurely brought. By the eleventh condition of the policy it is agreed that no suit or action shall be maintainable thereon "until after full compliance by the assured with all the foregoing requisites."

Certainly this has not been done. None of the proofs of loss have complied with the requirements of the policy, as has above been demonstrated. This being so, this action must fall.

Blossom v. Lycoming Ins. Co., 5 Ins. L. J.,
302; N. Y. Ct. of Appeals, 1876.

VI.

With regard to the plaintiff's offer to prove, printed on pages 24 and 25 of the case, we submit

that the offer was an attempt to introduce evidence not competent in law, and not within the issues of the case.

1. If it be true that the fact of the mortgages had been communicated to Pearce, Pearce had no power to waive any of the conditions of the policy.

See the policy.

2. That Pearce not being a policy writing agent, no knowledge communicated to him could bind the company or relieve the assured of any of the conditions of the policy.

Bush v. Westchester Fire Ins. Co., 5 Ins. Law J., 1876; N. Y. Ct. of Appeals, 1876.

Whitcomb v. Phoenix Mu. Ins. Co., 8 Ins. L. J., 624; U. S. Cir. Ct., Dist. of Mass.

3. That the application and policy being written instruments cannot be varied, altered or contradicted by parol evidence, and that in a Court of law these instruments must stand just as they read, and that this offer is an attempt to introduce testimony contrary to that rule.

Dewes v. Manhattan, 6 Vroom., 371.

Franklin F. Ins. Co. v. Martin, 11 Vroom., 573.

For the foregoing reasons, among others, we submit that this action cannot be maintained.

FLAVEL MCGEE.

The following is a copy of the sworn statement of David Carson, in evidence in the cause and referred to in this brief.

STATE OF NEW JERSEY, }
County of Hudson, } ss:

DAVID CARSON, of Washington Township, Mercer county, and State of New Jersey, being duly sworn according to law, deposes and says, in answer to the following interrogatories:

1st. Are you the owner of the property known as Carson's Mills, situated in Washington Township, Mercer county, New Jersey?

A. Yes, sir.

Q. Has the mill been burned, if so, when?

A. 15th of February, 1880, about one o'clock in the morning, the mill was discovered on fire by a black man; it was all burned up except the engine and boiler, and water wheel; the water wheel about half burnt; I think the engine and boiler was damaged by the fire about \$200, perhaps more.

Q. (Paper purporting to be proofs of loss, dated March 30th, 1880, shown witness.) Did you sign and make oath to these papers purporting to be proofs of loss to The Jersey City, Merchants, Long Island, Montauk and Republic Insurance Companies?

A. Yes, sir, I did.

Q. Had you ever read those papers?

A. No, sir.

Q. Had they ever been read to you?

A. No, sir.

Q. Did you know the contents of them?

A. I know what they were got up for, but did not know their contents; I supposed when I signed them they were all right.

Q. If those papers which you made oath to state that the value of the engine and boiler was \$1,500; of machinery, \$3,000; building, as described in policy, \$2,500; making the total value \$7,000, and the

whole amount of the loss sustained \$7,000, to wit, on building, \$2,500 ; machinery, \$5,000 ; engine and boiler, \$1,500, is the statement true ?

A. No, sir ; it is not true ; the damage to engine and boiler is from \$200 to \$400 ; I testified at Hightstown under oath that the damage to engine and boiler about \$200, not over \$400.

Q. Would you have signed and made oath to those papers purporting to be proofs of loss to the afore mentioned insurance companies, had you known their contents ?

A. No, sir, I shouldn't.

Q. State what amount of encumbrance was on the property known as Carson's Grist Mill, and destroyed by fire as before stated, when the survey to the Jersey City Insurance Company, signed by you and dated January 3d, 1880, was made ?

A. I signed the application on January 3d, 1880 ; at that time the following encumbrances was on the property : Mortgaged to Jonathan D. Hutchinson for \$1,500, dated April 6th, 1847, principal and interest from April 1st, 1878, unpaid ; also mortgaged to Ezekiel Cubberly for \$1,000, dated April 1st, 1867, principal and interest from April 1st, 1879, unpaid ; also mortgage to John Taylor for \$1,200, dated March 31st, 1877, principal and interest from March 31st, 1879, unpaid ; also mortgage to Israel Baldwin for \$2,100, dated December 30th, 1879, given to secure some notes he was the security on, viz. : One of \$600 to Tobias Polhemus ; also one for \$500, First National Bank of Hightstown N. J ; also one for \$300 to G. Wilson ; also one for \$466.53 to James Nutt ; also one of \$30 to Israel Baldwin, amounting in all to \$1,896.53, to secure the payment of which, with interest, the mortgage of \$2,100 was given. The above include all incumbrance on the property January 3, 1880 ; since that date the following judgments have been entered against the property, viz. : One in favor of George W. Middleton for \$314.80,

and costs; one in favor Lewis Gordon, for \$355.41, and costs; one in favor of First National Bank at Hightstown, entered January 6, 1880, for \$906.06; one in favor of Geo. Middleton and Tobias Polhemus for \$603.25, entered Jan'y 30, '80.

Q. What amount of the \$1,896.53 to secure the payment of which the mortgage for \$2,100 was given Mr. Baldwin has been paid by him?

A. Mr. Baldwin informs me he has taken up all but Mr. James Nutt's note, \$466.55; I have paid Mr. Baldwin towards paying off said mortgage \$490.

Q. Has anything else been paid on the indebtedness against your property stated above except the \$490 to Mr. Israel Baldwin?

A. No, sir.

Q. Were any of your creditors pressing you for the payment of their claims before the fire occurred?

A. Yes, Geo. W. Middleton on the two claims, also the First National Bank of Hightstown, they had levied on the engine and boiler and advertised them for sale, on the Tuesday following the fire or February 17, 1880.

Q. Had any steps been taken to prevent the sale?

A. Yes, sir.

Q. By whom?

A. Yes, sir; by Israel Baldwin and myself on the Saturday before the fire (February 14), we went to Trenton to A. G. Ritchey to try to stop the sale, he agreed to see the Chancellor on Monday and try to get an injunction to stop the sale.

Q. In your opinion was the fire caused by an incendiary or from accidental causes?

A. It was set on fire by some person unknown to me.

Q. Would any person be likely to be benefited by the fire?

A. It looked that way to me.

Q. Who?

A. I suppose the one who got the insurance money would be benefited by the fire?

Q. At the time your application for insurance was made January 3—80 did you expect to borrow \$,2500, and give the insurance policies for which you then made application as collateral?

A. No, I did not.

Q. Did you at that time think of placing another mortgage on the property?

A. No, sir; this was intended as collateral for the \$2,100 to Israel Baldwin; he thought he could sell the mortgage to a better advantage with the policies as collateral security; I was informed that Mr. Baldwin offered to sell the mortgage for \$1,600 to Aaron Taylor.

Q. At whose suggestion did you apply for the insurance?

A. I had it insured at the request of Israel Baldwin; he thought he could get rid of the mortgage better.

Q. Would you have got the insurance on the mill had it not been for Mr. Baldwin?

A. Well, I don't think I should.

Q. Could anyone except Mr. Baldwin have been benefited by the fire?

A. I don't see as they could.

Q. How long have you owned those mills?

A. Thirty-three years this April; I bought in April, 1847; I have occupied the premises ever since that date.

Q. When did you first have the mill insured?

A. January 3, 1880.

Q. Was that application which you signed January 3, 1880, the first you ever made for insurance in the mill property?

A. Yes.

Q. Have you been notified that the proofs of loss furnished to the insurance companies are not satisfactory and incomplete?

A. Yes, I had a statement from you.

Q. How much was the premium in each of the fire policies issued by the insurance companies, before mentioned for \$500, each upon your application of January 3, 1880.

A. The premium would be \$15, apiece.

Q. Have you paid that premium?

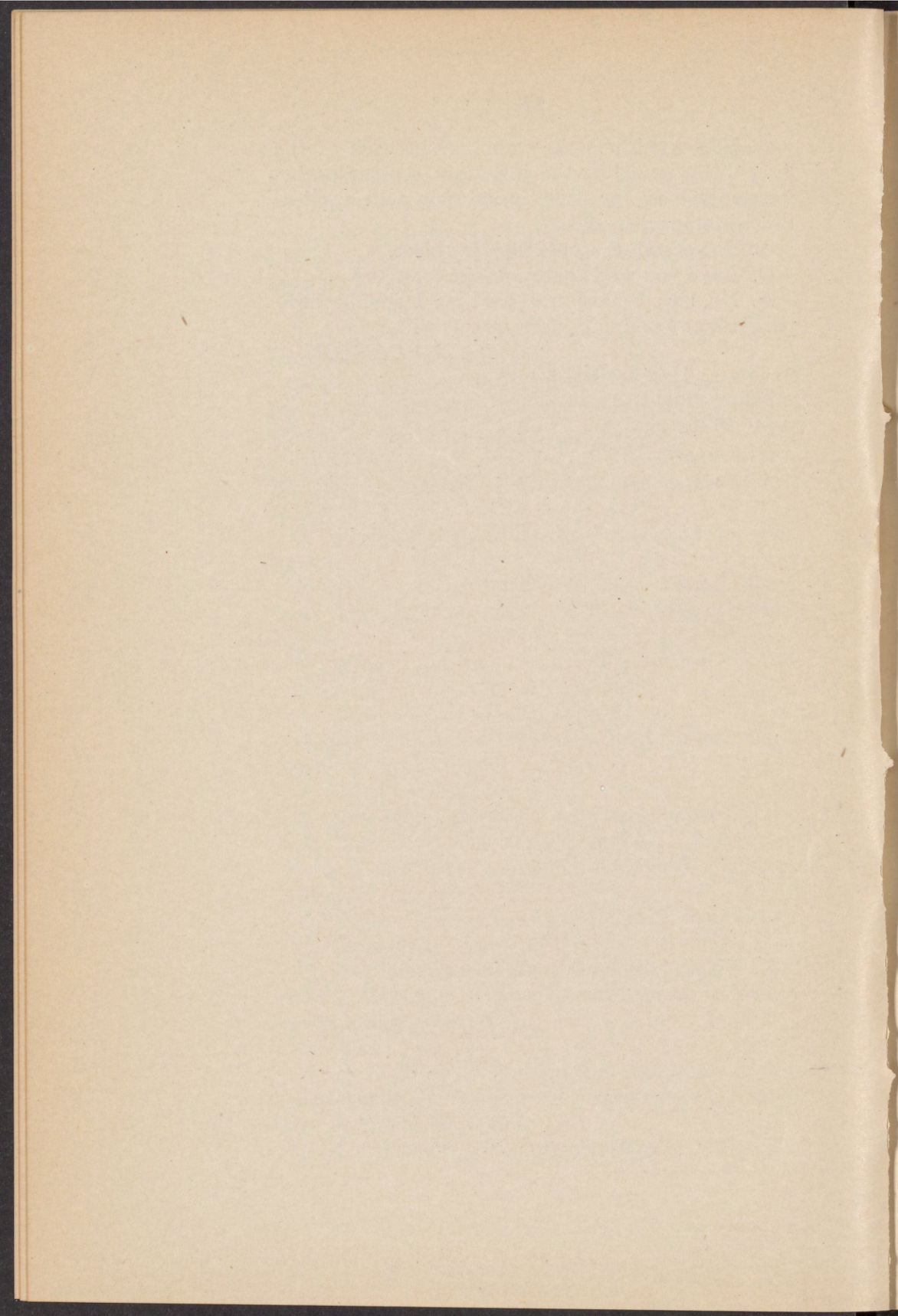
A. No, sir; I have not paid it; I should have paid it, but I had nothing to pay it with.

DAVID CARSON.

Sworn and subscribed }
before me this April, }
27, 1880.

W. MUIRHEID

M. C. C.



New Jersey State Library

N. J. Supreme Court.

THE JERSEY CITY INSURANCE COM-
PANY

vs.

DAVID CARSON, who sues, &c.

In Case.

Reply of Defendants' Counsel to the Briefs of Mr. Richey and Mr. Beasley.

We add the following to the Brief of Mr. McGee previously prepared and herewith submitted, observing the order of Mr. Beasley's brief chiefly:

I.

Mr. Beasley's first suggestion is that there is an acknowledgment of the receipt of the premium, and that such acknowledgment estops the company from setting up the contrary.

We reply—

1. There is no such acknowledgment in the policy.

The words are: "In consideration of fifteen dollars, and of the agreements and conditions herein contained."

There is no acknowledgment of receipt in these words.

2. The policy was never delivered. It was intrusted to Pearce to deliver when the premium should be paid.

Pearce says (pp. 16 and 17): "To my knowledge the company never knew of my trusting for premiums outside of this case. I did not myself issue policies for the Jersey City Company. If I received an application I would send it to the company. It was subject to the company's approval—if approved by the company the policy would be forwarded to me."

"Q. Your duty, then, was to do what!

"A. Collect the premium—deliver the policy, and collect the premium; I never had any authority to deliver the policy on credit."

See also Dr. Foote (case, p. 20):

"Q. Did you ever have any knowledge of Mr. Pearce delivering policies and taking notes for premiums?

"A. No, sir, except in this case; not until since this loss, and I heard him so state on the stand?"

3. The express condition of the policy is that the company shall not be liable for any loss that may occur before the premium has been *actually paid to the company*.

This was not done, and has never yet been done; and nobody had any authority to waive this condi-

tion, except the President or Secretary of the company, and they could *only do it in writing*.

See last clause of Policy.

There is no pretense that this has been done.

The Bach case, 6 Vroom, 429, is not in point.

1. In that case the policy contained a formal acknowledgment of the receipt of the premium.

Our policy does not.

See Policy.

2. In that case the insured applied to his agent, and he to the general agent of the company. The policy was afterwards sent directly from the office of the company to the agent to whom the plaintiff had applied. Accompanying the policy was a letter stating that the policy was "*for*" the plaintiff. There was no restriction as to the delivery of the policy. In this case, on the contrary, the policy was intrusted to Pearce on a specific understanding—namely, that he would deliver it upon receipt of the premium, not otherwise.

This was the condition upon which all policies were given to him ; he so testifies, and so does Dr. Foote.

See Abstract of Testimony given above.

II.

His next point is that Pearce was the agent of the company, and that they are therefore bound by his acts, we reply :

1. That Pearce was not such agent is sufficiently argued in Mr. McGee's brief.
2. Even if he had been he had no authority to waive any condition of the policy.

The policy specifically provides that: "No agent of this company is authorized in any respect to change the terms or conditions of this policy; and they shall neither be changed nor waived, except in writing signed by the President or Secretary of this company."

This is very plain and the plaintiff is bound by it.

One of the conditions of the policy is that the company will not be liable for any loss occurring before actual payment of the premium.

If he took the policy without so actually paying he did so at his own risk, and he can not now be permitted to shield himself under any supposed authority of Pearce who was his agent, nor could he under the policy even if Pearce were really the company's agent.

Mr. Beasley endeavors to argue that because Baldwin gave Pearce a note for the premium and Pearce had that note discounted therefore the premium was actually paid to the company we hardly think that he is serious in this argument but if so, it is answered by some very simple suggestions.

1. A note is not payment, but merely promise of payment.
2. The getting a note discounted, is not payment by the maker, but merely a loan by the bank, on the credit of the promises of the maker and endorser, the latter being first liable to the bank in case of default in payment of the note at maturity.

3. Giving a note to Pearce was not payment to the company.

The argument of the learned counsel seems to be founded on that of Mr. Micawber, who when he gave a note exclaimed thank the Lord that debts paid,

The illustration put by Mr. Beasley, namely that if Pearce had loaned the money to Baldwin and then received it as payment of the premium constitutes an entirely different state of affairs, and as it supposes a condition that does not exist does not require a reply.

III.

The next matter taken up, is that of the answers to the three interrogatories in question 19 of the application.

The contention is that, as there is no specific answer to the second interrogation, namely if mortgaged, state the amount, therefore there is no violation of the policy and no breach of the warranty therein contained. By reference to the application or Flouring Mill Survey as it is called, the Court will see that it contains twenty-two subjects of inquiry. The subject matter of each of which is printed in large course print, and each of which contains from one to ten inquiries relating to that particular subject matter.

Bearing this in mind, look at subject 19. The questions and answers are as follows:

19. Incumbrances.—Is there any incumbrance on the property? If mortgaged state the amount.	Expects to borrow \$2,500, and use this policy as collateral.
Is there any insurance by the mortgagee?	No.

Suppose now to the first interrogatory the applicant had answered no.

Can there be any doubt that the Court would construe the dash opposite the second interrogatory to be, and to be understood as being, a repetition of that answer.

Suppose to the first he had placed a dash, and to the second answered no, would the Court have any difficulty in holding that the one answer covered and was intended to cover both questions.

But wherein is this case different?

Bear in mind that the two questions relate to the same subject-matter. The second is useful only in case the first be answered in the affirmative. Now, the answer to the first is: "Expects to borrow \$2,500, and use this policy as a collateral."

Does not that answer mean the company to understand that there is no present incumbrance on the property, but that the applicant intends to place one thereon to the amount of \$2,500, and use this policy as a collateral to assist in procuring the loan. Stop now at this question. Leave out all the others. Is there not already a case made out for the company?

Was this answer true? At that very time there were \$5,800 of incumbrances of record against that property, all executed by and known to the applicant.

Can it be possible that learned counsel seriously contends before the Court that this answer was not a false representation in answer to a specific question, and therefore a breach of warranty within the terms of the policy.

Suppose this were any ordinary contract between man and man, do your Honors doubt that any Court would hesitate for a moment in construing it to mean, and to be understood to mean, that there were then no incumbrances on the property.

If so, then this policy is entitled to the same ruling, and our Courts have so held. For many cases on this point, see Mr. McGee's brief (pp. 13, 14, 15).

Now, go a step further. The applicant has answered to interrogatory one of this subject-matter, that there are no present incumbrances.

The next direction is: If mortgaged, state the amount. To this he draws a dash.

Would any man of ordinary judgment doubt that this dash is intended to convey to the mind of the insurer the idea that the applicant considers that he has already disposed of this subject in the negative. That he has included this less in that greater; that when he said there were no incumbrances, he necessarily said there were no mortgages.

To our minds this reasoning seems unanswerable, and certainly the Court will apply to this policy the same reasoning that is applied to other contracts, namely, that when the contract is capable of reasonable interpretation, it shall stand or fall thereby.

But go one step further, and all doubt seems to us to be set at rest.

Immediately thereunder are these words: "Make this policy payable to Israel Baldwin, as his interest may appear."

And the policy itself is drawn, "loss, if *any*, payable to Israel Baldwin, mortgagee."

Here you have the whole story.

The applicant intended the company to believe that there were no incumbrances then on the property; that he intended to borrow \$2,500, and place thereon an incumbrance for that amount, and that Israel Baldwin was to be the person who was to hold that incumbrance.

The company did so believe, and issued the policy accordingly. That the answer was untrue in fact. That it was intended to mislead, and that it did mislead—we think there is no reasonable room for honest doubt.

If so, it avoids the policy.

See cases cited by Mr. McGee.

If not, even if it be only a case of omission, the result is the same. The policy (Condition 1) says, "any omission to make known any fact material to the risk" shall avoid the policy. But the existence of the question makes the fact *material to the risk*. There is no room for construction. There is the contract. This fact is material. An omission, therefore, to make known this fact avoids the policy. Here is such omission. *Therefore* the policy is avoided.

So it seems to us so that which ever way these questions and answers be considered they present an unanswerable defence to this action.

Our learned friend makes a point of our statement that we stand not upon fraud in fact in the application, but put ourselves upon the breach of warranty and omission to make known the fact of the encumbrances in the application.

We have no intention of abandoning that ground—we took no testimony on that point; we say now, as we said then, these answers constitute a breach of the warranty in the two points named, and as such avoid the policy, and render it unnecessary to go into the domain of actual fraud, or to enter upon an investigation of that subject, excepting in so far as that is necessarily implied in the legal fraud which is proven.

Under this view of the case, an extended examination of the authorities cited on that head is not necessary, nor to say of them further that they are not in point.

In addition to the authorities cited by Mr. McGee, see, as applicable to this branch of the subject, the following:

Battles *vs.* York Co., M. F. I. Co., 41
Maine, 208; 4 Bennett's Fire Ins. Cases,
151.

Bowditch Mu. F. Ins. Co. *vs.* Winslow, 8 Gray, 38; 4 Bennett, 167.

Richardson *vs.* Maine Ins. Co., 46 Maine, 394; 4 Bennett, 441.

Hutchings *vs.* Cleveland Mu. Ins. Co., 11 Ohio State, 477; 4 Bennett, 510.

Abbott *vs.* Shawmut Mu. F. Ins. Co., 3 Allen, 213; 4 Bennett, 555.

Falls *vs.* Conway Mu. F. Ins. Co., Mass., Sup. Ct., Oct. T., 1863; 4 Bennett, 706.

Town *vs.* Fitchburg Fire Ins. Co., Mass., Sup. Ct. Oct. T., 1863; 4 Bennett, 707.

Davenport *vs.* N. E. Mu. F. I. Co., 6 Cushing, 340; 3 Bennett, 129.

Hayward *vs.* N. E. Mu. F. I. Co., 10 Cushing, 444; 3 Bennett, 439.

IV.

Ownership: This question has already been treated by Mr. McGee—permit us to add only this: When in answer to the questions, “Is there any other person interested in the property?—if so state the interest,” the applicant answered “None,” when at that time there were four persons holding mortgages on the property, certainly the answer cannot be construed to be truthful.

The question is not, did Carson have an insurable interest in the property, nor whether the title stood in his name, but whether any other person was interested therein, and to this investigation he returned an answer that was false in fact.

Further, the company cannot be said to have waived this condition as to the three who were never disclosed, by recognizing one, who was named not as a present but a prospective incumbrance.

This consideration seems to us to establish the breach of warranty.

As to the materiality and the effect thereof, it is not necessary to repeat what has already been said

V.

With regard to the proofs of loss, a very elaborate argument is made to establish—

1. That the failure to furnish proofs of loss within 30 days has been waived.
2. That the failure to furnish proper proofs at any time has been waived.
3. That sufficient proofs have been furnished.
4. That anyhow the defendants cannot set up this defect for the reason they have not pleaded it.

Let us take up these contentions in inverse order :

1. As to pleading.

In the declaration, this averment occurs :

“And the said plaintiff avers that afterwards and
 “ within thirty days of the time of the
 “ said loss and more than sixty days
 “ before the commencement of this suit, to
 “ wit: on the fifteenth day of March, A. D.
 “ eighteen hundred and eighty, *due* notice and
 “ proof of said loss was made by the plaintiff
 “ and received by the defendants, *in accord-*
 “ *ance* with the terms and provisions of said pol-
 “ icy, at Jersey City, to wit: at Trenton, in the
 “ County aforesaid.”

Here is a specific averment to this declaration we pleaded the general issue, which puts at issue every specific averment therein contained, and we submit to the Court that to any matter so specifically averred in the declaration no special plea is necessary.

In fact, under the ruling in *Deweese vs. Manhattan*
5 Vroom, 253,

none of our special pleas were necessary ; still for greater precaution they were introduced, but certainly to so specific an averment no special plea can be required.

2. As to the sufficiency of the proofs.

That the first two papers furnished were defective does not seem to be denied.

The final proof is in evidence and marked No. 3, M. B.

A glance at it shows that it contains no statement of incumbrances whatever.

Yet, at that time, there were not only mortgages but judgments.

Condition 8 of the policy requires, that the proofs of loss shall be in writing and shall be signed and sworn to by the insured, and shall give all incumbrances on the property.

Is it pretended that any such proof has ever been rendered ?

It is said that a list of the incumbrances was at one time afterward handed to the president of the company, on a loose piece of paper. But this piece of paper has no connection with the proof of loss and is neither signed nor sworn to and is not in any respect a compliance with the conditions of the policy.

We submit to the Court, that a solemn contract has some value, and that the Court will not permit parties to overthrow it by construction, when its terms are so plain as those of this policy.

3. As to waiver :

The argument of the learned counsel seems to be this.—

Because Dr. Foote did not in each conversation and each letter go over all the grounds of defense that the company intended to make, therefore the company must be held to have waived every condition of the policy the breach of which was not specified in every conversation.

It is true that Dr. Foote did mention several specific grounds of objection to each proof of loss, notable among which were the non-payment of premium, and failure to set forth incumbrances which latter defect has never yet been remedied, but in addition to that he did distinctly declare each time that the company "*waived none of the conditions of the policy.*" What language can be stronger or more comprehensive. The insured is notified that he must comply with *all* the conditions of the policy, and that he must do so at his peril, and the reason is given, namely that he considered the fire, an incendiary fire.

He said this to Pearce.

Case, page 20.

He said it to Baldwin.

Same page.

He repeated it to Worthington.

Page 21.

Baldwin does not deny it. He pleads forgetfulness : He says : (page 8). "I do not think he did "he may have done so—I won't say positively" and so following :

Worthington says p. 10. he may have made that remark.

In his letter to Carson of March, Exhibit L. Dr. Foote says so, very positively, fully and circumstantially.

We ask that the Court will read that letter carefully that Dr. Foote did so notify all interested we think there can be no doubt.

The Dr. has been an insurance adjuster for over twenty years.

He was the sufferer in the Maackin's case.

9 Vroom, 569.

He is thoroughly familiar with the doctrine of waiver as applied by the Courts of New Jersey.

He believes this fire to be an incendiary fire, and that Baldwin was complicated; and under the statements of Pearce and Carson had good reason to so believe, and he therefore meant to take advantage of every defense available, and not to waive any condition thereof.

Under these circumstances we think the Court will find great difficulty in holding that the Doctor, when he said that the company waived *none* of the conditions of the policy, meant anything less than he said.

It is also contended that the company waived this matter of time, because after its expiration they did not explicitly refuse to pay on that ground.

The reply to that has already been covered. The President said, every time, "We waive none of the conditions.

When the question of premium was up he said, "You didn't pay it."

When proofs were being talked about he said, "They are defective."

He at no time put his refusal on one ground, but at all times put it upon all grounds.

There was no ambiguity about his position in the case, and the plaintiff cannot successfully assert that anybody waived anything.

There is another very important consideration not to be overlooked.

It is this :

By the contract no one, not even the President of the company, had power to waive any condition of the policy, *except in writing, signed by the President or Secretary.*

Is there any evidence in the case of any written waiver? If so, we have failed to discover it; but if not, then no waiver can be reached by construction.

It is further contended that the false swearing regarding the value of the engine and boiler was not wilful.

On this point we refer to the brief of Mr. McGee, pp. 16 and 17.

We also call the attention of the Court, to that very familiar principal of law, that a man will always be held to have intended the consequences of his acts.

The point to which the false swearing was addressed, was directly important. The result of the falsehood if successful was to be the very considerable pecuniary advantage of the affiant. The fact sworn to was known both by Carson and Baldwin to be otherwise than as stated in the sworn paper.

See Carson's sworn statement, annexed to Mr. McGee's brief.

This being so we are at a loss to see how the Court can escape the contention that we make, namely that the swearing was false and that it vitiates the policy.

Before closing permit us to call the attention of the Court on the question of waiver to the rule, that the doctrine of waiver does not apply to the contract itself and that the warranty is an essential part of it.

We have covered the points so far as we deem it essential.

Respectfully submitted.

FLAVEL MCGEE,
JOSEPH D. BEDLE,

N. J. Court of Errors and Appeals.

THE JERSEY CITY INSURANCE COM-
PANY,
Plaintiffs in Error,

vs.

DAVID CARSON, who sues, &c.,
Defendant in Error.

In Error to
New Jersey
Supreme
Court.

Brief of Counsel for Plaintiff in Error.

The briefs of the counsel for defendants below, the plaintiffs in error here, were very voluminous, and covered all the points which have been raised in the cause. Copies enough are left to place before this Court and counsel have therefore for the sake of economy taken the liberty of binding them together, with such additional suggestions only as seemed to them to be due, in answer to the views expressed by the learned Judge who read the opinion of the Supreme Court, which additional suggestions are as follows:

I.

In addition to what was said in the earlier briefs regarding subdivision 19, of the application for insurance, it is submitted that the whole of that subdivision with the replies thereto, must be taken together, and must also be considered in connection with subdivision 20, and that when so read, the second query of Article 19, is not unanswered.

The title of the subdivision is "Incumbrance." That is, that is the subject matter of the whole article.

The first query is, "Is there any incumbrance on the property?" using the word incumbrance generally as applying to all incumbrances.

To that the applicant answered: "Expects to borrow \$2500, and use this policy as a collateral. The second query restricts the same subject matter to a narrower range, viz.: "If mortgaged, state the amount."

To this the applicant writes a dash —.

Now can any fair man read these two together and say that they mean any thing else than this, to wit, that the only incumbrance on the property was a proposed incumbrance to be created, by borrowing \$2500, and that of the special species of incumbrance known as mortgage, there was as yet none. It seems to me that any other construction is disingenuous.

This view is strengthened by the third clause of the article which is, "Is there any insurance by the mortgagee?" To which the applicant answers, No, and the sense is complete. There is no incumbrance—a mortgage is proposed; there is no insurance by such mortgagee, but this policy is proposed to be in lieu of such insurance.

If now you go a step further and read immediately below, make this policy payable to Israel Baldwin as his interest may appear, the conclusion is irresistible that the foregoing was intended to mean what has been said, and that Israel Baldwin was to be the holder of the proposed incumbrance, and that it meant and could mean nothing else.

Further I submit, that there is nothing in this application that will justify the Court in straining the law or treating it in anywise different from other contracts, but that it is entitled to a fair construction to effectuate the intention of the parties.

As was well said by Judge Davies in *Bigler v. N. Y. Central Ins. Co.*, 22 N. Y. 405 :

“ We are not at liberty to make a new contract for the parties, but to inquire whether that made has in fact, been violated.”

II.

The learned Judge says that the clause in the policy making the insurance broker the agent of the insured, did not debar the company of the power to appoint agents, and clothe them with such authority, general, special or limited, as might be advisable, and the delegation of such authority will carry with it such powers and consequences as are incident to the relation of principal and agent within the scope of the authority conferred.

That Pearce was constituted the agent of the company for the purpose of receiving premiums on policies negotiated by him, and that payment of such premiums to him was payment to the company.

And that the premium on this policy was paid when the note was discounted, and the proceeds passed to Pearce's credit in the bank.

To what already is said in the brief before the Supreme Court, I desire merely to add that the contract between the parties uses these words :

Condition 7. “ If any broker or other person than the assured have procured this policy,” * * *
* * * “ he shall be deemed to be the agent of the assured, and *not* of this company, *in any transaction relating to the insurance.*” Case, p. 61, line 10. *

Condition 2. “ This company shall not be liable by virtue of this policy” * * * * for any loss that may occur before the premium has been *actually paid to this company.*” Case p. 59, lines 12-15.

It would seem as if the ruling of the learned Judge could hardly be sustained without making a new contract for the parties.

III.

WAIVER.

The clause in the policy, p. 66, which is "No agent of this company is authorized in any respect to change the terms or *conditions* of this policy; and they shall neither be changed or waived except in writing signed by the president or secretary of this company."

The conditions relating to proofs of loss are expressly made a part of the contract, and very important ones too, and I fail to see how the Court can hold that they are not included in this prohibition. It may be that the words do not mean as much, but if so the English language fails to provide words sufficiently comprehensive to attain that end.

Take the following illustration as to the importance of this provision regarding proofs of loss:

A owns a house worth \$900. He takes out two policies in companies located at points distant from each other, for \$900 each, without notice to either company of the other policy. The policies require the proofs of loss to distinctly state what other insurance is on the property, and the policies each contain clauses of avoidance in case of other insurance without notice.

Is it not at once apparent that this clause regarding proofs of loss is as important as any part of the contract?

Yet if the Court below is right, such a clause may be waived by any agent of the company, either by inadvertance or collusion, and the company be powerless to prevent it, notwithstanding this precaution in their policy.

I am loth to believe that the Court will go so far.

IV.

One point was made and strenuously urged below which seems to have been passed by without comment by that Court in its opinion, namely, that this suit is not *yet* maintainable.

Lest we should be held to have overlooked it, we desire here to repeat it :

The policy provides, condition II, as follows : "It is
" furthermore hereby expressly provided and agreed,
" that no suit or action against this company, for the
" recovery of any claim by virtue of this policy shall
" be sustainable in any Court of law or equity, until
" after full compliance by the assured with all the
" foregoing requirements."

Case, pp. 64 and 65.

One of the foregoing requirements referred to is contained in condition 8, and is : "Persons sustaining loss
" or damage by fire shall" * * "render a
particular account of such loss, *signed and sworn* to by
them * * * * giving * * *
all encumbrances thereon."

Case, p. 61, lines 20-31.

There is no pretense in this case that any proof of loss has ever yet been served or furnished, which contained an account of the incumbrances on the property, *and which was signed and sworn to.*

Every proof which was signed and sworn to omitted all reference to incumbrances.

There was a statement of incumbrances furnished by somebody—Exhibit 10, M. B., Case p. 81, but it was not sworn to, nor was it signed by anybody connected with the case.

But until such a proof of loss is furnished, no suit can be maintained, and as a consequence this suit falls, if there is any force in contracts.

For the reasons above stated, and those contained in the briefs before the Supreme Court herewith also furnished, I respectfully ask that the judgment of the Supreme Court be reversed.

FLAVEL McGEE.

NEW JERSEY SUPREME COURT.

DAVID CARSON (*who sues for*
the use of Israel Baldwin) } *In Case.*
v. } *Case*
JERSEY CITY INSURANCE } *Certified.*
COMPANY.

Messrs. A. G. Richey and Mercer Beasley, Jr., for
Plaintiff.

Brief of A. G. Richey.

The execution of the policy sued on was admitted by the defendants.

The mill was burned on the 15th of February, 1880.

See section 8 of policy, which requires notice.

Notice was given, on the 16th of February, to Mr. Pearce, by Mr. Baldwin, of the fire.

Page 5, line 33, of state of case.

Mr. Pearce says, pages 5 and 6 of state of case—
 “Same day I notified the company.”

Page 6, line 2.

Exhibit No. 1 is proof of loss, made by D. Carson on 2d of March, 1880, before James McGalliard, justice of the peace.

Page 6 of state of case, Mr. Baldwin said—

“I sent this proof of loss to Dr. Foote, president of Jersey City Insurance Company, on 2d or 3d of March, 1880, by mail; I was notified by Mr. Carson that Dr. Foote said they were not right.”

Exhibit No. 2. Proof of loss was made out on 20th of March—I think on 22d or 23d of March—by Mr. Baldwin; handed to Dr. Foote.

Page 6, line 25—

“Dr. Foote read over the proof of loss, and he objected to it, on the ground that the written portions of the other policies were not written out; I don't think he made *any other objection.*”

Page 6, line 30—

“I then employed Mr. Worthington to make out another proof of loss.”

Proof of loss No. 3, made by Mr. Worthington March 30th, 1880.

Page 9, line 25—

“I served this proof of loss on Dr. Foote on 30th or 31st March, 1880.”

Page 9, line 33—

Dr. Foote objected to the amount on engine and boiler—\$1500.

“He made no other objection.”

Certificate of Justice McGalliard, dated March 25th, 1880, as referred to in section 8 of policy.

The preliminary proofs of loss were given; the last one, given by Mr. Worthington, was received without objection.

Exhibit No. 10. List of encumbrances furnished by Mr. Worthington.

This is a waiver of all objections as to the form or time of proof of loss.

State Ins. Co. *v.* Maackens, 9 Vroom 564.

On page 568 Justice Depue said—

“If the proof of loss is not strictly in accordance with the contract of insurance, the informality will be waived by the failure to object to its form, and making the objection to the payment on other grounds.”

See also—

Francis *v.* Ins. Co., 1 Dutcher 78.

Bush *v.* Humbolt Fire Ins. Co., 6 Vroom 429.

Jones *v.* Mechanics' Ins. Co., 7 Vroom 29.

Plaintiff also presented and proved his title to the premises insured.

This proof established plaintiff's right to recover.

But defendants have given us notice with their plea of general issue, of several special matters which they intend to rely on, in bar of plaintiff's action.

First. That the premium for the insurance covered by the policy mentioned in the plaintiff's declaration has never been actually paid to these defendants, contrary to the second condition of the policy.

Facts.—See letter of Pierce to Jersey City Ins. Co., *Exhibit F* for defendants, dated Feb. 10th, 1880—

“The premium was settled at the time it was insured.”

Page 14, line 18, of the case, Mr. Pearce said :

“I had received a note for the premium before the policy was delivered; I took the note on my own responsibility; the discount on note was paid by J. Baldwin; I got the note discounted; the proceeds passed *to my credit*.

“I held the premium for a month, and sometimes longer, before remitting it to the insurance company.”

Page 15, line 8—

“I have taken policies for this company for fifteen years; I am agent for this company and have been for fifteen years.”

A condition in a policy of insurance containing a clause that no insurance shall be binding until premium is paid, may be waived.

Bodine *v.* Exchange Fire Ins. Co., 51 N. Y. Ct. of App. 117.

Baptist Church *v.* Brooklyn Ins. Co., 19 Id. 306.

Sheldon *v.* Atlantic Fire Ins. Co., 26 Id. 460.

Wood *v.* Poughkeepsie Ins. Co., 32 Id. 619.

Vanshoik *v.* Niagara Ins. Co., 68 Id. 439.

In vol. 51 of New York Reports, p. 122, in the case of Bodine *v.* Exchange Fire Ins. Co., the court said :

“A provision in a policy already executed and delivered, so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect, except to impart convenient information to persons who may wish to be insured, as such a provision could have no effect *upon the delivered and perfected contract* in which it was contained.”

On page 123 of the same book and case, the court said :

“If the agent or his clerk waive the pre-payment of

premiums without authority from the company, it can lose nothing, as the agent becomes responsible for the amount of the premiums as if the same had been paid *to him in cash*.

In the letter of Pearce to the company, dated Feb. 10th, 1880, before the fire, he said—

“The premium was settled at the time it was insured.”

The mere fact that the agent only transmitted premiums to the company at stated periods, and although he received this premium when the mill was insured and had not sent it to the company until some time afterwards, cannot affect the contract of insurance.

The next ground of defence made by the defendants, of which they have given notice, is that the application and survey was a warranty on the part of said plaintiff, and that in the said application made by the plaintiff in this case *he made a false representation and misrepresentation* of the condition of the property insured, which has rendered the policy void.

See Quest. 19 in the application, *and answer thereto—*

“*If mortgaged, state the amount?*”

To this question there is no answer made.

Where is the false representation? Plaintiff made no answer at all. *How can it be said to be false?*

The defendants knew that Carson had *given a mortgage to Baldwin* on this mill property when they *issued the policy*.

For in filling up the policy they inserted these words, “*Loss, if any, payable to Israel Baldwin’s mortgagee.*”

They knew of Baldwin’s mortgage before the policy was executed by them.

These words are in the same handwriting as the balance *of the policy*.

Pearce must have written about this mortgage.

The defendants had information of the mortgages on the premises insured outside of the written application.

It is the same as if there was no such question. We insist that where the insured does not answer the question at all there is no *breach of warranty*. We refer to Sec. 166 of May on Insurance, where he says—

“And though the insured do not answer certain questions at all and give a negative answer to a general question as to his knowledge of any other circumstances affecting the risk, such answer cannot be made applicable to another question in the same application which is unanswered, but which if negatived would be untruly answered, nor will the failure to answer at all vitiate the policy. The issuing of a policy on an application which contains no answer to certain questions, is a waiver of answer to those questions.”

Liberty Hall Association *v.* H. Ins. Co., 7 Gray Rep. 265, the court said—

“The defendants having issued the policy without requiring any answer to the 11th interrogatory contained in the application, concerning the occupation of the building insured, it was fair to infer that they waived information on that point, and having done so, they cannot now avoid the policy, by proof that the premises were used *for hazardous purposes*.”

Now in this case, although there is no answer to question 19, yet it is evident that the defendants knew that Israel Baldwin had a mortgage on the premises insured, because they make the loss payable to him *as mortgagee*.

We insist, therefore, that there was no breach of warranty, and consequently no avoiding the policy.

The law as now established on this point of warranty is laid down in Sec. 139 of Wood on Fire Insurance, where it is stated—

“The tendency of the later and better class of cases is that when the insurer knows the falsity of the warranty when the contract is made, he cannot avail himself thereof *as a defence* to an action on the policy. And especially is this the case when the agent of the company fills up the application knowing the real facts, mistakes them either fraudulently or through design, and when the agent of the insurer fills up the application he cannot be treated as the agent of the insured.”

The defendants, when they read the application, knew there was no answer to question 19—if mortgaged, state the amount.

Yet they issue the policy on this application and state in it: “*Loss, if any, payable to Israel Baldwin mortgagee.*”

They accept the premium of insurance with this knowledge. They are now estopped and precluded from setting up this as a *breach of warranty*.

Frost *v.* The Saratoga Fire Ins. Co., 5 Denio 154. In this case a contract of insurance was entered into, where the application for insurance was made a part of the contract in which the applicant engaged that there was no building within less than ten rods of the store insured, except those mentioned in the application, which was untrue, for there were other buildings within the distance stated, of which no mention was made in the application.

The defendants relied on this fact as a breach of warranty, but it appeared that the defendants were apprised soon after that the application for the insurance did not describe all the buildings within the prescribed distance, but had omitted to make mention of one or more such buildings, yet the defendants made an assessment on the premium note of the plaintiff.

The court held in this case that the defendants were estopped from showing the facts constituting a breach of the warranty, and if the facts appeared in the evidence they would not be allowed to set them up as a defence to the action.

In Sec. 138 of Wood on Insurance, he says—

These statements in applications are not to be treated as warranties, but merely as representations.

See *Budd v Fairwaner*, 8 Bing. 48.

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

Section 139 of Wood on Insurance—

In the United States court it has been held in a number of cases, and is now well settled by adjudicated cases, "that an untrue or fraudulent statement, on the part of the applicant, of a fact material to the risk, does not avoid the policy, when either the company or its agent was informed of or knew the real facts, at the time when the contract was made or the premium paid."

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

In 94 U. S. Rep. 384, the court said—

"As the exact facts were communicated to the agent, and he took the responsibility to state them in the way he did, leading the applicant to suppose it was all right, we think it would be great injustice to turn him out of court now for this inexact method of statement."

Also *New Jersey Mutual Life Ins. Co. v. Bocker*, 94 U. S. Rep. 610.

Insurance Co. v. Mahone, 21 Wall. 152.

Rowley v. Empire Ins. Co., 36 N. Y. 550.

Again, defendants say that the interest of the plaintiff in the property mentioned in the said application and policy, was not the entire, unconditional and sole ownership thereof, for the use and benefit of the insured, but, on the contrary, there were mortgages on the property at the time of making the application, and equity of redemption, only, *was in the plaintiff*.

The application, in question 18, has reference to the owner of the equity of redemption.

For—

The next question has reference to mortgagors.

If there is any ambiguity, the defendants are guilty of making it, by the form of their printed application, and they are estopped from taking any advantage of that.

But we say Carson had an insurable interest there, and I refer to

Higginson v. Dale, 13 Mass. 96.

Kenny v. Clarkson, 1 Johns. 385.

I also refer to

Strong v. Manufacturers' Ins. Co., 10 Pick. Rep. 40.

This was an action of *assumpsit* on a policy of insurance, where the plaintiff, in his application for the insurance, stated, in reply to interrogations on the part of the defendants, that the property *was his own*.

The property was mortgaged at the time, and the equity of redemption was seized by virtue of these executions issued against the insured at the time of his application, of which no mention was made.

The court said, on page 43—

“Upon these facts there can be no question that the

plaintiff had an insurable interest in the house assured at the time the policy was effected, and it is clear that the plaintiff not only had an insurable interest, *but that his interest was substantially the same* as it would have been had the property insured been free from any encumbrances.”

Columbian Ins. Co. v. Lannon, 2 Pet. Rep. 25.

We will not encumber the case by replying to that part of the defendants' notices appended to their plea, charging fraud upon the plaintiff, both in the application for the insurance and in the proofs of loss.

For, by reference to the twenty-fifth page of the state of the case, commencing at line 29, you will find that counsel for defendants, on the trial before the Chief Justice, stated that they did not intend to rely upon fraudulent misrepresentations or fraudulent concealments, but desired to stand *upon the warranty and breach of such warranty.*

And they disclaimed any fraud in fact—any actual fraud in the matter of the application—but put themselves on the warranty.

And page 26 of the state of the case, the court said—
“That raises nothing but the question of warranty.”

We, in conclusion, insist that there was no breach of warranty proven, and, therefore, the plaintiff is entitled to recover, both by the facts and the law arising in the case.

WM. S. SHARP, Printer, 21 W. State St., Trenton, N. J.

NEW JERSEY SUPREME COURT.

*DAVID CARSON, who sues for
the use of Israel Baldwin,*

vs.

*THE JERSEY CITY INSUR-
ANCE COMPANY.*

*In Case.
On Case
Certified.*

State of the Case.

Afterwards, to wit, at a Circuit Court held at the court-house, in the city of Trenton, in and for the county of Mercer, on the thirtieth day of October, A. D. eighteen hundred and eighty, before his Honor Mercer Beasley, Chief Justice of the Supreme Court, assigned to hold the said Circuit Court, according to the form of the statute in such case made and provided, the aforesaid issues joined between the said parties, came on to be tried by a jury of the county of Mercer aforesaid, for that purpose duly impaneled, good and lawful men of the said county, at which day came there as well the said plain- 10
tiff as the defendants by their respective attorneys, and the jurors aforesaid, impaneled to try the aforesaid issue, being called, also came, and were then and there

in due manner chosen and sworn to try the issue *pro ut* the pleadings in the said cause, and upon the trial of the issue the counsel for the said plaintiff, to maintain and prove the issue on his part, offered the following witnesses and proofs :

The policy was offered and admitted by consent of the defendants. Policy dated January eighth, A. D. eighteen hundred and eighty. Premium fifteen dollars. Amount of insurance five hundred dollars. Two hundred dollars
 10 on building ; two hundred dollars on machinery, shafting and belting ; one hundred dollars on boiler and engine.

Offer five deeds made by different parties to David Carson. First deed, dated April sixth, A. D. eighteen hundred and forty-seven, Jonathan D. Hutchinson and Elizabeth, his wife, to David Carson, recorded in Book N of Deeds ; second deed, Abraham Harris and wife to plaintiff, deed dated April fourth, A. D. eighteen hundred and sixty ; third deed, Joseph Page to David Carson, November
 20 sixteenth, A. D. eighteen hundred and sixty ; fourth deed, Isaac H. Wilson to David Carson, dated October twelfth, A. D. eighteen hundred and sixty-four ; fifth deed, John Brown and wife to David Carson, dated March twenty-third, A. D. eighteen hundred and sixty-nine, all said deeds duly recorded in the Mercer county clerk's office.

Elwood Carson, being first duly sworn, saith—I am a son of David Carson, the plaintiff ; I was in possession of the mill at the time of the fire, which happened on the fifteenth day of February last ; I have been in possession, under my father, of the mill that was burned, for
 30 the last nine years.

And being cross-examined, says—

The fire took place in the night, at about one o'clock.

James McGalliard, another witness on part of plaintiff, being duly sworn, saith—I live in Windsor, about one and a half miles from the Carson mill, and have done so for fifteen or twenty years ; I was and am acquainted

with Mr. David Carson, the owner of the mill; I have frequently been to this mill; I have been assessor of the township of Washington for seven or eight years; in performing my duty as assessor I have frequently been at that mill; the mill was located on the Assanpink, about a mile and a half above Amos Hutchinson's mill.

[Description of property as contained in the policy of insurance was here read to witness, and witness said that he had heard the description of the property as contained in the various deeds to Carson, read, and continuing with 10 his testimony, said]

I recognize the property described in the policy of insurance, and in the said deeds, as being the property of Mr. David Carson, and as being the property of Carson's which was burned in February last; at the time of the fire, and at the time of insurance, the mill building was worth about \$2500 to \$3000 in the condition in which it was; I was at the mill the next day after the fire occurred; the fire was on Saturday night, and I was there on Sunday—the next day; the building was entirely de- 20 stroyed; the boiler was standing, and the engine, but both were broken and burned; I have been a justice of the peace for eight years; I examined the building as to the loss.

[Paper here shown, witness says]—That is proof of loss, made March 2d, or 2d A. D. 1880; I gave that paper to Carson and to Baldwin.

[Another paper was here shown witness, dated March 25th, A. D. 1880, witness says]—I made that certificate, and gave it to Mr. Carson and Mr. Baldwin; I think I 30 made five of these, and gave them to Mr. Baldwin on March 25th, A. D. 1880.

Being cross examined, witness says—

The boiler was in a shed attached to the mill; the engine, I think, was in the mill; the engine and boiler were not totally destroyed; they were only a partial loss; the mill property was assessed before the engine

and boiler was put in, for \$4000; that took in a part of the pond—not all of it; about twenty-five acres; the engine and boiler had been in use in said mill for about three years; the property of Carson was assessed in three different parcels.

Witness, on re-direct-examination, says—

They were both of iron; I am not prepared to say the amount of damage, not being a machinist; after the steam fixtures were put in it was assessed, I think, \$15 C
10 higher; we aim, in assessing, to give all property about two-thirds value; I believe I am, and was at the time of the fire, the nearest justice of the peace to the mill.

Daniel Hutchinson, another witness on the part of the plaintiff, being duly sworn, says—

I live in Washington township, about two hundred yards from the mill; the building was destroyed pretty clean; it was a stout frame building of oak; the building, without any machinery, was worth about \$2000;
20 the machinery, without the boiler and engine, was worth about \$2000; the connecting pipes were smashed and rendered useless; the boiler stood up on the foundation as it did before the fire; I have no experience as to cost of engines and boilers.

And being cross-examined, witness says—

It took to consume this building about an hour; from the time it was first built, it had been standing about fifty or sixty years; there had been almost new machinery throughout, in my memory, two or three different times.

30 *William H. Brackett*, another witness on the part of the plaintiff, being duly sworn, saith—

I live in Chambersburg; I am a machinist, and have been for thirty-two years; I passed the Carson mill some time in August last, and I got out and examined the

boiler; I wanted one about that size; the attachments were all burned off; the brass was melted down, and had run off; the engine was burned, and I considered destroyed; it was burnt and broken, some parts of it; a boiler that gets red hot always leaks around the seams; I considered that it would leak around all the joints and seams; an engine and boiler like that, in good condition, with all connections, would have been worth last January about \$1400; when I examined them they were not worth anything; they were worth about the price of old 10 iron in the market.

Q. How much would that be?

A. Well, I didn't examine the engine.

Q. Well, you can tell nearly?

A. Well, as old iron they would have been worth about \$35; when I speak of the injury, I only speak of the effect of the fire, and not of any damage by exposure.

Being cross-examined, witness says—

I didn't examine the engine particularly; the boiler was rusted some; nothing over it to protect it; the fire 20 had scaled the boiler a good deal; I was there examining the same about twenty minutes; I don't recollect of its being out of shape much; it was injured by the effect of the fire, and lay exposed when I examined it; both engine and boiler were standing out unprotected; when I say \$1400, I mean a new boiler and engine; I did not contemplate that it had been in use three years; its value then would depend upon how it had been taken care of.

Thomas C. Pearce, another witness on the part of the plaintiff, being first duly sworn, saith—

I live in Hightstown, New Jersey, and have lived there since 1852; part of my business is the business of insurance; know the Jersey City Insurance Company; I knew the Carson mill; I knew when it was burned; I was notified, the day after, by Israel Baldwin; I knew, at the time that the Jersey City company had a policy on that loss; I think I communicated the fact of that 30

loss to the company ; I think I notified them right away, the same day ; I mean I notified the company, at the office of the company at Jersey City.

And being cross-examined, witness saith—
I did not issue policies for the Jersey City company.

Israel Baldwin, another witness on the part of the plaintiff, being first duly sworn, saith—

I live in Windsor, about two miles from Carson's mill ; I am the person named in the policy as mortgagee ; I was notified of the fire on Sunday morning, and I went down to see it ; it was all burned down ; I went down on Monday and notified Mr. Pearce ; I went to Mr. McGalliard, to have him make out a proof of loss ; I sent proof to Mr. Foote, the president of the company at Jersey City, on the 2d or 3d of March ; I sent it by mail ; I was then notified by Carson that the company said that papers were not right ; by papers I mean proof of loss ; after that, I came to Trenton to get proof of loss made out there, one for each company ; the second proof of loss, counting the one made by Mr. McGalliard as one, was made out on the 20th of March, and I went and served one on Mr. Foote, the president of the Jersey City company ; I got them on Monday, the 22d of March, and served them on the 23d or 24th of March ; I handed a copy of the proof of loss to Dr. Foote ; he read it over, or a part of it, and he objected to it on the ground that the written portions of the other policies were not written out ; I do not think he made any other objection ; I then came back to Trenton, and employed Mr. Worthington to make out another proof of loss ; I did this to remedy defects that Dr. Foote pointed out ; I did this because the others wasn't good, I suppose ; it was within a day or two afterward that I employed Mr. Worthington.

[It was admitted here by the counsel of the defendants that the insurance has not been paid by the com-

pany, nor the buildings rebuilt, or any notice of intention to do the same given by the said company.]

And being cross-examined, the above witness saith—

The morning after the fire, Josiah Gordon notified me of it; I lived about two miles off; I reached scene of fire about eleven o'clock; I was notified of it about ten o'clock, just as I was getting ready to go to church; that was the first I had heard of it; I went down in a carriage, in a single carriage; Albert Brown rode down with me; I held a mortgage on the property of \$2100 of 10 principal, and it was put on the property about the 1st of January or last of December; it was there when the insurance was effected; I was not interested in any other mortgages on this property; mine was the last mortgage.

By the Chief Justice—Your idea was that there were other mortgages ahead of you?

A. Yes, sir; there were three others before mine; I understood that one was given to Jonathan Hutchinson, and had been there for some fifteen years, and was for \$1500; one to Ezekiel Cubberly, for \$10 0, and one to John Taylor, for \$1200—all of them given two or three years before my mortgage was given; I procured this insurance through Mr. Carson; I had the policy in my possession at time of the fire; when I went to Jersey City to see Mr. Foote, there were others there, but they were strangers to me; I am a brother-in-law of Carson.

Q. Did not Dr. Foote inform you that Mr. Carson had informed him that you were the cause of the fire, and the company would waive nothing?

A. No. 30

Q. Did Dr. Foote, at that time, say to you that the company waived nothing?

A. I do not remember what he did say now, but I do not think he said anything of the kind.

Q. Did he not say to you, in substance, that the company wanted all the conditions complied with?

A. I do not think he did; he may have done so—I won't say positively.

Q. Do you recollect of his reading then to you a copy of a letter which he had sent to David Carson?

A. I don't remember of his reading any letter.

Q. Did you not understand that the company required a complete compliance with all the conditions of the policy?

A. Perhaps I did; I can't say now what conversation
10 we had; I cannot say that he said to me that he had written to David Carson that the company would not waive any conditions of the policy—would not like to say he did or did not; I cannot remember that Mr. Foote got a letter-book, or that he said anything about a letter; I recollect telling Mr. Foote that Mr. Carson had told me that he (Carson) had received a letter from Mr. Foote; Mr. Foote did not tell me that Carson had told him that the insurance was the cause of the fire, and that, under such circumstances, the company would waive
20 nothing; I did not understand that there was much interest due on the other mortgages at the time my mortgage was put on the property; I understood at the time of the fire that there had been a levy made on the boiler and engine as personal property, and that they were advertised for sale under it; I came down to see Mr. Richey, to get him to take some steps to stop that; I understood that the judgment the levy was made on was a judgment for \$900; I understood that an injunction had been prepared by Mr. Richey, but not granted at the
30 time of the fire; I did not know that there were any judgments against David Carson on that mill property when my mortgage was given nor when the insurance was effected; I made personal application for the insurance; I happened to be at the mill at the time Mr. Pearce came there to take out a policy for Mr. Carson; after Mr. Carson didn't take it, I said I would pay for one of \$2500; Mr. Carson said he hadn't the money to

do it; I said I'd pay for it; I had not the money with me.

Court at this point adjourned to two o'clock.

Upon the re-assembling of the court, Mr. Baldwin, still on his cross-examination, says—

I did not, when I was at Jersey City, take away with me the proof of loss I have spoken of; I left it there.

[Paper being shown to witness by counsel for defendants, witness says]—That is a copy of the one I left.

Albanus L. Worthington, a witness on the part of the 10 plaintiff, being first duly sworn, saith—

I live in Trenton, and have been engaged here in the insurance business for about twelve years; I remember that Mr. Baldwin came to me and brought a copy of a proof of loss said to have been served on the Jersey City company; he came to me to see if I would not agree to make out some proofs of loss of mill of David Carson; he brought me this Jersey City policy of insurance, and, in addition to that, he brought four other policies; I had the proofs of loss made out; I had entered on the backs 20 of the proofs of loss the written portions of the other four policies; the one I made out for the Jersey City company was sworn to on the 30th day of March, 1880; I went over to Jersey City and gave it to Mr. Foote, the president of the Jersey City Fire Insurance Company; I think it was on the 30th or 31st of March—it was the thirty-first, I think.

[Paper being here shown witness, he says]—That is a correct copy of the one I served on Dr. Foote.

[A paper being here produced by Dr. Foote and 30 shown to witness, witness says]—That is the one I handed to Dr. Foote; when I handed it to Dr. Foote, he looked it over and he objected to the amount on engine and boiler of \$1500; he seemed to think that might be a mistake; he made no other objec-

tion, no other than the amount of loss on engine and boiler; he thought that that might be a mistake as being put too high.

And witness being cross-examined, says—

I mean the only objection he made to the proof of loss; when Mr. Baldwin came to me he brought with him the copy of the second proof of loss and the policies of insurance; the proof of loss that I copied from was the blank proof of loss of the Standard Fire Insurance Com-
10 pany.

[Witness being shown paper called proof of loss No. 2, says]—I am uncertain whether others were made out on the same blanks; I think this marked No. 2 is the one I copied from, I cannot positively identify it; I am positive this is the same one, as it is in the same handwriting as the one I copied from.

Q. Now, is not No. 2 the original; look at it?

A. I couldn't tell; I don't know that I made any memorandum on the one Mr. Baldwin brought me; I
20 am not familiar with the handwriting of any part of No. 2.

Q. Did not Dr. Foote state to you in substance that he had been informed that the fact of the insurance had something to do with the fire, and that he would expect a strict compliance with all the terms of the policy?

A. Dr. Foote and I had a sort of running conversation after he looked over the proofs I gave him, and I could not say all that passed between us; he may have made that remark.

30 *Q.* Didn't the doctor say that the company were standing upon all their rights?

A. The remark that he made to me was, that he had some other matters to attend to, and that he would meet me there at the scene of the fire, and either write me or telegraph me; he said he would write or telegraph me to meet him there, and he would talk it over; he did telegraph me and meet me, and we looked over where

the fire had been; I understood from Dr. Foote that when I left him, the matter was open for further consideration; I did not tell Dr. Foote that Carson had told me that Baldwin was the cause of the fire, or any words to that effect; I did not say so at the time Dr. Foote and I were at the mill; I may have said that I understood Carson had said so; I don't recollect hearing Carson say anything of the kind in Dr. Foote's presence.

[Telegram of May 27th, 1881, marked by the court *A., M. B.*—I sent that telegram to Dr. Foote; I received a letter from Dr. Foote in reply to that telegram.

Execution of policy admitted.

Policy offered.

Policy objected to by counsel for defendants, because it is here stated by counsel for plaintiff that they do not propose to offer the application and survey referred to in the policy. The ground of the objection was that the policy does not constitute the whole contract. The application and survey referred to in the policy constitute a part of the contract.

Upon this objection, made the counsel for plaintiff calls for said application and survey from the defendants' counsel, who produces same and admits execution and signature to said application.

Policy and application and survey were then offered by counsel for plaintiff, and admitted without further objection.

Counsel for plaintiff then offered proof of loss marked by the court *No. 1, M. B.*, dated March 2d, 1880.

Defendants' counsel objected on the ground that it is not in compliance with the terms of the policy.

The Chief Justice—That goes to its legal effect. [Admitted.]

Also proof of loss marked *No. 2, M. B.*, dated March 20th, 1880.

Defendant's counsel—I understand that we are not shut off as to the character of the paper or its sufficiency.

The Chief Justice—Certainly not.

Also proof of loss marked *No. 3, M. B.*, dated March 30th, 1880; same understanding as to that.

Also certificate above referred to of Justice McGalliard, dated March 25th, 1880.

Also five deeds above referred to, being said deeds to David Carson.

It is here admitted by both sides that summons in the case was tested July 8th, 1880.

Plaintiff rests.

- 10 Governor Bedle, of counsel, for the defendants, opened the defendants' case.

Thomas C. Pearce, already sworn, called as the first witness for the defendants, and testified as follows—

[Shown a paper writing, being sworn statement or testimony made by David Carson. It was marked *E* by the Chief Justice.]—I have seen Mr. Carson write his name; he wrote his name to that paper; that is his handwriting.

- 20 [Four mortgages were here produced and read by counsel for defendants. Also a letter from plaintiff's counsel admitting them. They were—first, mortgage by Carson to Hutchinson, \$1500, dated April 6th, 1847; next, Carson to Ezekiel Cubberly for \$1000, dated April 1st, 1867; next, Carson to John Taylor for \$1200, dated April 8th, 1878; next, Carson to Israel Baldwin, \$2100, dated December 30th, 1879.]

- 30 [It was here admitted on both sides that the mortgages above named cover the mill property and the farm adjacent. The first mortgage is only on the mill property, and is for \$1500, and is described in the Hutchinson deed above referred to. The second mortgage for \$1000 and the third mortgage for \$1200 cover mill property and farm adjacent.]

Witness, continuing, says—

I delivered the policy in this case to Mr. Baldwin; cannot tell the day; it was within a week of the issue;

also delivered the other four policies to him; the total premium on the five policies was \$75; I took Mr. Carson's note with Mr. Baldwin's endorsement; note payable to me or to Baldwin; the note was paid soon after the fire, before it was due; soon after the fire, within a week; Mr. Baldwin paid it; the note, when it was paid, was in the bank; I think I took it up when it was paid; Mr. Baldwin came to my office and gave me the money, and I went down and took it up; the Jersey City Insurance Company knew nothing about it when I took the note; 10 I took it on my own responsibility, and they did not, as far as I was concerned, know anything about it until after the fire; at the time of the fire, the Jersey City Insurance Company had received no money for this policy; I had not forwarded it to them then; Baldwin came to see me the next day after the fire, and within two weeks after that he paid the note to the bank; that is, after I received the money from Baldwin I went to the bank and took up the note, and gave it to Mr. Baldwin; I had got the note discounted before that, and put it to my 20 credit in the bank; after that I sent the company checks less my commissions; cannot tell the dates without seeing my bank book; it was soon after the fire; the checks were in the neighborhood of \$70; at the time I sent the checks to the company, I wrote to them; I have requested the company to hold checks of mine, but I don't remember whether I asked them to hold these checks or not; the checks I sent to the company after the fire were my checks.

Q. Do you know whether the company declined to 30 use the checks, and that you requested them to hold the checks?

A. I don't know that I requested the company to hold them.

The Chief Justice—Well, did they give you any notice that they wouldn't receive them?

A. Well, I didn't go on to Jersey City.

The Chief Justice—Well, I understand, then, that you sent the checks, and didn't go yourself.

[Paper marked *F* shown witness.]

At this point court adjourned to Monday at ten o'clock.

Monday, ten A. M. Same witness, resuming his direct examination, says—

[Papers shown witness marked by court *G* and *H*. Witness says]—These are the checks referred to by me in my examination on Saturday; they bear date February 16th, 1889; I saw Dr. Foote a short time after I sent the checks; I went to the office of the company at Jersey
10 City; so far as I know, the checks have been with either the secretary or president of the company ever since they were sent; they are made payable to Mr. Pearson; I understood Dr. Foote to say that he was not going to use the checks at present; he was speaking about the peculiar character of the fire and said that they would not use them at present.

Witness, being cross-examined, says—

I had received a note for the premium before the policy was delivered; the company was not named on the note;
20 I took it on my own responsibility; the note was made payable to me; the discount was paid by Mr. Baldwin at the time the note was given; I got it discounted at the First National Bank of Hightstown; the proceeds passed to my credit; it was discounted in a week or ten days after I received it, and perhaps in less time; I took the note on my own responsibility, and myself assumed the payment of the premium to the company; the company knew nothing about the note; the custom of the company was for their agents to report once a month and
30 sometimes not for a longer time; I always hold the funds for a month and sometimes for longer; I have taken a great many policies for that company.

[Objected to by defendant's counsel as seeking to show, by parol, an agency different from that provided for by

And the said Chief Justice having given as his opinion that the said testimony was competent and legal evidence in the cause, admitted the same, to which the defendants by their counsel excepted, and that this their bill of exceptions might be

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I had received a note for the premium before the policy was delivered; the company was not named on the note;
20 I took it on my own responsibility; the note was made payable to me; the discount was paid by Mr. Baldwin at the time the note was given; I got it discounted at the First National Bank of Hightstown; the proceeds passed to my credit; it was discounted in a week or ten days after I received it, and perhaps in less time; I took the note on my own responsibility, and myself assumed the payment of the premium to the company; the company knew nothing about the note; the custom of the company was for their agents to report once a month and
30 sometimes not for a longer time; I always hold the funds for a month and sometimes for longer; I have taken a great many policies for that company.

[Objected to by defendant's counsel as seeking to show, by parol, an agency different from that provided for by the terms of the policy. Admitted. Exception allowed.]

And the said Chief Justice having given as his opinion that the said testimony was competent and legal evidence in the cause, admitted the same, to which the defendants by their counsel excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

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my checks, I have never known them to object when I requested them to hold them; Mr. Baldwin has had policies before in this company from me; I have been doing all Mr. Baldwin's insurance for ten years past; I have frequently taken notes for premiums on my own responsibility entirely on policies in that company, but not from any orders from the company; I do not know but that I may have said to them that I had taken notes for premiums; I do not know that they know that I have taken 30 notes for premiums; they do not know anything about my taking notes for a premium; I say the company don't know nothing about my taking notes; it's all done between me and the parties.

Chief Justice—The question is, Mr. Pearce, whether they knew either before or after?

A. I don't think they ever knew; I would sometimes send them word that I had not collected the premium and ask for time on my checks.

Q. Over what period of time has this taking of policies by you in this company extended ?

[Objected to by counsel for defendants as irrelevant, and also that question seeks to show an agency different from that mentioned in the policy.]

[Objection overruled, question allowed and exception to ruling taken by counsel for defendants. Exception allowed.]

A. It has extended over a period of fifteen years ; I am the agent of this company.

10

[Same objection and same ruling. Exception allowed.]

Witness continuing, says—I have been an agent for that company for fifteen years, if not more ; during that time I have taken a great many policies for this company ; I have collected all the premiums for the company on the policies which I have taken ; the rule of the company has been for the agents to report once a month for the funds in their hands ; the company has always forwarded policies to me to be delivered before they had received the premiums themselves ; this is not the only instance in which I have written to the company to hold my checks ; I have never known them to object when I requested them to hold them ; Mr. Baldwin has had policies before in this company from me ; I have been doing all Mr. Baldwin's insurance for ten years past ; I have frequently taken notes for premiums on my own responsibility entirely on policies in that company, but not from any orders from the company ; I do not know but that I may have said to them that I had taken notes for premiums ; I do not know that they know that I have taken notes for premiums ; they do not know anything about my taking notes for a premium ; I say the company don't know nothing about my taking notes ; it's all done between me and the parties.

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Chief Justice—The question is, Mr. Pearce, whether they knew either before or after ?

A. I don't think they ever knew ; I would sometimes send them word that I had not collected the premium and ask for time on my checks.

Q. How is it possible for the company not to know when you had told them that you had not collected the premium?

A. They might think I was holding the policy; they knew that I had trusted some men for their premiums; I do not know that the company knew that I delivered the policies before I received the premium; it was possible for them to think that I was holding the policies waiting for the premiums to be paid; I have often sent
10 a check to the company for the premium before I had delivered the policy, when I knew the party was good; there has never been no understanding with the company that I should trust for anything.

Q. I ask you whether the company didn't know, when you asked for time on a check, that you had trusted the parties for the premium?

A. Well, there's the inference in there I cannot explain; I have told the company sometimes to hold my checks as I had not collected the premiums; I do not
20 think they knew that I had ever taken notes for premiums; I never told them so; I may have said to them that I had taken notes for premiums; I may have said

And the said Chief Justice having given as his opinion that the said testimony was competent and legal evidence in the cause, admitted the same, to which the defendants by their counsel excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

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not myself issue policies for the Jersey City company; if I received an application I would send it to the company; it was subject to the company's approval, always; if approved by the company, the policy would be forwarded to me.

Q. How is it possible for the company not to know when you had told them that you had not collected the premium?

A. They might think I was holding the policy; they knew that I had trusted some men for their premiums; I do not know that the company knew that I delivered the policies before I received the premium; it was possible for them to think that I was holding the policies waiting for the premiums to be paid; I have often sent a
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A. Well, there's the inference in there I cannot explain; I have told the company sometimes to hold my checks as I had not collected the premiums; I do not
20 think they knew that I had ever taken notes for premiums; I never told them so; I may have said to them that I had taken notes for premiums; I may have said so; I have no recollection of it.

Q. Is it not a common custom with insurance agents to take notes for premiums?

[Objected to by counsel for defendants. Objection overruled, question permitted, exception to ruling prayed and allowed.]

A. I do not think it is a common custom for agents to
30 take premiums; I often do it; I do not know one way or the other what other agents do.

On re direct examination, witness says—

To my knowledge the company never knew of my trusting for premiums outside of this case; I did not myself issue policies for the Jersey City company; if I received an application I would send it to the company; it was subject to the company's approval, always; if approved by the company, the policy would be forwarded to me.

Q. Your duty then was to do what?

A. Collect the premium—deliver the policy and collect the premium; I never had any authority to deliver the policy on credit.

[Governor Bedle here read the examination of David Carson, the plaintiff in this case, taken by virtue of a clause in the policy, under oath, at Jersey City, at the office of the Jersey City Insurance Company, on the 27th day of April, 1880.]

Edward Sweeney, another witness on the part of defendants, being duly sworn, says—

I am a clerk in the office of the clerk of the Supreme Court.

[Book of minutes of the Supreme Court, November Term, 1879, being shown, witness says]—

This contains the minutes of all judgments for that term, and up to February Term, February 22d, 1880.

[Witness reads from page 258]—Judgment on bond and warrant, First National Bank of Hightstown *v.* Elwood Carson and David Carson; amount of judgment, 20 \$1821.12; costs, \$4.50; real debt, \$910.56; date of judgment, January 6th, 1880.

The records of judgments during that time have not been made or written up.

[Defendants here offer in evidence book of minutes, and also the original papers on file in the case.]

[From the same book of minutes, witness reads]—

Page 278. Judgment, George Middleton and others, administrators, *v.* Elwood T. Carson and David Carson, dated January 30th, 1880; judgment, \$564.17; costs, 30 \$39.08.

[This book of minutes offered.]

[Summons, narr., affidavit of service, and assessment on file offered in evidence.]

The following judgments in the Mercer County Circuit Court were admitted as correct:

Middleton et al. *v.* David Carson; \$314.80 and

costs of suit; dated January 30th, 1880. Also judgment of Lewis Gordon et al. v. David Carson; dated February 14th, 1880, for \$355.41, besides costs of suit.

[Defendants' counsel further offer in evidence the following records of mortgages:

First. David Carson to Jonathan D. Hutchinson, dated April 6th, 1847, for \$1500.

Second. David Carson to Ezekiel Cubberly, mortgage dated April 1st, 1867, for \$1000.

10 Third. Mortgage of David Carson to John Taylor, dated March 31st, 1877, for \$1200.

Fourth. Mortgage, David Carson to Israel Baldwin, dated December 30th, 1879, for \$2100.

Admitted that these mortgages all cover the mill property. The last three, also, include the adjacent farm.]

Nathaniel Foote, another witness on the part of the defendants, being duly sworn, says—

20 I am the president of the Jersey City Insurance Company and have been since March 1st, 1879; previous to that, and since 1860, I had charge of agents; I was secretary since January 1st, 1875, and for twenty-one years have been superintendent of agencies.

[Witness being shown *Exhibits G* and *H*, says]—I first saw these checks February 17th, 1880, on the opening of our mail that morning; I saw Mr. Thomas C. Pearce a few hours after that—on noon of the same day.

Q. What did you tell him in regard to the checks and the payment of the premium, if anything?

30 [Objected to by counsel for plaintiff, because, under the present proofs, what the company say to this agent in our absence on the subject of payment of premiums cannot bind us. Exception overruled. Question allowed. Exception taken and granted.]

A. After his statement of the case, we told him that we would not complicate matters by accepting the premium; that he could take them (the checks) back with

him, or if he wished to leave them with Mr. Pearson, he could do so; Mr. Pearson was the secretary of the company; I told him we would return him the checks any time that he desired it; he said he would like to leave them there; the checks have never been used.

Q. Had you any knowledge, or any officers of the company any knowledge, of Mr. Pearce taking notes at any time for premiums on the policies, or of his giving any credit for premiums?

[Objected to by counsel for plaintiff, as irrelevant. 10
Objection overruled, and exception taken and allowed.]

A. Never heard of his doing so until since this fire occurred.

Q. Had he any permission from the company to do it?
[Same objection taken and exception allowed.]

A. No, sir.

Q. Do you recollect of Mr. Pearce ever asking the company to hold his checks, and, if so, under what circumstances?

A. Yes, sir; he has a number of times asked the company to hold his checks, stating that the parties were away, and that he had not delivered the policies; this was done by letter, in response to our demand for settlement. 20

To the striking out of which said answer of the witness the said defendants by their counsel excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

A. No, sir; not to my knowledge.

him, or if he wished to leave them with Mr. Pearson, he could do so; Mr. Pearson was the secretary of the company; I told him we would return him the checks any time that he desired it; he said he would like to leave them there; the checks have never been used.

Q. Had you any knowledge, or any officers of the company any knowledge, of Mr. Pearce taking notes at any time for premiums on the policies, or of his giving any credit for premiums?

[Objected to by counsel for plaintiff, as irrelevant. 10
Objection overruled, and exception taken and allowed.]

A. Never heard of his doing so until since this fire occurred.

Q. Had he any permission from the company to do it?

[Same objection taken and exception allowed.]

A. No, sir.

Q. Do you recollect of Mr. Pearce ever asking the company to hold his checks, and, if so, under what circumstances?

A. Yes, sir; he has a number of times asked the company to hold his checks, stating that the parties were away, and that he had not delivered the policies; this was done by letter, in response to our demand for settlement. 20

Q. By letter or by mouth?

A. By letter and at the office; he has called at the office.

[On application of counsel for plaintiff, this last answer of witness was struck out, because it appeared from said answer that this communication having been made by letter, and the letters not being produced. Exception allowed to the striking out of that answer—namely, the one beginning, "Yes, sir." 30

Q. Did Mr. Pearce ever request you, in any way, to hold on to his checks in any cases where the policy had been delivered and credit given and note taken for premium?

A. No, sir; not to my knowledge.

Q. Did you ever have any knowledge of Mr. Pearce delivering policies and taking notes for premiums?

A. No, sir; except in this case—not until since this loss and I hear him so state on the stand; after the fire, on February 24th, I saw Mr. Carson at the office of S. M. Schanck, at Hightstown, and also at the house of Thomas C. Pearce; I saw Baldwin a moment that day, at Mr. Schanck's office, but had no conversation with him; I had a conversation on that day with Mr. Carson,
10 at Mr. Pearce's house, and stated to him that the company had not been paid the premium, and would not complicate the case by accepting it; I was introduced by Mr. Pearce; I asked him with regard to the fire; he told me that he was satisfied that the fire was an incendiary fire. [Objected to.]

The Chief-Justice—Well, let it be confined to waiver.

After hearing this conversation as to the circumstances of the fire, I told him that we would not accept the premium, and that we waived none of the conditions of the
20 policy; I took one of the policies and read to him the conditions applying to the case, and told him I should waive none of the conditions of the policy, and should expect a strict compliance; I said this after hearing Mr. Carson's statement; after that I saw Mr. Baldwin at Jersey City, on March 23d, 1880; he brought with him a paper which purported to be a proof of loss; I saw the paper; Mr. Baldwin took it away with him.

[Paper marked *No. 2* being shown witness, he says]—
I believe this to be the same paper; I stated that it did
30 not answer the requirements of the policy; I stated to him what had been stated to me by Mr. Carson relative to the loss; read to him a letter from my letter-book a copy of a letter to Mr. Carson, and told him that we would waive none of the conditions of the policy; I stated to him that the premium had not been paid to the company, and that the company would not complicate matters by accepting it.

[Paper marked letter *L* by court being shown witness,

witness says]—That is the letter I read to Baldwin ; this is taken from the letter-book.

Court at this point adjourned to two o'clock P. M.

Court met at two o'clock. Same witness on the stand, and letter marked *Exhibit L*, dated March 10th, 1880, was then read. Original called for. Plaintiff's counsel says it is lost. Copy offered in evidence.

[Another paper shown to witness, marked *No. 3*, being proof of loss, witness says]—That is the paper Mr. Worthington brought to me ; I cannot give the exact date ; I think April 2d, 1880—it was within three days of its date ; I stated to Mr. Worthington at that time what Mr. Carson had said at the time or about the time of the fire, and that, under the circumstances, we should waive none of the conditions of the policy ; I stated to him the facts as to the checks for premium having been sent after the fire and our refusing to receive them. 10

[Paper marked *Exhibit E*, being David Carson's examination, being shown witness, witness says]—That paper was signed by David Carson in my presence, and was made under the condition of the policy ; that examination was dated April 27th, 1880 ; that examination was conducted by me. 20

Q. At the interview with Carson at Pearce's house, February 24th, 1880, what was said by Carson in regard to circumstances of burning ?

[This question was stated by counsel for defendants to be put as bearing on the question of waiver, and also to show the correctness of the statements in the letter of Foote to Carson of March 10th, 1880. Question was objected to by counsel for plaintiff. The objection was overruled and the question was admitted by the court for the purpose of bearing on the question of waiver, Exception taken to this ruling and allowed.] 30

A. He stated the hour as one o'clock when the fire was discovered : that a colored man came to him, told

him the mill was on fire; that they went out and found the fire so far advanced that they had hard work to save anything, and hard work to save the dwelling; that he was satisfied if it had not been for the insurance the mill would be standing that day; that he had confessed judgment to Hightstown bank, and they had levied on engine and boiler, and had advertised it for sale Tuesday morning following the fire; that he went to Trenton on Saturday before the fire with Mr. Baldwin to see Mr. Richey, to see if they could get an injunction to stop the sale, and returned Saturday evening; that is all about the origin of the fire; he said there was no one else could be benefited by the fire but his brother-in-law, Mr. Baldwin; he began to recite the notes that Baldwin had endorsed for him, and would have to pay, and he said there was no security for him unless it burned, and unless he got his pay from the insurance company he would have to lose it; he said he was satisfied that the person who set the house on fire came from Mr. Baldwin's house and rode Mr. Baldwin's horse, from the fact that they compared it with the tracks of Mr. Baldwin's horse that he drove there next morning after the fire; I remember nothing else on this subject; he said he found the remains of a kerosene jug, a broken jug, and he supposed that the person who set it on fire brought that to set it on fire with.

Witness being cross-examined, says—

Mr. Baldwin, Mr. Lyman Brainard, David Carson and myself were present when this examination was taken; Mr. Brainard is the special agent of the Jersey City Insurance Company; this affidavit was taken before Mr. Muirheid; the same Mr. Muirheid that is one of the attorneys of record in this case; we went first to Mr. Vredenburgh's office, then to another office; they being out, we then went to Mr. Muirheid, and got him to administer the oath; the examination was taken at the office of the insurance company, and we went out to Mr. Muir-

heid's office to get the affidavit taken ; the examination was taken the day it was dated, April 27th, A. D. 1880 ; the examination was written down by Mr. Brainard.

[*Exhibit No. 10* being shown witness, and produced on call of plaintiff by defendants' attorney, witness says]—

Mr. Worthington left that paper with me when he served the proof of loss, which paper purported to be a list of encumbrances upon the Carson mill property and farm, consisting of both judgments and mortgages as 10 above have been proved.

[Paper purporting to be a telegram from Worthington to Foote, dated May 27th, A. D. 1880, shown witness, marked *Exhibit A*, witness said]—I did not receive that telegram the day it is dated ; I was out of town ; I received it on my return, the day my letter in response was dated.

[*Exhibit 11*, purporting to be a letter written by Dr. Foote to A. L. Worthington, dated May 31st, A. D. 1880, being shown witness, witness said]—I wrote that letter 20 to Mr. Worthington in answer to his telegram, and I sent it the day it was written.

[The letter above recited, marked *Exhibit 11*, telegram marked *Exhibit A*, and list of encumbrances marked *Exhibit 10*, were here offered in evidence by counsel for plaintiff, and admitted without objection.]

Witness, on his re direct examination, said—

The firm of Bedle, Muirheid & McGee were not our attorneys when the affidavit to the examination of Carson was administered by Mr. Muirheid.

There was a certificate of loss, signed by J. McGalliard, justice, sent to us, and a similar one was sent to us for each of the four companies ; our company had received no other certificate of the loss than made by Mc Galliard, justice.

[Defendants here offered in evidence four executions and levies issued upon the judgments above referred to,

and formal proof of the same being waived, they were admitted without objection.]

[Defendants' counsel then offered judgments, executions and levies, book of minutes of the Supreme Court, above referred to, as containing minutes of judgments, above spoken of, and also original papers, in said cases; also the records of the mortgages; also letter to Carson from Dr. Foote, date of March 10th, A. D. 1880; also two checks of Thomas C. Pearce, payable to the Jersey
 10 City Insurance Company, above referred to—which were all admitted in evidence; also Mr. Richey's letter admitting the existence of the mortgages.]

Defendants here rested their case.

Plaintiffs here offer in evidence—

Certificate from McGalliard, marked *Exhibit C*.

Policy of insurance sued on. Application and survey upon which said policy was issued.

Three proofs of loss, marked respectively 1, 2 and 3.

List of encumbrances, marked *Exhibit 10*.

20 Telegram from Worthington to Foote, marked *Exhibit A*.

Letter from Foote to Worthington in answer to said telegram, marked *Exhibit No. 11*.

Five deeds of title to David Carson from different grantors, for mill property and farm adjacent.

All of the above were admitted in evidence, without objection.

Plaintiff's counsel here offered to show that at the
 30 time the application for insurance was made by Carson to Thomas C. Pearce, that Pearce was in possession of and produced the blank application which was afterwards filled up; that the said Thomas C. Pearce filled up the application, and that he did not ask the applicant as to encumbrances on the property, and that the application was never read over to the applicant before signing; that a day or two before the application was made

and filled up, that Mr. Carson had told Mr. Thomas C. Pearce, while the subject of insurance was being spoken of between them, of the existence of the various encumbrances that have been shown to have been upon the property at that time; and that on the day and just before the filling up of the application, Mr. Carson talked over with Mr. Pearce, the subject of the different encumbrances which were on the mill property; and that Thomas C. Pearce was the agent of the Jersey City company, and the one to whom the blank applications 10 were sent, and that the company paid him a commission for all insurance obtained for them; and that Thomas C. Pearce, when applications were filled up by him, sent such applications to the insurance company, and that such applications were received by the insurance company from Pearce; and that, in fact, said Pearce was the agent of the insurance company, and not of the applicant, in matters of the application for insurance, and that in this case, the said Pearce acted as the agent of the said insurance company, and did not act in that 20 regard as the agent of the applicant.

Counsel for defendants here objected to all of the above offer, and the court having intimated that upon the question of a fraudulent concealment, or fraudulent suppression of the truth in regard to encumbrances on the property sought to be insured in the said application, the above offered evidence might be admissible.

At this point counsel for defendants stated that they do not intend to rely upon fraudulent misrepresentation or fraudulent concealment, in this branch of the case, but 30 desired to stand upon such warranty and breach of such warranty, and upon the construction of such contract.

Said counsel further said that they disclaim any fraud in fact, any actual fraud, in the matter of the application, but put themselves on the warranty, and on the omission to make known, under clause number one in the policy, the fact of the encumbrances in the written

application and contract, called the application and survey in the policy.

The court said that this raises nothing but the question of warranty and construction of the contract, and under that view, will overrule the evidence which the plaintiff offers.

To this ruling an exception was prayed by counsel for plaintiff, and the exception allowed.

The counsel for defendants said that his statement will
10 show what his position is.

At this stage of the case, by consent of the counsel of both sides, and the court permitting the same to be done, the jury impaneled to try the case was discharged; and it was then agreed by counsel of the respective parties in the suit—the court also permitting the agreement to be entered into—that questions of law in the cause should be heard before the Supreme Court in bank, upon the evidence taken in the case, and that the Chief Justice, being judge before whom the cause had so far
20 been tried, should settle all questions of fact, and that all questions of fact necessary to a proper determination of the case should be referred to the said Chief Justice, and that his judging of said facts should be final in the case.

It is further agreed by the counsel of the respective parties, and so sanctioned by the Chief Justice, that upon the decision of the case by the Chief Justice, the rulings of the Supreme Court upon the law shall be considered his rulings, and that either side may have a bill
30 of exceptions thereto, in the same manner as though such rulings had been made at the Circuit; or the findings of fact by the Chief Justice may be put in the form of a special verdict.

January 20th, 1881.

A. G. RICHEY & SON,

Attorneys of Plaintiff.

BEDLE, MUIRHEID & MCGEE,

Defendants' Attorneys.

And thereupon the said Chief Justice, under the opinion of the said Supreme Court ruled : That when in answer to paragraph 18 of the application or survey referred to in the policy, viz. : "Is there any other person interested in the property?" the said plaintiff answered, "none;" that such answer was not, pro ut the said opinion, a breach of article 4 of the conditions of the policy referred to in the said declaration, which provides: If the interest of the 10 assured in the property be other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy should be void, notwithstanding there were at that time four mortgages, amounting in the aggregate to fifty-eight hundred dollars upon the said property, which were valid liens thereon.

To which ruling of the said Chief Justice the de- 20 fendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

And the said Chief Justice further ruled : That the answer to said eighteenth subdivision of said application created no breach of the warranty expressed therein, pro ut the said opinion.

To which ruling of the said Chief Justice the de- 30 fendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

The nineteenth subdivision of said application or survey, and the reply thereto, is in the words and figures following, to wit :

- | | |
|---|--|
| <p>10 “ 19. Incumbrance.--Is there
 “ any incumbrance on
 “ the property?
 “ If mortgaged state the
 “ amount. _____
 “ Is there any insurance
 “ by the mortgagee? No.</p> | <p>19. Expects to borrow \$2500
 and use this policy
 as collateral.</p> |
|---|--|

Pro ut the said application.

At the time of the making of said application and the issuing of said policy there were as aforesaid four mortgages on the said property amounting in the aggregate to fifty-eight hundred dollars, which were liens thereon, and the said Chief Justice, in respect to this subdivision of said application and the reply thereto, ruled: That the same did not create a breach of
 20 warranty by the assured, under the conditions of said policy, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

And the said Chief Justice further ruled: That the said written answer to said subdivision nineteen of
 30 said application, failed to answer the second clause of said subdivision, and that said second clause was unanswered in said application, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

And the said Chief Justice further ruled : That said reply to said sub-division nineteen did not create such an omission to make known every fact material to the risk as would avail to avoid the said policy under the conditions thereof, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.] 10

And the said Chief Justice further ruled : That the said Thomas C. Pearce was constituted the agent of the defendants for the purpose of receiving premiums on such policies of insurance, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.] 20

And the said Chief Justice further ruled : That under the circumstances of the case payment to said Pearce of premiums on policies negotiated by him, was payment to the company, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.] 30

And the said Chief Justice further ruled : That the delivery to said Pearce of the note for the amount of the premiums on the five policies referred to in the testimony, one of which was the policy in suit in this case, and the discounting of said note by said Pearce at his bank, and the passing of the proceeds thereof by the bank to the credit of said Pearce was actual payment of said premium to the defendants, pro ut

10 the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.]

And the said Chief Justice further ruled : That a failure to comply with the condition of insurance with respect to the reasonableness and sufficiency of the preliminary proofs may be waived by the insured. The waiver may be by parol, although the policy provides in its conditions that insurance shall neither be changed nor waived, except after written consent by the President or Secretary. That such a stipulation applies only to those conditions or provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue on his contract, pro ut the

20
30

said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.]

And the said Chief Justice further ruled : That in this case there was competent evidence to justify a jury in finding a waiver of literal compliance with the condition of said policy with respect to the service and substance of preliminary proofs in all matters to which objections are made, pro ut the said opinion.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is 10 sealed accordingly.

M. BEASLEY, C. J. [L. s.]

And the said Chief Justice further ruled : That the failure to furnish competent proofs of loss stating the incumbrances on said property within thirty days after the fire, did not work a forfeiture of claim on said defendants under said policy, because there was a waiver on the part of said defendants, pro ut the said opinion. 20

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. s.]

The policy of insurance set forth in the declaration in the eighth condition thereof required that persons sustaining loss or damage by fire should within thirty days after the fire render a particular account of such loss 30 signed and sworn to by them, stating the actual cash value of the property and their interest therein, and the encumbrances thereon.

The eleventh condition of said policy provided as follows : "*Limitation as to suit or action* It is furthermore hereby expressly agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity, until after full compliance by the assured, with all the foregoing requirements." 40

It appeared by the testimony and trial in the cause, pro ut the same, that the defendants contended, that no proof of loss containing a statement of the encumbrances on said property, and signed and sworn to by the person sustaining loss by said fire has ever been furnished to the said defendants.

Under this state of facts the said defendants contended on the trial of said issue, that said suit was prematurely brought, and was not yet sustainable, and requested the said Chief Justice so to rule, but the
10 said Chief Justice declined to so rule, and on the contrary ruled that under the facts in said cause, said suit was not prematurely brought, but was at this time sustainable, notwithstanding said conditions in said policy.

To which ruling of the said Chief Justice the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

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And the said Chief Justice further ruled : That the statement in the said papers furnished as proofs of loss with regard to the value of the engine and boiler, and the damage thereto, were not fraudulent, and did not cause a forfeiture of claim on the said defendants under said policy.

To which ruling of the said Chief Justice the
30 defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

OPINION.

1. Where the policy in express terms refers to the application, or other papers connected with the risk, and adopts them as part of the contract of insurance, they become part of the policy, and the statements therein relative to the situation, use and character of the risk are warranties on the part of the assured.

2. Conditions in a policy which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. 10

3. A policy issued on a written application for insurance in which one of the questions propounded is left unanswered, is a waiver of the right to the information called for by such a question, and the contract of insurance will be considered as based on answers given to inquiries to which the applicant has responded. 20

4. An application for insurance on a mill property, contained the following questions : (18th.) Ownership. Is the mill owned and operated by the applicant ? Ans. Yes, by the applicant and his son. Is any other person interested in the property ? if so, state the interest ? Ans. None. (19th.) Incumbrances. Is there any incumbrance on the property ? Ans. Expects to borrow \$2,500 and use the policy as collateral. If mortgaged, state the amount ? To this question there was no answer. The applicant had title to the premises in fee simple, but they were subject to four mortgages. The policy was written in "Loss if any payable to Israel Baldwin, mortgagee." Baldwin was one of the four mortgagees. *Held :* 30

- (1.) That the first of these inquiries had reference to the state of the legal title, and that the subject of incumbrances was dealt with exclusively in the inquiry contained in the 40 other subdivision.

- (2.) That the applicant being the owner in fee of the legal estate, the mortgages, were no breach of the warranty with respect to the ownership of the property.
- (3.) That the policy having been issued upon an application in which no answer had been given to the inquiry as to incumbrances, there was no warranty on that subject.

10 5. The policy contained a stipulation that the insurer should not be liable by virtue of this policy or any renewal thereof, for any loss that may occur before the premium has actually been paid to this company. The policy was sent to P., an agent, for delivery, whose duty it was to deliver the policy and receive the premium. The agent testified that the rule of the company was for the agent to report once a month; that he always held the funds for a month, and sometimes longer. His commissions were deducted from
 20 the premiums when he made his remittances. The agent delivered the policy and took the note of the assured, with an endorser, payable at a bank, for the premium. He had the note discounted, and the proceeds placed to his credit in the bank before the loss occurred. Held:

- (1.) That a condition in a policy, "that if any broker, or any other person than the assured, has procured this policy, he shall be deemed the agent of the assured, and not of the company," did not debar the company of the power to appoint agents, and clothe them with such authority, general, special or limited, as might be advisable; and the delegation of such authority will carry with it such powers and consequences as are incident to the relation of principal and agent within the scope of the authority conferred.

- (2.) That P. was constituted the agent of the company for the purpose of receiving premiums on policies negotiated by him, and that payment of such premiums to him was payment to the company. And
- (3.) That the premium on this policy was paid when the note was discounted, and the proceeds passed to P.'s credit in the bank.

6. A stipulation in a policy, that no agent of the company is authorized, in any respect, to change the terms and conditions of this policy, and they shall neither be changed nor waived except in writing, signed by the president or secretary of the company, "applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue upon his contract. After the loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, though the policy contain such a stipulation as is above referred to." 10 20

7. A condition providing that "all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under the policy," is available as a defense only when it appears that the assured knowingly and intentionally swore falsely, or said or did that which is claimed to be fraudulent. Mere mistake in stating facts, or an over-valuation, is not sufficient to sustain the defense.

Argued before the Chief-Justice and Justices Depue, Scudder, and Knapp, by Mr. Beasley, Jr., and A. G. Richey, for plaintiff, and F. McGee and J. D. Bedle for defendants.

The opinion of the Court was delivered by Depue, 40

J. The suit was tried at the circuit until the evidence was in, and then the trial was, by consent of counsel, suspended, that questions of law might be heard before the Supreme Court.

The premises insured consisted of a flouring mill, engine, and machinery, situate in the County of Mercer. The insurance was negotiated with Thomas C. Pearce, an agent of the company, residing at Hightstown, in said county. The policy bears date January 10 8, 1880. In it is written the direction, "Loss, if any, payable to Israel Baldwin, mortgagee." The fire occurred February 15, 1880.

The defense was made exclusively on the ground on non-compliance with the conditions of the insurance. When the testimony for the defense was in, the plaintiff offered evidence competent to meet a defense, founded on a fraudulent concealment or suppression of the truth in regard to incumbrances on the property, and thereupon the defendant's counsel stated that they 20 did not rely on fraudulent misrepresentation, or fraudulent concealment, and disclaimed any imputation of actual fraud in the application, and put themselves upon a breach of warranty and non-compliance with the conditions of insurance. This disclaimer has simplified very much the examination of the case.

The conditions of insurance are contained in the body of the policy. By the first of them it is stipulated that if an application, survey, plan or description is referred to in the policy, it shall be considered a part 30 of the contract and a warranty by the assured. The policy was issued upon an application signed by the applicant, which is referred to in the policy in the same words, viz.: "For a more particular description reference is had to the application and survey No. 118,031, filed with this company, which is a warranty on the part of the assured, and is hereby made a part of this policy."

Where the policy in express terms refers to the application or other papers connected with the risk, and 40 adopts them as part of the contract of insurance, they

become part of the policy ; and the statements therein relative to the situation, use or character of the property are warranties on the part of the assured, and the validity of the contract of insurance depends upon the truth and fulfillment of the warranties and conditions therein expressed. Wood on Insurance, § 137; Jennings v. The Chenango County Insurance Co., 2 Denio, 75 ; Sheldon v. Hartford Fire Insurance Co., 22 Conn. 235 ; First National Bank v. Insurance Co., 50 N. Y. 45 ; DeWees v. Manhattan Ins. Co., 5 Vroom 244. I consider the incorporation of the application for insurance into this policy so as to make it part of the contract of insurance too clear to require discussion. 10

First—The only portion of the defense which is rested on matters contained in the application for insurance is that which relates to the ownership of, and incumbrances upon, the premises embraced in the 18th and 19th sub-divisions of the application which are as follows : “(18). Ownership. Is the mill owned and operated by the appellant? A. Yes ; by the appellant and his son. Is any other person interested in the property ; if so, state the interest? A. None. (19). Encumbrances. Is there any incumbrances on the property? A. Expects to borrow \$2,500 and use the policy as a collateral. If mortgaged state the amount? To this question there is no answer. 20

It is manifest from the classification in these two sub-divisions and the enquiries specially propounded under each head, that in the former, ownership and interest had reference to the state of the legal title, and that the subject of incumbrances was dealt with exclusively in the latter subdivision. 30

A warranty in a policy of insurance excludes all argument in regard to its reasonableness, or the probable intent of the parties. If the policy contains a condition which in law amounts to a warranty on the part of the assured, he can derive no benefit from the policy, unless the condition has been literally performed. And it is immaterial to what cause non-compliance is 40

attributable, for, if it be not in fact complied with, the assured will forfeit all his rights under the policy, unless the forfeiture has been waived by the insurer. *Marshall on Ins.*, 251; *Wood v. Hartford Insurance Co.*, 13 Conn., 544; *DeWeer v. Manhattan Insurance Co.*, 5 Vroom, 244. Hence it has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them
 10 which create forfeitures, will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy.

Palmer v. Warren Ins. Co., 1 Story, 360.

Stone v. United States Casualty Ins. Co.,
 5 Vroom, 375.

State Insurance Co. v. Maackins, 9 Vroom,
 564.

Wood on Insurance, § 57.

20 In enforcing forfeitures the court should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction, which will not produce such results. *Walker J. in Hartford Insurance Co. v. Walsh*, 54 Ill. 164

If the assured has an insurable interest in the property, insurance of it as his property, or by him as owner, will be valid, though his title be a qualified or a mere equitable title : (*Franklyn Fire Insurance Co. v. Martin*, 11 Vroom, 568 ; *Insurance Company v. Wood-*
 30 *ruff*, 2 Dutch, 541 ;) and he is not bound to state the nature or particulars of his title, unless expressly required to do so by the provisions of the policy ; *May on Insurance*, 285.

The production of the plaintiff's title showed that he was the owner of the entire legal estate in fee simple. A mortgagor is deemed seized of the lands against all the world except the mortgagee. *Thompson v. Boyd*, 1 Zab. 58. In this state the title of the mortgagee is only a title *sub modo*, and in law as well as in common
 40 parlance, the mortgage is considered as a mere security

for the debt, an incumbrance on the legal title of the mortgagor. *Kircher v. Schalk*, 10 Vroom, 335-337; S. C., 11 Vroom, 32. A mortgage upon property insured is not a violation of a condition against a sale, conveyance, alienation or change of title. *Commercial Insurance Company v. Sparnable*, 52 Ill. 53. Nor is it within a prohibition against any change in the title or possession of the property, whether by sale, transfer or conveyance. *Hartford Insurance Company v. Walsh*, 54 Ill., 164. A mortgage is not such¹⁰ an alienation of real or personal property as will avoid the policy. *Jackson v. Warren Insurance Company*, 23 Pick., 418; *Rice v. Somer*, 1 Gray, 426; *Conover v. Mutual Insurance Company*, 3 Denio, 254. The cases of *Allen v. Charlestown Insurance Company*, 15 Gray, 384, and *Franklyn Insurance Company v. Vaughan*, 92 U. S. Rep., 516, illustrate the strictness of construction applied to such conditions when they are invoked to work a forfeiture of the contract.

In *Insurance Company v. Huron*, 95 U. S., 242, the²⁰ owner of the fee, to whom was issued a policy containing a condition identical with the fourth condition in the policy with respect to the interest of the assured, being "other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured" was held entitled to recover on his policy, although at the time it was issued there was an outstanding lease for years to a third party, which fact was neither represented to the company nor expressed³⁰ in the policy.

I think there was no breach of the warranty expressed in the eighteenth sub-division of the application, which relates to the ownership of the land.

The defence under sub-division nineteenth in the application stands on a different ground. The premises were then subject to four mortgages; one to Hutchinson, dated April 6, 1847, for \$1500; another to Cubberly, dated April 1, 1867, for \$1000; the third to Taylor, dated March 31, 1877; the fourth to Baldwin, dated December 30, 1879, for \$2000. If the appli- 40

cant had falsely answered the enquiries propounded with respect to incumbrances, the policy would be avoided for a breach of a condition of insurance, but he studiously refrained from making any answers to the inquiry on the subject. The paper was incomplete in this respect.

The application was prepared by Pearce and signed by the applicant. It was then transmitted to the company and the policy was issued directly from the company's office upon the application in its incomple-
 10 condition. When a policy is issued on a written application for insurance, and any of the questions are left unanswered, the objection must be made before the policy is issued. A policy issued upon such an application is a waiver of the right to the information called for by the inquiry unanswered, and the contract of insurance will be considered as based only on the answers given to the inquiries to which the applicant has responded. If the insurer issues a policy upon an
 20 incompleated application for the insurance, he cannot afterwards avoid the policy, on the ground that the answers were not full. Wood on Insurance, §§ 151-496; May on Insurance, § 166; Liberty Hall Association v. Housatonic Insurance Co., 7 Gray, 261; Hall v. People's Insurance Co., 6 Gray, 185; Dolan vs. Farmer's Insurance Co., 5 Lansing, 275; Core vs. Hide and Leather Insurance Co., 112 Mass. 139.

The plaintiff at the trial in order to meet a defense that the information with regard to incumbrances was
 30 fraudulently withheld, offered to show that Pearce the agent of the company, filled up the application, and that the different incumbrances on the property were spoken of between him and Pearce before the application was filled up, and that therefore there was no omission to make known the existence of the incumbrance. Upon such a defence the evidence proffered was competent. Franklyn Fire Insurance Co. v. Martin, 11 Vroom, 574, and cases cited; Insurance Co. v. Woodruff, 2 Dutcher, 551-2; Dodge County Insurance
 40 Company v. Rogers, 12 Wisconsin, 337. The testi-

mony was objected to, and on a disclaimer by the defendant's counsel of the defence of a fraudulent misrepresentation of a fraudulent concealment the evidence was withdrawn. The defence was at the trial put solely on a breach of warranty. It is therefore sufficient to say that we do not find that the applicant entered into any contract of warranty on this subject.

Second—The policy was executed at the company's office in Jersey City, and sent to Pearce for delivery. He delivered it to Baldwin within a week from the 10 time it was issued. One of the conditions of insurance is, that the "company shall not be liable, by virtue of this policy, or any renewal thereof, for any loss that may occur before the premium has actually been paid to the company." Another condition is that "No agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall be neither changed nor waived except in writing, signed by the president or secretary of the company." 20

When the policy was delivered, Pearce took a note 20 for the premiums on this and other policies on the same premises, delivered at the same time and issued by other companies. In *Basch v. Humboldt Insurance Company*, 6 *Vroom*, 429, it was held, upon a policy containing the same condition with respect to the prepayment of the premium, which also contained an acknowledgment of the receipt of the premium, that the company was, on the delivery of the policy by the agent, estopped from setting up the non-payment of 30 the premium. This policy contains no formal acknowledgment of the receipt of the premium. It recites that the company, "in consideration of fifteen dollars, and the conditions and agreements herein contained, doth insure, &c." It is not proposed to consider whether, in legal effect, there is any difference between these two forms of policies, where the policy has been delivered by an agent authorized to deliver it and receive the premium, if such agent has delivered the policy unconditionally, and has agreed to credit 40

the insured, and has made himself a debtor for it to the company. See *Halleck v. Insurance Co.*, 2 Dutch. 268-275; *Trustees v. Brooklyn Insurance Company*, 19 N. Y. 305; *New York Central R. R. Co.*, 20 Barb. 469, 12 Wall, 385. As will appear in the sequel, the decision of that question is not necessary in this case.

Pearce was the agent of the company. He had been its agent for fifteen years, and had taken a great many policies for the company. He testified that the
 10 company always forwarded policies to him before it received the premiums, and that it was his duty to deliver the policies and collect the premiums. He also testified that it was the rule of the company for the agent to report once a month; that he always held the funds for a month, and sometimes longer. His commissions were deducted from the premiums when he made his remittances. The condition in this policy,
 20 "that if any broker, or any other person than the assured, has procured the policy, he shall be deemed the agent of the assured, and not of the company," does not debar the company of the power to appoint agents, and clothe them with such authority, general, special or limited, as might be advisable; and the delegation of such authority will carry with it such powers and consequences as are incident to the relation of principal and agent, within the scope of the authority conferred. There can be no doubt that, under the circumstances of the case, payment to Pearce
 30 of premiums on policies negotiated by him was payment to the company. He was constituted its agent for the purpose of receiving such premiums.

The note taken by Pearce was payable to him individually, and was endorsed by Baldwin. Pearce testifies that he took the note on his own responsibility; that he got it discounted at bank within a week or ten days after he received it, and perhaps in less time, and that the proceeds were passed to his credit. The note was discounted and the proceeds passed to Pearce's credit in the bank before the fire occurred. On the next
 40 day after the fire Pearce sent his account to the secre-

tary of the company, including the premiums on this policy, and other policies he had negotiated for the company, inclosing therewith his checks for these premiums less his commissions. In his letter he says, speaking of the Carson policy, "the premium was settled at the time it was due." The company having received information of the fire, has not not used Pearce's check. The president testified that he informed Pearce that they would not complicate matters by accepting the premium, and that he could take the checks back, or if he wished, might leave them with the secretary. The checks are still in the secretary's hands unused. The note was paid by Baldwin after the fire but before it matured. 10

Assuming that the note was given, not as payment, but only as an instrument by which to obtain the money for the premium, and that Pearce in obtaining its discount, acted as the agent of the plaintiff, and giving to the condition of insurance the most literal interpretation it is susceptible of, as soon as the note was discounted, and Pearce received the proceeds, the premium was actually paid as much so as if he had secured a check for it on a bank or an order on a third person which was paid on presentation. On a state of facts much less direct and positive the Court held in *Chickering v. Globe Insurance Co.*, 116 Mass. 321, that the funds of the assured had come into the hands of the agent, and were a payment of the premium within the meaning of a similar provision in a policy. The question of the power of an agent to waive conditions of insurance does not arise. The agent had authority to receive the premium for the company. Payment of it to him was payments to the company, and when the money for it actually came into his hands from the discounting of the note, the premium was actually paid, and the policy took effect then by its own terms. 20

Third—Exceptance was taken to the substance and service of proof of loss. Proofs were served March 8, March 28 and March 31. The first was served 40

within the time prescribed, the others after that, to meet objections made to former proofs. Condition eighth requires that the proofs shall be in writing, signed and sworn to by the insured, and shall give all incumbrances upon the property. The proofs served were signed and sworn to by the insured. Besides the mortgages named, judgments had been recovered against the insured after the application was made. With the last proofs served, a detached paper contain-

10 ing a statement of the mortgages and judgments was delivered. On the 27th of April, 1880, before this suit was commenced, and after the thirty days had expired within which the proof of loss was acquired, the defendant obtained the examination of Carson under oath, pursuant to one of the conditions of insurance.

Failure to comply with the condition of insurance with respect to the reasonableness or sufficiency of the preliminary proofs may be waived by the insurer.

20 The waiver may be by parol, although the policy provides that the conditions of insurance shall neither be changed nor waived except in writing, signed by the president or secretary. Such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable

30 the assured to sue on his contract, such as giving notice and furnishing preliminary proof of loss.

May on Insurance, § 511.

Wood on Insurance, § 496.

Franklyn Fire Ins. Co. v. Chicago Ice Co.
36 Md., 102, 11 American Rep., 469.

Blake v. Exchange Ins. Co., 12 Gray, 265.

Priest v. Citizens Ins. Co., 3 Allen, 602.

In this case there was competent evidence to justify

40 a jury in finding a waiver of a literal compliance with

the condition with respect to the substance and service of preliminary proofs in all matters to which objection was made.

Fourth—The condition which provides that all fraud, or attempt at fraud by false swearing, or otherwise, shall cause a forfeiture of all claim under the policy is available as a defence only when it appears that the assured knowingly and intentionally swore falsely, or said or did that which is claimed to be fraudulent. Wood on Insurance, § 429. Mere mistake in stating facts or an over-valuation in making out proofs of loss, is not sufficient to sustain the defense. It must appear that the erroneous statement or over-valuation was made intentionally and with a fraudulent intent. May on Insurance, § 477; Jones v. Mechanics Ins. Co., 7 Vroom, 29; Gibbs v. Continental Ins. Co., 11 Hem. 611; Franklyn Fire Ins. Co. v. Vaughan, 92 U. S. Rep. 516; and the question is one of fact for the jury, Wood on Insurance, § 429; Insurance Co. v. Weides, 4 Wall. 376.

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COPY OF POSTEA.

Afterwards, to wit, at a Circuit Court holden at Trenton in and for the County of Mercer, before Mercer Beasley, Esquire, Chief Justice of the Supreme Court, holding said Circuit Court at the Term of October, A. D. eighteen hundred and eighty of said Circuit Court, according to the form of the statute in such case made and provided, comes as well the said plaintiffs, by A. G. Richey & Son, his attorneys, as the said defendants, by Bedle, Muirheid & McGee, their attorneys within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid being also summoned, come who to speak the truth of the matters and things within contained, being chosen and sworn, and the evidence having been duly taken, and thereupon, by consent of the attorneys and 40

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counsel of both sides the Court permitting the same to be done, the jury empaneled to try the cause was discharged. And it was further agreed that questions of law in the cause should be heard before the Supreme Court in Bank, upon the evidence taken in the case, and that the Chief Justice before whom the case was tried should settle all questions of fact, and the questions of law arising in the case having been heard by the said Supreme Court, and the said Court having decided
 10 the same in favor of the plaintiff, now, therefore, I, Mercer Beasley, Chief Justice of said Supreme Court, holding said Circuit Court, to whose decision the facts in the case were referred, do find that the said defendants, the Jersey City Insurance Company, did undertake and promise in manner and form as the said plaintiff, David Carson, who sues to the use aforesaid, hath in his said declaration alleged, and I do hereby assess the damages of the plaintiff, by reason of the not performing said promises and undertakings,
 20 over and above the costs and charges by him about his suit in this behalf expended, at the sum of five hundred and thirty dollars and eighty cents (\$530.80), and for those costs and charges to six cents, therefore, &c.

M. BEASLEY,
 Ch. J.

ASSIGNMENT OF ERRORS.

30 Afterwards, that is to say, on the eleventh day of July, eighteen hundred and eighty-one, before the Court of Errors and Appeals, in the last resort in all causes, in the State of New Jersey, comes the said The Jersey City Insurance Company, by Bedle, Muirheid & McGee, its attorneys, and says that, in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exception, and in the determination, decision, and
 40 judgment aforesaid, there is a manifest error in this, to

wit: That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said David Carson to have his aforesaid action thereof against the said The Jersey City Insurance Company.

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was tried, admitted evidence at the trial of said issue which was illegal, and which was objected to by the said defendants on the trial, and which was injurious to the said defendants; whereas, by the law of the land, the said Chief Justice ought not to have admitted the said evidence. 10

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was tried, at the trial of said issue, struck out as illegal an answer of the witness, Nathaniel Foote, namely, in answer to the question, "Do you recollect of Mr. Pearce ever asking the company to hold his checks, and if so, under what circumstances?" the said witness answered, "Yes, sir, he has a number of times asked the company to hold his checks, stating that the parties were away, and that he had not delivered the policies; this was done by letter in response to our demand for settlement." To which striking out the defendants objected, and by which they were injured, and which answer was a legal answer; whereas, by the law of the land, the said Chief Justice should have permitted said answer to stand, and ought not to have stricken out the same. 20

There is also manifest error in this, to wit: That the said Chief Justice before whom the said issue was tried, at the trial of said issue decided that when in answer to paragraph eighteen of the application or survey referred to in the policy set forth in said declaration namely, "Is there any other person interested in the property?" the said plaintiff answered "None;" that such answer was not a breach of article four of the conditions of the policy referred to in said declaration which provides, "If the interest of the assured in the property be any other than the entire, uncondi- 30 40

tional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void," notwithstanding that there were at that time four mortgages amounting in the aggregate to fifty-eight hundred dollars upon the said property which were valid liens thereon ; whereas by the law of the land the said Chief Justice should have decided that said reply was
 10 a breach of said article four of the conditions of said policy.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was tried, at the trial of said issue decided that the reply of said plaintiff to the eighteenth sub-division of said application or survey in the policy referred to in said declaration created no breach of the warranty expressed therein ; whereas by the law of the land the said Chief Justice should have decided that such answer
 20 did create a breach of said warranty.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was tried, at the trial of said issue decided, with reference to the nineteenth sub-division of said application or survey and the reply thereto, as herein stated namely, The nineteenth sub-division of said application or survey and the reply thereto, is in the words and figures following, to wit :

19. Encumbrances.—Ist here any incumbrance on the property ? 30 If mortgaged state the amount.— Is there any insurance by the mortgagee? No.	19. Expects to borrow \$2500 and use this policy as a collateral.
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Pro ut the said application.

At the time of the making of said application and the issuing of said policy, there were as aforesaid four mortgages on the said property amounting in the aggregate to fifty-eight hundred dollars, which were liens thereon, and the said Chief Justice in respect to this said sub-division of said application or survey, and the reply
 40 thereto, decided that the same did not create a breach of

warranty by the assured under the conditions of said policy ; whereas by the law of the land the said Chief Justice should have decided that the same did create a breach of warranty by the assured under the conditions of said policy.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was tried, at the trial of said issue decided that the said written reply to said sub-division nineteen, of said application or survey referred to in said policy on which 10 the said declaration was founded, failed to answer the second clause of said sub-division, and that said second clause was unanswered in said application or survey ; whereas by the law of the land the said Chief Justice ought to have decided that the said sub-division of the said application or survey was sufficiently answered, and that said answer created a breach of the warranty therein contained.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was 20 tried, at the trial of said issue decided that the second clause of said sub-division nineteen of said application or survey was not answered ; whereas by the law of the land, the said Chief Justice ought to have decided that the answer to the first clause of said sub-division covered and was intended to cover all the incumbrances then on said property, and that the dash written after the second clause of said sub-division was intended to negative the conclusion that were any mortgages on said property other than those stated in the 30 reply to said sub-division.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was tried, at the trial of said issue decided with reference to the nineteenth sub-division of said application or survey, that the second clause thereof was unanswered ; whereas by the law of the land the said Chief Justice ought to have decided that the reply, " Expects to borrow \$2,500 and use this policy as a collateral," and the dash written after the second clause of said sub- 40

division, and the word, "No," written after the third clause of said sub-division, taken in connection with the inquiries propounded in said sub-division, constituted a warranty on the part of the assured that there was at that time no encumbrance whatever on the property therein mentioned, and on which said policy was afterwards issued.

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was
 10 tried, at the trial of said issue decided with reference to the second clause of the nineteenth sub-division of said application or survey, that the same was unanswered; whereas by the law of the land the said Chief Justice ought to have decided that the answer, "Expects to borrow \$2,500 and use this policy as a collateral," and the dash and the word "No," above referred to, taken in connection with the inquiries propounded in said sub-division, constituted a warranty on the part of the applicant that there were at that time no in-
 20 cumbrances on the property, but that he expected to borrow to \$2,500 and use this policy as a collateral for said proposed loan.

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was tried, at the trial of said issue, decided, with reference to the nineteenth sub-division of said application or survey, and the reply thereto, that the same did not create a breach of warranty by the assured under the conditions of said policy; whereas, by the law of the
 30 land, the said Chief Justice ought to have decided that the said answer ("Expects to borrow \$2,500, and use this policy as a collateral," in view of the facts set forth in the testimony, that at that time the said plaintiff did not intend to borrow \$2,500), did create a breach of warranty by the assured under the conditions of said policy, and did avoid the said policy.

There is also manifest error in this, to wit: That the said Chief-Justice, before whom the said issue was tried, at the trial of said issue, ruled that said reply to
 40 said sub-division nineteen, in said application or sur-

vey, did not create such an omission to make known every fact material to the risk as would avail to avoid the said policy under the conditions thereof.

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was tried, at the trial of said issue, decided that the said Thomas C. Pearce was constituted the agent of the defendants, for the purpose of receiving premiums on such policies of insurance; whereas, by the law of the land, the said Chief Justice should have decided that the said Thomas C. Pearce was the agent of the assured, and not in any respect the agent of the said defendants. 10

There is also manifest error in this, to wit: That the said Chief-Justice, before whom the said issue was tried, at the trial of said issue, decided that, under the circumstances of this case, payment to said Pearce of premiums of policies negotiated by him was payment to the defendants; whereas, by the law of the land, the said Chief Justice should have decided that the said defendants were not liable by virtue of said policy or any renewal thereof, for any loss that might occur before the premium had been actually paid to the defendants, and that payment to said Pearce was not actual payment to the defendants. 20

There is also manifest error in this, to wit: That the said Chief Justice before whom said issue was tried, at the trial of said issue, decided that the delivery to said Pearce of the note for the amount of the premiums on the five policies referred to in the testimony, one of which was the policy in suit in this case, and the discounting of said note by said Pearce at his bank, and the passing of the proceeds thereof by the bank to the credit of said Pearce, was actual payment of said premium to the defendants, whereas by the law of the land the said Chief Justice ought to have decided that the same did not constitute payment of said premium to these defendants. 30

There is also manifest error in this, to wit: That the said Chief Justice, before whom said issue was tried, 40

at the trial of said issue, decided that a failure to comply with the the conditions of insurance with respect to the reasonableness and sufficiency of the preliminary proofs might be waived by the assured; that the waiver might be by parol, although the policy provided in its conditions that the policy should neither be changed nor waived except after written consent by the president or secretary, that such a stipulation applied only to those conditions or provisions in the
 10 policy which related to the formation and continuance of the contract of insurance, and were essential to the binding force of the contract while it was running, and did not apply to those conditions which were to be performed after the loss had occurred, in order to enable the assured to sue on his contract, whereas by the law of the land the said Chief Justice ought to have ruled that under the conditions of the said policy none of the terms or conditions of said policy could be waived by an agent of the company, and that none
 20 of the said conditions could either be changed or waived except in writing, signed by the president or secretary of the company, and that these conditions include the preliminary proofs and all the requisites thereof set forth in the policy.

There is also manifest error in this, to wit: That the said Chief Justice, before whom the said issue was tried, at the trial of said issue, decided that in this case there was competent evidence to justify a jury in finding a waiver of literal compliance with the conditions
 30 of said policy with respect to the service and substance of preliminary proofs in all matters to which objections were made; whereas by the law of the land the said Chief Justice ought to have ruled that there was not competent evidence to justify a jury in such finding.

There is also manifest error in this, to wit: That the said Chief Justice, before whom said issue was tried, at the trial thereof decided that the failure to furnish competent proofs of loss stating the encum-
 40 brances on said property within thirty days after the

fire, did not work a forfeiture of claim on said defendants under said policy, because there was a waiver on the part of said defendants; whereas by the law of the land said Chief Justice should have decided that such failure did work a forfeiture of claim on these defendants under said policy.

There is also manifest error in this, to wit: That the said Chief Justice, before whom said issue was tried, at the trial thereof, decided that said suit was sustainable and not prematurely brought; whereas by the law of the land the said Chief Justice ought to have decided, that under the conditions of said policy the said plaintiff was not entitled to maintain any suit or action against these defendants for the recovery of any claim by virtue of said policy, until after he had furnished sufficient proofs of loss in accordance with the conditions of said policy. 10

There is also manifest error in this, to wit: That, by the eighth condition of said policy of insurance, it was provided that persons sustaining loss or damage by fire should, within thirty days after the fire, render a particular account of said loss, signed and sworn to by them, stating the actual cash value of the property, and their interest therein, and the encumbrances thereon. And, by the eleventh condition of said policy of insurance, it was provided that no suit or action against the said defendants, for the recovery of any claim by virtue of said policy, should be sustained in any court of law or equity, until after full compliance by the assured with all the requisites contained in the conditions of said policy. 20 30

It appeared by the testimony in the case that no proof of loss containing a statement of the encumbrances on said property, and signed and sworn to by the persons sustaining loss by the said fire, had ever been furnished to said defendants at the time of the beginning of said suit, or at any time. And the said defendants contended, on the trial of said issue, that said suit was prematurely brought, and was not yet sustainable, and requested the said Chief Justice to so 40

rule, yet the said Chief Justice, before whom the said issue was tried, at the trial thereof declined so to rule, but, on the contrary, decided that, on the facts in said cause, said suit was not prematurely brought, but was at that time sustainable, notwithstanding said conditions in said policy ; whereas, by the law of the land, the said Chief Justice ought to have decided that, under the said conditions of said policy, the said action was prematurely brought, and was not at that time sustain-
 10 ble.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issue was tried, at the trial thereof, decided that the statement in said papers furnished as proofs of loss with regard to the value of the engine and boiler, and the damage thereto, were not fraudulent, and did not cause a forfeiture of claim on said defendants under said policy ; whereas, by the law of the land, the said Chief Justice ought to have ruled that said statement did cause such
 20 forfeiture.

There is also manifest error in this, to wit : That the said Chief Justice, before whom the said issues were tried, at the trial thereof decided said cause in favor of said plaintiff and against said defendants ; whereas by the law of the land the said Chief Justice ought to have decided said cause in favor of the defendants and against the said plaintiff.

There is also manifest error in this, to wit : That by the record aforesaid it appears that judgment in the
 30 said plea aforesaid was given for the said David Carson, who sues, etc., against the said The Jersey City Insurance Company ; whereas by the law of the land judgment in the said plea ought to have been for the said The Jersey City Insurance Company against the said David Carson.

Therefore the said The Jersey City Insurance Company prays that the judgment aforesaid by reason of the errors aforesaid, and of the errors appearing in the record and proceedings aforesaid may, be reversed, an-
 40 nulled and for nothing holden, and that the said The

Jersey City Insurance Company may be restored in all things that it has lost on occasion of the said judgment, and that the said David Carson may rejoin to the said errors.

BEDLE, MUIRHEID & MCGEE,
Attys of Pltffs in Errors.

10

JOINDER IN ERROR.

And hereupon, afterwards, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-one, the said David Carson, who sues for the use of Israel Baldwin, defendant in error, by A. G. Richey & Son, his attorneys, comes into Court, and says: That there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c. ²⁰

A. G. RICHEY & SON,
Attorneys and of Counsel
with Defendant in Error.

EXHIBITS.

EXTRACT FROM EXHIBIT B. M. B.

Flouring Mill Survey, Jersey City Insurance Company.

The applicant will answer *particularly* the following questions, and sign the same, as descriptive of the premises, and forming a part of the contract of insurance and a *warranty* on his part.

Give clear and definite answers to all the questions.

* * * * *
 18. *Ownership.* Is the mill owned and operated by the applicant.
 Is there any other person interested in the property?
 If so, state the interest.
 Is the property rented or leased? If so, state for how long.

* * * * *
 18. Yes, by the applicant and his son.

None.

20
 19. *Incumbrance.* Is there any incumbrance on the property?
 If mortgaged, state the amount, _____
 Is there any insurance by the mortgagee? No.

19. Expects to borrow \$2500, and use this policy as a collateral.

20. *Other Insurance.* What amount is now insured on the property? Building and stock separately.
 In what offices, and on whose account? Specify particularly.

20. } make this
 None. } policy payable
 } to Israel Baldwin,
 } as his interest
 None. } may appear.

30 * * * * *

* * * * *

Valuation of Buildings, \$2000
 Valuation of machinery, \$2000
 " " stock, \$2000

Insurance on: Buildings, \$1000
 " " machinery, \$1000
 Engine and Boiler, \$500

 2500

This survey in all cases to be signed by the applicants, or some person duly authorized by him; in no case by the agents effecting the insurance.

Rates 3 per cent. per year.

Dated at January 3rd, 1880.

No. 118,031

POLICY.

\$500

By this policy of insurance, The Jersey City Insurance Company, in consideration of fifteen dollars and of the agreements and conditions herein contained, do insure David Carson, against loss or damage by fire or lightning to the amount of five hundred dollars.

\$200—On his 3 story frame Custom Grist Mill building, 32 x 32 ft., slate and shingle roof, situate $1\frac{1}{2}$ miles south of Windsor, Mercer Co., N. J., and standing detached 100 ft. or more from the residence of the assured. 10

\$200—On his machinery, shafting and belting.

\$100—On Engine and boiler contained therein.

Loss if any payable to Israel Baldwin mortgagee

\$2,000. Other insurance permitted.

\$500 1 year ; 3% , \$15.

For a more particular description, reference is had to the application and survey No. 118,031, filed with this Company, which is a warranty on the part of the assured, and is hereby made a part of this Policy. 20

Term.—Payment of Loss.—And the said Jersey City Insurance Company hereby agree to make good unto the said assured, his executors, administrators and assigns all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the 8th day of January, one thousand eight hundred and eighty, at twelve o'clock at noon, to the 8th day of January, one thousand eight hundred and eighty one, at twelve o'clock at noon ; the amount of loss or damage to be estimated according to the actual cash market value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at this office, in accordance with the terms and provisions of this policy, unless the company shall have given notice of their intention to re-build, repair or replace the property. 30 40

1. *Matters avoiding Policy.*—If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in written application or otherwise; or if the
 10 assured shall have or shall hereafter make any other insurance whether valid or not on the property hereby insured, or any part thereof, without the consent of this company written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk, or if the premises are vacant or become vacant or unoccupied, without notice to, and consent of this company, in writing, or the risk be increased by the erection or occupation of neighboring buildings, or
 20 by any means whatever within the control of the assured, without the assent of this company endorsed hereon; or if it be a manufacturing establishment running in whole or in part over, or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred, or if a decree of foreclosure be made against the property insured, or any change takes place in title or possession, whether by legal process, or judicial decree, or voluntary transfer
 30 or conveyance, or by any assignment under any bankrupt or insolvent law, or if this policy shall be assigned before a loss, without the consent of the company endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, celluloid, gasoline, benzine, benzole, or benzine varnish, or keep
 40 or use camphene, spirit gas, or any burning fluid or

chemical oils, without written permission in this policy ; then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for light in dwellings, and kept for sale in stores in quantities not exceeding two barrels—to be drawn by daylight only.

2. *Property not covered by Policy.*—This insurance does not apply to or cover jewels, plate, jewelry, silver or plated ware, watches, musical or scientific instruments, ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, 10 sculpture, casts, models, or curiosities, unless particularly specified in this policy. This company shall not be liable by virtue of this policy, or any renewal thereof, for any loss that may occur before the premium has been actually paid to this company ; nor for loss by theft at or after a fire ; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind ; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power ; 20 nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist ; nor for any loss caused by the explosion of gunpowder, or any explosive substance ; or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the explosion, nor for loss or damage caused by removal of property from a build- 30 ing except it be proved that such removal was necessary, to preserve the property, in which case the damage shall be borne by the assured, and the company, in proportion as the sum hereby insured bears to the whole value of the property insured.

3. If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. *Interest of the Assured in Property.*—If the interest of the assured in the property be any other than 40

the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods on storage must be separately and specifically insured.

10 5. *Protection of Property at and after a Fire.*—The best endeavors of the assured shall be used in saving and protecting the property from damage at and after a fire ; and in case of failure to do so, this company will not be liable for damage caused by such failure ; and there can be no abandonment to the company of the property insured.

The use of general terms, or anything less than a
20 distinct, specific agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein.

6. *Other Insurance.*—It is hereby expressly agreed that this company shall not be liable under this policy, in case of loss for any amount exceeding the actual cash, market value of the property hereby insured, and in case of any other insurance upon the property hereby insured, whether made prior or subsequent to
30 the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the solvency or liability of the other insurers, and no more than a *pro-rata* proportion of the actual cash value of such property ; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall
40 be subject to average in like manner. Any floating

policy attached, in whole or in part, to the property covered by this policy, shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro-rata* any loss, total or partial, on the property hereby insured.

Re-insurance in case of loss, to be settled in proportion as the sum re-insured shall bear to the whole sum covered by the re-insured company.

7. *Relative to issue and cancellation of policy.*—1. If any broker or other person than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. 2. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect. On surrender of the policy the company shall refund any premium that may have been paid, reserving the usual short rates in the first case, and *pro-rata* rates in the other case.

8. *Statement by insured in case of loss.*—Persons sustaining loss or damage by fire shall forthwith give notice of said loss in writing, to the company, and within thirty days after the fire, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, and all encumbrances thereon, and for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of the Chief of the Fire Department, or other officer having charge of the investigation of fires, (if said property is situate within the jurisdiction of any such officer), and if not, then of the magistrate or notary public (nearest to the place of the

fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has made diligent enquiry into the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such officer, magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, at this office, by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same [for examination at the office of the company, and permit extracts and copies thereof to be made ; the assured shall deliver to this company duplicate copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company.

Care of damaged property and appraisal of same.—

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers), to be mutually appointed by the assured and the company; their report, in writing, to be made under oath before any magistrate or other properly commissioned person, shall form part of the proofs hereby required; one-half of the appraisers' fees to be paid by the assured. The company reserve the right to take the whole or any part of the articles at their appraised value, and

unless such proofs, declarations and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable.

Proofs of loss to be made by owner.—In case of loss on property held in trust, or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud, or attempt at fraud, by false swearing, or otherwise, shall cause a forfeiture of all claim on this company under this policy.

Differences to be submitted to arbitration.—But provided, in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, to be mutually appointed by the assured and this company (one-half of the arbitrator's fees to be paid by the assured), whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy, and provided further, that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after the receipt of the proofs herein required, and the assured shall, if required, furnish plans and specifications of the buildings destroyed.

Value of property.—The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing

shall be made, to ascertain the actual cash value; and if by any law, ordinance or regulation the replacing of such property in like manner as to material, strength, size, form or manner of construction as the same was constructed immediately before the fire, shall be restricted or forbidden, in such case the cost of replacing hereinbefore mentioned, shall be taken and held to be the cost of replacing such property as it was immediately before the fire, such cost to be sub-
 10 ject to the deduction for depreciation hereinbefore mentioned.


9. *Renewal of policy.*—This insurance (the risk not being changed), may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representations and for the original amount and divisions, unless otherwise specified in writing; but in case there shall have been
 20 any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.


10. It is a part of this contract, in all cases of loss under this policy, the assured shall assign to this company, all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney, to sue for and recover the same at the expense of this company. When insured as a
 30 mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced, as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security.


11. *Limitation as to suit or action.*—It is furthermore hereby expressly provided and agreed, that no suit or action against this company, for the recovery of any
 40 claim by virtue of this policy, shall be sustainable in


any court of law or equity, until after full compliance by the assured with all the foregoing requirements, nor unless such suit or action shall be commenced within six months next after the fire shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.


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
 Gas lights next to curtains, or in show windows, must be protected by glass or metal globes or shades, or loss or damage arising therefrom will not be payable under this policy.

 Gas.—The generating or evaporating within the building or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon, otherwise this policy shall be void.

 Fences and other yard fixtures, also store furniture and fixtures, are not insured under this policy, unless separately and specifically mentioned.

 Plate glass doors and windows, when the plates are of the dimensions of three square feet or more are not covered by insurance on the building, but must be separately and specifically insured.

 Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

 Builders' Risks.—The working of carpenters, 30 roofers, tinsmiths, gas-fitters, plumbers or other mechanics in building, altering or repairing the premises named in this policy, will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

Agent no authority to change conditions.—And it is hereby understood and agreed, by and between this company and the assured, that this policy is made and 40

accepted upon the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing. No agent of this company is authorized, in any respect, to change the terms or conditions of this policy; and they shall neither be changed or waived, except in writing signed by the president or secretary of this company.

10 In witness whereof, The Jersey City Insurance Company have caused these presents to be signed by their president and attested by their Secretary, in Jersey City, this 8th day of January, in the year of our Lord one thousand eight hundred and eighty.

Attest : N. FOOTE, President.
H. C. PEARSON, Secretary.

20

EXHIBIT F, M. B.

HIGHTSTOWN, Feb. 10/80.

H. C. PEARSON, Sec.

DEAR SIR:—Please find check for D. Carson, 5 policies.

113,356.	Montauk, 120 Broadway,	\$500
167,193.	Long Island, 120 Broadway,	500
278,195.	Republic, 153 Broodway,	500
30 286,631.	Merchants, 149 Broadway,	500
	Jersey City,	500
	Premiums,	60.00
	Commission,	6.00
		<hr/>
		\$54.00
	Premiums in the Jersey City,	\$15.00
	Commission,	3.00
		<hr/>
		\$12.00

40 All the above is on the David Carson risk.

Edward Allen, risk in the Home of New York,	\$4,000	
Premium,		30
Commission,		3
		<hr/>
		\$27
Dr. W. B. Orchard, in Merchants,	\$1,500	
Premium,		22.50
Commission,		2.25
		<hr/>
		\$20.25
		<hr/>
		10
I send you check for Carson risk,	\$54.00	
Jersey City, Carson risk,		12.00
E. Allen, risk in Home,		27.00
Orchard, risk in Merchants,		20.25
		<hr/>
		\$113.25

Respt Yours,

THOMAS C. PEARCE, Agt.

P. S.—I understand the Mill Burn Down on Saturday night this is very Bad I never was caut in such a Bad fix Before the parties Stand as High in point of character as any one in the county i am sick over the matter the premium was settled at the time it was Ins I believe it should be investigated.

EXHIBIT G.

No. HIGHTSTOWN, N.J., Feb. 16th, 1880. 30

FIRST NATIONAL BANK.

Pay to the order of H. C. Pierson, Sec., fifty-four dollars.

\$54

THOMAS C. PEARCE.

(Written across the face in red ink.)

Certified Jos. H. Johnes, Cas., First National Bank of Hightstown, N. J.

EXHIBIT H.

No. HIGHTSTOWN, N. J., Feb. 16th, 1880.

FIRST NATIONAL BANK.

Pay to the order of H. C. Pierson twelve dollars.
\$12 THOMAS C. PEARCE.

(Written across the face in red ink.)

Certified Jos H. Johnes, Cas., First National Bank
of Hightstown, N. J.

10

EXHIBIT No. 1. M. B.

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

20 Personally appeared before the subscriber, one of
the Justices of the peace in and for the County of
Mercer and state of New Jersey,

DAVID CARSON,

30 who, upon his Oath, saith that, in January, A. D.
eighteen hundred and eighty, he was the owner of a
certain Mill property situate in the Township of Wash-
ington, County of Mercer, and State of New Jersey,
and the value of said Mill property was, on the Fif-
teenth day of February, A. D. Eighteen hundred and
Eighty, the day Said Mill was burned, was Seven
Thousand Dollars, on which there was an Indebted-
ness of Five thousand eight hundred dollars, in four
different mortgages, as follows: one Mortgage held by
the Township of Washington against said Mill prop-
erty for the sum of Fifteen hundred Dollars, and one
Mortgage held by Ezekiel Cubberly against said Mill
property for the Sum of One thousand Dollars, and
one Mortgage held by John Taylor for the Sum of
Twelve hundred Dollars, and one Mortgage held by
Israel Baldwin against said Mill property for the Sum
of Twenty-one hundred Dollars.

40 On said Mill property there is Insurance against

Loss or Damage by fire or lightning Amounting to Twenty-five hundred Dollars, in five different companies, as follows :

No. 118,031.

By this Policy of Insurance, the Jersey City Insurance Company, In Consideration of Fifteen Dollars, and of the agreements and conditions, herein contained, do Insure David Carson against Loss or Damage by fire or Lightning to the amount of Five Hundred Dollars. 10

\$200. On his 3 story frame custom Grist Mill Building, 32x32 ft., slate and shingle Roof, situate $1\frac{1}{2}$ miles south of Windsor, Mercer Co., N. J., and standing detached 100 ft. or more from the residence of the assured.

\$200. On his Machinery, Shafting and Belting.

\$100. On Engine and Boiler contained therein.

Loss, if any, payable to Israel Baldwin, mortgagee.

\$2,000. Other Insurance permitted.

\$500. 1 year. 3% \$15. 20

Date of Jersey City Policy, January 9th, A. D. 1880.

No. 167,193.

The Long Island Insurance Company, In consideration of fifteen Dollars and of the agreements and conditions herein contained, Does Insure David Carson To the amount of five hundred Dollars, viz. :

\$200. On his three-story frame custom Grist Mill Building, 32x32 feet, slate and shingle Roof, situate 30 about one and a half miles south of Windsor, Mercer County, New Jersey, standing detached over one hundred feet from Residence of the assured, as per survey, filed in the office of Jersey City Ins. Co.

\$200. On Machinery, Shafting and belting.

\$100. On Engine and Boiler contained therein.

Loss if any payable to Israel Baldwin, Mortgagee.

Other insurance permitted without notice until required.

Date of Long Island Policy January 9th 1880. 40

No. 286,631.

The Merchants' Insurance Company of the City of New York, 149 Broadway, N. W. corner of Liberty street, In consideration of fifteen dollars, to them paid by the insured, hereinafter named, do Insure David Carson Against Loss or Damage by fire to the Amount of Five Hundred dollars.

10 \$200. On his three story Frame Custom Grist Mill Building 32 x 32 ft. with slate and shingle Roof situate about $1\frac{1}{2}$ miles South of Windsor Mercer County New Jersey standing detached over 100 feet from residence of the assured as per survey filed in the office of the Jersey City Ins. Co.

\$200. On Machinery, Shafting and belting.

\$100. On Engine and Boiler contained therein.

Loss if any payable to Israel Baldwin, Mortgagee.

Other Insurance permitted.

\$500. One year @ 3% \$15. $\frac{00}{100}$.

20 Date of Merchants' Insurance Company of the City of New York Policy January 9th 1880.

No. 113,356.

The mutual fire Insurance Company of the City of Brooklyn In consideration of Fifteen Dollars, do insure David Carson Against loss or damage by Fire to the Amount of five hundred Dollars viz.

30 \$200. On his three Story frame Custom Grist Mill building 32 x 32 feet Slate and shingle roof situate about one and a half Miles South from Windsor, Mercer County, New Jersey, standing detached over one hundred feet from residence of the assured as per plan on file in the office of the Jersey City Insurance Co.

\$200. On Machinery Shafting and Belting and \$100 on Engine and Boiler contained therein.

Loss if any payable to Israel Baldwin, Mortgagee.

\$2500 total insurance permitted.

\$500 one year 3% \$15. $\frac{00}{100}$.

Date of Mutual fire Insurance company of the City of Brooklyn January 10th 1880.

No. 278,195.

Republic Fire Insurance Company of the City of New York. In consideration of the receipt of Fifteen Dollars, and the representations covenants and warrants of the assured herein after named Do Insure David Carson as owner and Israel Baldwin as Mortgagee as interest may appear to the amount of Five Hundred Dollars.

\$200. On the three story frame custom Grist Mill Building 32 x 32 feet Slate and Shingle Roof is located 10 about 1½ miles South of Windsor Mercer County N. J. Standing detached over 100 feet from residence of the Assured as per survey filed in office of Jersey City Insurance Company, and

\$200. On Machinery, Shafting, Belting, and

100. On Engine and Boiler contained therein.

Other insurances permitted.

Loss, if any, first payable to Israel Baldwin, as such Mortgagee.

\$500. one year 3% \$15.00. 20

Date of the Republic Fire Insurance Company of the City of New York. Policy January 9th, A. D. 1880.

And whereas, I, David Carson, do hereby swear that I am the legal owner of the above-described premises, and that said Mill Building was insured in the above-described Insurance Companies for the sum of Twenty-five Hundred Dollars, and that the description of the Indebtedness as given is correct, and that said Mill Building was Burned on Sunday Morning Morning, 30 February Fifteenth, Eighteen hundred and Eighty, and that the cause of the Fire is to me unknown.

DAVID CARSON. [L.S.]

Sworn and subscribed before me, this Second day of March, A. D. 1880.

JAMES MCGALLIARD,
Justice of the Peace.

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

Personally appeared Before the Subscriber, one of
 the Justices of the Peace in and for said County,

ISRAEL BALDWIN,

Who, upon his Oath, saith that he is the Identical
 person named in the foregoing Policies of Insurance,
 and that he hath a Just and legal claim against the
 property of David Carson, above described, amount-
 10 ing to the sum of eighteen hundred and forty Dollars
 and sixty-three cents ($\$1,840\frac{63}{100}$), and that said Mill
 Building above described was destroyed by fire on the
 Fifteenth day of February, A. D. 1880, and that the
 cause of said fire is to him unknown.

ISRAEL BALDWIN. [L.S.]

Sworn and subscribed before me, this second day of
 March, A. D. 1880.

JAMES MCGALLIARD,

20 Justice of the Peace.

EXHIBIT No. 2 M. B.

*To the Jersey City Insurance Company of Jersey City,
 New Jersey.*

30 By your Policy of Insurance No. 118,031 dated Janu-
 ary 9th, 1880, issued to David Carson, by Thomas C.
 Pearce, your agent at Hightstown, N. J., for the term of
 one year from January 8, 1880, to the 8th day of January,
 1881, you insured the party herein and therein named,
 against loss and damage by fire, to the amount of five
 hundred dollars, as more fully appears by the printed
 portions and conditions of said policy, the written por-
 tion being as follows, viz.:

\$200. On his three story frame custom grist mill build-
 ing 32x32 ft. with slate and shingle roof, situate about 1½
 40 miles south of Windsor, Mercer county, New Jersey,

standing detached over 100 feet from residence of the assured as per survey filed in the office of the Jersey City Ins. Co.

\$200. On Machinery, Shafting and Belting. and

\$100. On Engine and Boiler contained therein.

Loss if any payable to Israel Baldwin, mortgagee.

Other insurance permitted.

\$500. one year @ 3% \$15.00.

2. The property thus insured belonged to David Carson, and no other person or party had any interest 10 therein, excepting as mortgagees.

3. The Building was occupied by the following persons and occupations, and by no other person or persons : by Ellwood T. Carson, and used as Custom grist mill, and for merchant work.

4. A fire occurred on the fifteenth day of February, 1880, at about the hour of one o'clock A. M., by which the property named in the Policy was destroyed or damaged as hereinafter set forth in detail.

5. The *whole value* of the property amounted to 20 \$7,000, which was the actual cash value at the time of the fire, as set forth in annexed Schedule A.

6. The *whole amount of loss* sustained is \$7,000, as set forth in annexed Schedule A.

7. The *whole insurance* on said property at the time of the fire, including that above mentioned, was \$2,500, and no more. See Schedule B annexed.

8. I claim of your Company its proportion of said loss, viz : \$500. $\frac{200}{1000}$ as per Apportionment Schedule C.

9. The fire originated as follows, viz : from causes 30 unknown.

10. Nothing has been done by me or with my privity or consent to violate the conditions of insurance, or void the policy.

Any other information that may be required will be furnished on call, and considered a part of these proofs.

Witness my hand at Trenton, N. J., this twentieth day of March, 1880.

DAVID CARSON. 40

STATE OF NEW JERSEY, }
 COUNTY OF MERCER, } March 20th, 1880.

Personally appeared David Carson, the signer of the the foregoing statement, and made solemn oath that said statement is just and true, according to the best of his knowledge and belief. Before me,

THEO. C. MAPLE,
 Notary Public.

10 SCHEDULE A.

Value of Building, Machinery, Engine and Boiler.

Mill building as described in policy	\$2500
Machinery, &c, " "	3000
Engine and boiler " "	1500
	<hr/>
	\$7000
Whole amount of loss	7000
being total on each item.	

20 SCHEDULE B. *Whole Insurance.*

Jersey City Insurance Company	\$500 00
Long Island " "	500 00
Montauk Fire " "	500 00
Merchants " "	500 00
Republic Fire " "	500 00
	<hr/>
Policies all written alike. Total Ins.....	\$2500 00

SCHEDULE C.

COMPANIES.	Amt. Policy.	BUILDING.		MACHINERY.		ENGINE & BOILER.		Total Pays.
		Insurance.	Pays.	Insurance.	Pays.	Insurance.	Pays.	
Jersey City Insurance Co.....	\$500 00	\$200 00	\$200 00	\$200 00	200 00	100 00	100 00	\$500 00
Long Island " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Montauk Fire " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Merchants " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Republic Fire " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
	\$2500 00	1000 00	1000 00	1000 00	1000 00	500 00	\$500 00	\$2500 00

17

EXHIBIT C. M. B.

STATE OF NEW JERSEY, }
 MERCER COUNTY. } ss

I, James McGalliard, one of the Justices of the Peace in and for the County of Mercer, do hereby Certify that I have made diligent Inquiry into the circumstances attending the Loss by Fire of the Mill Property known as Carsons Mills, Formerly located in the Township of Washington, County of Mercer and State of New Jersey, That I know the character and circumstances of the Assured, and verily Believe the Assured has without Fraud Sustained loss on the property Insured to the amount of Seven Thousand Dollars.

In Witness Whereoff I have hereunto Set my hand and Seal this Twenty-fifth day of March, A. D. 1880.

JAMES MCGALLIARD, [SEAL.]

Justice of Peace.

20

EXHIBIT No. 3 M. B.

*To the Jersey City Insurance Company of Jersey City,
 New Jersey.*

By your Policy of Insurance No. 118,031 dated January 9th, 1880, issued to David Carson, by your company through Thomas C. Pearce, for the term of one year from Jan'y 8th, 1880, to the eighth day of January, 1881, you insured the party herein and therein named, against loss and damage by fire or lightning, to the amount of five hundred dollars, as more fully appears by the printed portions and conditions of said policy, the written portion being as follows, viz.:

\$200. On his 3 story frame custom grist mill building 32x32 feet, with slate and shingle roof, situate $1\frac{1}{2}$ miles south of Windsor, Mercer Co., N. J., and standing detached 100 ft. or more from the residence of the assured.

200. On machinery, shafting and belting.

100. On engine and boiler contained therein.

Loss if any payable to Israel Baldwin, mortgagee.

\$2000. Other insurance permitted.

\$500. 1 year 3% \$15.00.

2. The property thus insured belonged to David Carson, and no other person or party had any interest therein, excepting as mortgagee.

3. The Building was occupied by the following persons and occupations, and by no other person or persons : by Elwood T. Carson, and used as Custom grist mill, and for merchant work.

4. A fire occurred on the fifteenth day of February, 1880, at about the hour of one o'clock A. M., by which the property named in the Policy was destroyed or damaged as hereinafter set forth in detail.

5. The *whole value* of the property amounted to \$7,000, which was the actual cash value at the time of the fire, as set forth in annexed Schedule A.

6. The *whole amount of loss* sustained is \$7,000, as set forth in annexed Schedule A.

7. The *whole insurance* on said property at the time of the fire, including that above mentioned, was \$2,500, and no more. See Schedule B annexed.

8. I claim of your Company its proportion of said loss, viz : \$500 $\frac{0}{100}$ as per Apportionment Schedule C.

9. The fire originated as follows, viz : from causes unknown.

10. Nothing has been done by me or with my privity or consent to violate the conditions of insurance, or void the policy.

Any other information that may be required will be furnished on call, and considered a part of these proofs.

Witness my hand at Trenton, N. J., this thirtieth day of March, 1880.

DAVID CARSON.

STATE OF NEW JERSEY, }
 COUNTY OF MERCER, SS. } March 30th, 1880.

Personally appeared David Carson, the signer of the foregoing statement, and made solemn oath that said statement is just and true, according to the best of his knowledge and belief. Before me,

THEO. C. MAPLE,

10 [SEAL.]

Notary Public,
 Trenton, N. J.

SCHEDULE "A."

Value of Building, Machinery, Engine and Boiler.

	Mill building as described in policy	\$2500
	Machinery, &c, " "	3000
	Engine and boiler " "	1500
		<hr/>
		\$7000
20	Whole amount of loss	7000
	being total on each item.	

SCHEDULE "B." *Whole Insurance.*

	Jersey City Insurance Company	\$500 00
	Long Island " "	500 00
	Montauk Fire " "	500 00
	Merchants " "	500 00
	Republic Fire " "	500 00
		<hr/>
30	Total Insurance	\$2500 00

See Schedule "D."

SCHEDULE C.

COMPANIES.	Amt. Policy.	BUILDING.		MACHINERY.		ENGINE & BOILER.		Total Pays.
		Insurance.	Pays.	Insurance.	Pays.	Insurance.	Pays.	
Jersey City Insurance Co.....	\$500 00	\$200 00	\$200 00	\$200 00	200 00	100 00	100 00	\$500 00
Long Island " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Montauk Fire " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Merchants " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
Republic Fire " "	500 00	200 00	200 00	200 00	200 00	100 00	100 00	500 00
	\$2500 00	1000 00	1000 00	1000 00	1000 00	500 00	\$500 00	\$2500 00

SCHEDULE "D."

Copy of Policies.

JERSEY CITY INS. CO.

\$200. On his 3-story frame Custom Grist mill building 32x32 ft. slate and shingle roof, situate $1\frac{1}{2}$ miles South of Windsor, Mercer Co., N. J., and standing detached 100 ft. or more from the residence of the assured.

200. On his Machinery, Shafting and Belting.

100. On Engine and Boiler contained therein.

Loss if any, payable to Israel Baldwin, mortgagee.

\$2000. Other insurance permitted.

\$500. 1 year. 3% \$15.00

LONG ISLAND INS. CO.

\$200. On his three-story frame Custom Grist Mill Building 32x32 feet, slate and shingle roof, situate about one and a half miles South of Windsor, Mercer County, New Jersey, standing detached over one hundred feet from residence of the assured, as per survey filed in the office of Jersey City Insurance Co.

200. On machinery, shafting and belting.

100. On engine and boiler contained therein.

Loss (if any) payable to Israel Baldwin, mortgagee.

Other insurance permitted without notice until required.

30 MONTAUK FIRE INS. CO.

\$200. On his three-story frame Custom Grist Mill Building 32x32 feet, slate and shingle roof, situate about one and a half miles south from Windsor, Mercer County, New Jersey, standing detached over one hundred feet from residence of the assured as per plan on file in the office of the Jersey City Insurance Co.

200. On machinery, shafting and belting, and

100. On engine and boiler contained therein.

Loss if any payable to Israel Baldwin, mortgagee.

40 \$2500, total insurance permitted.

MERCHANTS INS. CO.

\$200. On his three-story frame Custom Grist Mill building, 32x32 ft., with slate and shingle roof, situate about $1\frac{1}{2}$ miles south of Windsor, Mercer County, New Jersey, standing detached over 100 feet from residence of the assured as per survey filed in the office of the Jersey City Ins. Co.

200—On Machinery, Shafting and Belting, and

100—On Engine and Boiler contained therein.

Loss if any payable to Israel Baldwin, mortgagee. 10

Other insurance permitted.

\$500 1 year @ 3% \$15⁰⁰

REPUBLIC FIRE INS. Co. insures David Carson as owner and Israel Baldwin as mortgagee.

\$200. On the three story frame custom Grist Mill Building 32 x 32 feet Slate and Shingle Roof situate about $1\frac{1}{2}$ miles South of Windsor Mercer County N. J. Standing detached over 100 feet from residence of the Assured as per survey filed in office of Jersey City Insurance Company, and 20

200. On Machinery, Shafting and Belting, and

100. On Engine and Boiler contained therein.

Other insurance permitted.

Loss, if any, first payable to Israel Baldwin, as such Mortgagee.

EXHIBIT 10 M. B.

30

Mortgages.

David Carson	}	\$1500.
to		Dated April 6th, 1847.
Jonathan D. Hutchinson.		Recorded " 7th, 1847.
		Vol. E. Page 362 &c.

David Carson	}	\$1000.
to		Dated April 1st, 1867.
Ezekiel Cubberly.		Recorded May 11th, 1867.
		Vol. S. Page 132 &c. 40

David Carson	}	\$1200.
to		Dated March 31th, 1877.
John Taylor.		Recorded April 8th, 1878. Vol. 37. Page 132 &c.

David Carson	}	\$2100.
to		Dated Dec. 30th, 1879.
Israel Baldwin.		Recorded Dec. 30th, 1879. Vol. 40. Page 250 &c.

Judgments.

10	Geo. W. Middleton, J'dgm't,	}	Default, \$314.80. Cost.
	vs. David Carson.		

	Lewis Gordon & et al.	}	Am't Judgment, \$355.41. Cost. In Case Default.
	vs.		
	David Carson.		

	The First Nat. Bank of Hightstown	}	In debt on Bond	}	Ent. Jan. 6, 1880. \$1812.12.
	vs.				
20	Elwood T. Carson, David Carson.	}	& Warrant.	}	Costs, \$4.50. S. M. SCHENCK, Att'y. \$4.00.

	Geo. Middleton, Adm.,	}	In Case by Default. Damages, 564.17 Cost, 39.08
	Tobias Polhemus,		
	vs. Elwood T. Carson, David Carson.		
		}	Ent. Jan. 30th, 1880. S. R. GUMMERE, Att'y.

30

EXHIBIT L.

MARCH 10th, '80.

DAVID CARSON, Esq. :

Dear Sir—When I saw you at Hightstown, Feb. 24th, 1880, I stated to you that this company would require full Proofs of Loss as called for in the Policy to you, and that, after receiving the Proofs of Loss
40 called for in the Policy, I would investigate the loss.

You then informed me that *you was satisfied* the "*Insurance*" was the cause of the fire, and that the mortgagee, Israel Baldwin, after obtaining the insurance, caused the fire, in your opinion. A paper has been received, signed by your name, stating the Insurance, and a part of the encumbrances (not all of them). If it is intended as a Proof of Loss, it is defective, and does not comply with the requirements of the Policy, to which *I particularly called your attention* Feb. 24th.

We shall *not waive any* portion of the *conditions* of 10 said *Policy*, as we have no reason to doubt the accuracy of your opinion of the origin of the fire.

Yours truly,

N. FOOTE,

Pres't.

EXHIBIT A. M. B.

Number, D. H. ; sent by H. ; time, 5 : 40 P. M. ; re- 20
ceived by A. R. ; check, D. H.

Dated Trenton, N. J., May 27. Received at 258
Wash'n st., J. City, May 27, 1880. To N. Foote,
President Jersey City Ins. Co.

What do you propose to do with the Carson loss?

A. L. WORTHINGTON.

EXHIBIT 11.

30

MAY 31st, 1880.

A. L. WORTHINGTON, Esq., Att'y for I. Baldwin and D.
Carson :

TRENTON, N. J.

Dear Sir—I received your telegram on my return to
the city this morning.

I demanded the examination under oath of Messrs.
Carson & Baldwin, as provided for in Policies. Also
notified them that Proofs of Loss were Unsatisfactory 40

& Incomplete, pointing out errors to them. Mr. Baldwin said He would see his Attorney and Mr. Schenck, Att'y for Assignee & Bank, and make an appointment for all to meet at this office. If a compromise was not effected, he would then correct Proofs of Loss, and submit to an examination under oath. I have not since heard from him. I am waiting for him.

Yours truly,

N. FOOTE,

Adjuster.

10

TRENTON, N. J., Oct. 25, 1880.

Messrs. BEDLE, MUIRHEID & MCGEE :

Gentlemen—Yours enclosing notices was received. We return the copies with same acknowledged. We will admit the existence of the four mortgages as covering the mill property and the farm adjacent thereto, referred to in the notices appended to your Pleas.

Respectfully yours,

A. G. RICHEY & SON.

20

EXHIBIT E.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.

David Carson, of Washington Township, Mercer County, and State of New Jersey, being duly sworn
 30 according to law, deposes and says, in answer to the following interrogatories :

1st. Are you the owner of the property known as Carson's Mills, situated in Washington township, Mercer county, New Jersey?

A. Yes, sir.

Q. Has the mill been burned ; if so, when ?

A. Fifteenth of February, 1880, about 1 o'clock in
 the morning, the mill was discovered on fire by a black
 man ; it was all burned up except the engine and
 40 boiler and water-wheel—the water-wheel about half

burned ; I think the engine and boiler was damaged by the fire about \$200—perhaps more.

Q. (Paper purporting to be proofs of loss, dated March 30th, 1880, shown witness.) Did you sign and make oath to these papers purporting to be proofs of loss, to the Jersey City, Merchants', Long Island, Montauk, and Republic Insurance Companies ?

A. Yes, sir, I did.

Q. Had you ever read those papers ?

A. No, sir. 10

Q. Had they ever been read to you ?

A. No, sir.

Q. Did you know the contents of them ?

A. I knew what they were got up for, but did not know their contents ; I supposed, when I signed them, they were all right.

Q. If those papers, which you made oath to, state that the value of the engine and boiler was \$1,500, of machinery \$3,000, building as described in policy \$2,500—making the total value \$7,000, and the whole amount of the loss sustained \$7,000, to wit, on building \$2,500, machinery \$3,000, engine and boiler \$1,500—²⁰ is the statement true ?

A. No, sir, it is not true ; the damage to engine and boiler is from \$200 to \$400 ; I testified at Hightstown, under oath, that the damage to engine and boiler was about \$200—not over \$400.

Q. Would you have signed and made oath to those papers purporting to be proofs of loss to the aforementioned insurance companies, had you known their contents ? ³⁰

A. No, sir, I shouldn't.

Q. State what amount of incumbrance was on the property known as Carson's Grist Mill, and destroyed by fire as before stated, when the survey to the Jersey City Insurance Company, signed by you, and dated January 3d, 1880, was made ?

A. I signed the application on January 3d, 1880 ; at that time the following incumbrances was on the property : Mortgaged to Johnson D. Hutchinson for \$1,500, ⁴⁰

dated April 6th, 1847; principal and interest from April 1st, 1878, unpaid. Also mortgaged to Ezekiel Cubberly for \$1,000, dated April 1st, 1867; principal and interest from April 1st, 1879, unpaid. Also mortgaged to John Taylor for \$1,200, dated March 31st, 1877; principal and interest from March 31st, 1879, unpaid. Also mortgaged to Israel Baldwin for \$2,100, dated December 30th, 1879, given to secure some notes he was the security on, viz., one of \$600 to Tobias
 10 Polhemus; also one for \$500, First National Bank of Hightstown, N. J.; also one for \$300 to G. Wilson; also one for \$466.53, James Nutt; also one of \$30 to Israel Baldwin; amounting in all to \$1,896.53, to secure the payment of which, with interest, the mortgage of \$2,100 was given. The above include all incumbrances on the property, January 3, 1880. Since that date the following judgments have been entered against the property, viz.: one in favor of George W. Middleton, for \$314.80 and costs; one in favor Lewis
 20 Gordon, for \$355.41 and costs; one in favor of First National Bank at Hightstown, entered January 6, 1880, for \$906.06; one in favor of Geo. Middleton and Tobias Polhemus, for \$603.25, entered January 30, 1880.

Q. What amount of the \$1,896.53, to secure the payment of which the mortgage for \$2,100 was given Mr. Baldwin, has been paid by him?

A. Mr. Baldwin informs me he has taken up all but Mr. James Nutt's note, \$466.53; I have paid Mr. Baldwin,
 30 win, towards paying off said mortgage, \$490.

Q. Has anything else been paid on the indebtedness against your property stated above, except the \$490 to Mr. Israel Baldwin?

A. No, sir.

Q. Were any of your creditors pressing you for the payment of their claims before the fire occurred?

A. Yes. Geo. W. Middleton on the two claims. Also the 1st National Bank of Hightstown; they had levied on the engine and boiler and advertised them for sale,
 40 on the Tuesday following the fire, or February 17, 1880.

Q. Had any steps been taken to prevent the sale?

A. Yes, sir.

Q. By whom?

A. Yes, sir, by Israel Baldwin and myself.

On the Saturday before the fire (February 14) we went to Trenton to A. G. Richey to try to stop the sale; he agreed to see the Chancellor on Monday and try to get an injunction to stop the sale.

Q. In your opinion was the fire caused by an incendiary or from accidental causes? 10

A. It was set on fire by some person unknown to me.

Q. Would any person be likely to be benefited by the fire?

A. It looked that way to me.

Q. Who?

A. I supposed the one who got the insurance money would be benefited by the fire.

Q. At the time your application for insurance made January 3, '80, did you expect to borrow \$2500 and 20 give the insurance policies, for which you then made application as collateral?

A. No, I did not.

Q. Did you at that time think of placing another mortgage on the property?

A. No, sir. This was intended as collateral for the \$2100 to Israel Baldwin, he thought he could sell the mortgage to a better advantage with the policies as collateral security. I was informed that Mr. Baldwin offered to sell the mortgage for \$1600 to Aaron Taylor. 30

Q. At whose suggestion did you apply for the insurance?

A. I had it insured at the request of Israel Baldwin, he thought he could get rid of the mortgage better.

Q. Would you have got the insurance on the mill had it not been for Mr. Baldwin?

A. Well, I don't think I should.

Q. Could any one except Mr. Baldwin have been benefited by the fire?

A. I don't see as they could.

Q. How long have you owned those mills?

A. Thirty-three years this April. I bought in April, 1847; I have occupied the premises ever since that date.

Q. When did you first have the mill insured?

A. January 3, 1880.

Q. Was that application which you signed January 3, 1880, the first you ever made for insurance in the mill property?

10 *A.* Yes.

Q. Have you been notified that the proofs of loss furnished to the insurance companies are not satisfactory and incomplete?

A. Yes, I had a statement from you.

Q. How much was the premium on each of the five policies issued by the insurance companies before mentioned for \$500 each upon your application of January 3, 1880?

A. The premium would be \$15 apiece.

20 *Q.* Have you paid that premium?

A. No, sir, I have not paid it; I should have paid it but I had nothing to pay it with.

DAVID CARSON.

Sworn and subscribed before me this Apr. 27, 1880.

W. MUIRHEID, M. C. C.