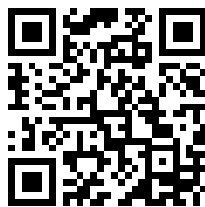
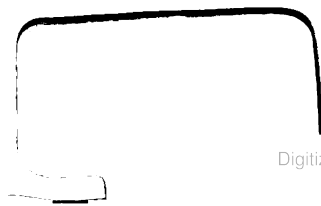

This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

GoogleTM books

<https://books.google.com>





DD
ACT
OC6

BRIEFS
ON THE
LAW OF INSURANCE

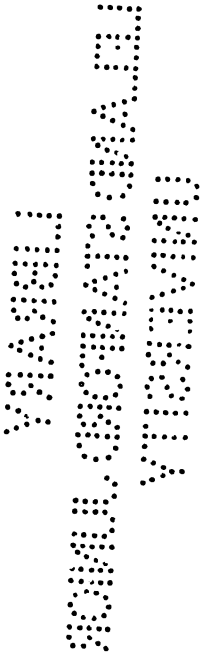
By ROGER W. COOLEY ✓

IN FIVE VOLUMES
VOLUME 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1905

**COPYRIGHT, 1905,
BY
WEST PUBLISHING COMPANY.**

94919



PREFACE.

THIS series of Briefs on the Law of Insurance is, in many respects, a radical departure from the beaten paths of legal literature. It is not a treatise, or a digest, or a series of annotations; nor is it a text-book, as that term is usually understood. Its purpose is to furnish the practitioner with complete briefs on every phase of the Law of Insurance, so far as it relates to the contract. The aim of the author has been to take up every question that has been raised in relation to the contract of insurance, and to brief the law applying to such questions—not only to state the decisions of the courts, but also to show the reasons for such decisions, and the theories on which the courts have distinguished or have attempted to reconcile apparently conflicting cases. The Briefs cover all kinds of insurance and the application of the law to all classes of insurance contracts. Questions connected with the organization of insurance companies, the conduct of their business, and their regulation by state laws have been discussed only in their relation to the validity and construction of the contract.

The general principles of the Law of Insurance may be regarded as fairly well settled. Though these principles are fully stated in the briefs and illustrative cases cited to sustain them, it has not been thought necessary to enter into any extended discussion of them. The special feature of the work—that which distinguishes it from text-books in general—is the discussion of the exceptional phases of the contract and of the law as applied thereto. In this discussion, whether of principles or of exceptions, the aim has been to treat all questions from a practical and not from an academic standpoint.

So far as this feature of the Briefs is concerned there has been a conscientious endeavor to exhaust the cases by which the general rules have been modified. To this end not only have the cases cited by the courts in their opinions been examined to determine the origin of the principle or exception, but the subsequent history of each case has been traced by means of tables of cases cited, distinguished and overruled. Great care has been exercised to cite

only cases which are directly in point with the proposition under consideration. Instead of relying on the citations of text-books, encyclopædias or digests, the author has satisfied himself by careful examination and analysis of the opinions, that each case cited to a proposition involves the particular principle under discussion.

The author is conscious that the work contains the imperfections necessarily incident to the application of an entirely new method of treatment of a subject of such magnitude as the Law of Insurance. It is believed, however, that these imperfections are defects of execution rather than of method, and that they do not seriously impair the adaptability of the work to the needs of the busy lawyer.

The writer takes this opportunity to acknowledge his indebtedness to Mr. Grant Hultberg and Mr. Earle B. Brockway for the efficient aid they have rendered in the preparation of these briefs. To their faithful assistance in the actual labor of composition and their valuable suggestions as to method and matter, any merits the work may possess are, in no small measure, due.

ROGER W. COOLEY.

St. Paul, Oct. 1, 1905.

TABLE OF CONTENTS.

VOLS. 1-4.

VOLUME I.

I. THE CONTRACT IN GENERAL.	Page
1. What constitutes a contract of insurance.....	4
2. What constitutes a contract of life insurance.....	15
3. Membership in mutual benefit association as a contract of insurance	25
4. Power to write insurance.....	39
5. Insurance companies and associations.....	50
6. Who may take out insurance.....	70
7. General nature of the insurance contract.....	78
8. Contracts of insurance as contracts of indemnity.....	85
9. Life insurance policy as an entire contract or contract from year to year.....	98
10. What may be the subject of insurance.....	105
11. General rights and liabilities incident to the contract.....	115
II. INSURABLE INTEREST—INSURANCE OTHER THAN LIFE.	
1. Necessity of insurable interest in property.....	134
2. Nature and essentials of insurable interest in property.....	145
3. Persons having insurable interest in general.....	153
4. Insurable interest based on contract relations in general...	170
5. Insurable interest of agents, carriers, factors, and other bailees	177
6. Insurable interest of creditors and lienors in general.....	180
7. Insurable interest of mortgagor and mortgagee.....	184
8. Insurable interest of vendor and vendee.....	188
9. Insurable interest in subjects of marine insurance.....	194
10. Termination of or change in insurable interest.....	201
11. Pleading and practice as to insurable interest in property..	214
12. Insurable interest—Guaranty and indemnity insurance....	236
III. INSURABLE INTEREST IN HUMAN LIFE OR HEALTH.	
1. Necessity of insurable interest in human life or health....	245
2. Necessity of insurable interest of assignee of life policy....	262
3. What constitutes an insurable interest in human life or health	278
4. Wager policies and rights dependent on extent of interest..	293
5. Extinguishment of insurable interest in human life.....	310
6. Pleading and practice in relation to insurable interest in life	317

IV. FORM AND REQUISITES OF THE CONTRACT.	Page
1. Agreements to procure insurance and liabilities thereunder	333
2. General powers and liabilities of agents in respect of the contract	345
3. Executory agreements to insure.....	362
4. Validity of oral contracts of insurance.....	391
5. Completion of contract—Application or offer and acceptance	407
6. Completion of contract—Execution of policy.....	436
7. Completion of contract—Delivery and acceptance of policy..	442
8. Completion of contract—Payment of first premium.....	461
9. Estoppel and waiver as to payment of first premium.....	496
10. Matters relating to the form and contents of the policy in general	513
11. Binding slips, receipts, or memoranda.....	535
V. VALIDITY OF THE CONTRACT.	
1. Validity of the contract in general.....	542
2. What law governs in determining the validity of the contract	558
3. Limitations on the powers of insurers.....	563
4. Validity of policy and collateral contracts as affected by failure to comply with statutes regulating insurance companies	581
5. Right to insure in company not complying with the laws regulating insurance companies.....	594
6. Estoppel and waiver as to defects and objections in general	607
7. Estoppel to plead ultra vires as to the insurance contract..	618
VI. CONSTRUCTION OF THE CONTRACT.	
1. General rules of construction of insurance contracts.....	627
2. What law governs in the construction of the contract.....	640
3. Papers accompanying policy or construed therewith in general	662
4. Application as part of the contract.....	676
5. Charter, constitution, by-laws, and statutes as part of the contract	690
6. Property and interests covered by policy of marine insurance	720
7. Property covered by policy—Fire and casualty insurance...	729
8. Interests covered by policy—Fire and casualty insurance..	763
9. Subjects of insurance in indemnity and guaranty policies..	782
10. Parties to insurance contracts.....	785
11. Beneficiaries	796
12. Amount of insurance.....	822
13. Commencement, duration, and termination of risk.....	830
14. Renewal of the contract.....	847
VII. REFORMATION AND MODIFICATION OF THE CONTRACT.	
1. Reformation of insurance contracts.....	854
2. Pleading and practice with reference to the reformation of insurance contracts	887
3. Modification of insurance contracts.....	900

VOLUME II.

VIII. PREMIUMS AND ASSESSMENTS.	Page
1. Premiums as consideration for contract.....	912
2. Right to and liability for premiums in general—Insurance other than life or accident.....	913
3. Rights and liabilities incident to premium or deposit notes and assessments thereon—Mutual insurance.....	936
4. Actions to enforce premium notes and assessments.....	976
5. Right to and liability for premiums—Life and accident insurance	990
6. Discrimination in rates—Life insurance.....	1009
7. Rights and liabilities as to assessments—Mutual benefit associations	1013
8. Recovery of premiums paid in general.....	1037
9. Recovery of premiums by insured on wrongful forfeiture or repudiation of life policy.....	1051
IX. ASSIGNMENT OF THE POLICY.	
1. Assignment of policy—Insurance of property.....	1063
2. Assignment of life insurance policies—Right to assign....	1070
3. Requisites, construction, and effect of assignments of life policies	1096
X. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION PRECEDENT—INSURANCE OF PROPERTY.	
1. Distinction between warranties, representations, and conditions precedent	1126
2. Effect of misrepresentation or breach of warranty or condition precedent as dependent on materiality and on knowledge and intent of applicant.....	1154
3. Pleading and practice with reference to misrepresentation or breach of warranty or condition in general.....	1174
4. Statutory provisions relating to avoidance of policy for misrepresentation or breach of warranty.....	1189
5. Effect of misrepresentation or breach of warranty as dependent on time and circumstances.....	1195
6. Concealment and its effect on the policy.....	1203
7. Persons affected by misrepresentation, breach of warranty, or concealment	1227
8. Effect of concealment, misrepresentation, or breach of warranty in marine policies in general.....	1233
9. Warranty of seaworthiness and effect of breach thereof....	1253
10. Effect of misdescription of property insured in general....	1274
11. Effect of misrepresentation, breach of warranty, or concealment as to use and occupancy of premises.....	1287

X. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION PRECEDENT—INSURANCE OF PROPERTY—(Cont'd).	Page
12. Effect of misrepresentation, breach of warranty, or concealment as to vicinity of other buildings and use of adjacent property	1298
13. Effect of misrepresentation or breach of warranty as to amount and value of insured property	1311
14. Effect of concealment, misrepresentation, or breach of warranty or condition as to title to or interest in property insured	1327
15. Construction and sufficiency of disclosures as to title to or interest in the property insured	1344
16. What constitutes breach of condition as to sole and unconditional ownership of property insured	1369
17. Pleading and practice with reference to misrepresentation, concealment, and breach of warranty or condition as to title or interest	1384
18. Effect of concealment, misrepresentation, or breach of warranty or condition as to existing incumbrances on the property insured	1391
19. Construction of statements and sufficiency of disclosure as to existence and amount of incumbrances	1414
20. Effect of concealment, misrepresentation, or breach of warranty as to special circumstances affecting the risk, and precautions against loss	1426
21. Effect of concealment, misrepresentation, or breach of warranty or condition as to prior insurance	1438
22. Effect of misrepresentation, breach of warranty, or concealment as dependent on relation to cause of loss	1455
XI. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WARRANTIES OR CONDITIONS SUBSEQUENT—INSURANCE OF PROPERTY.	
1. Nature of continuing or promissory warranties and representations and of conditions subsequent	1465
2. Effect of breach of continuing or promissory warranties and representations or of conditions subsequent	1482
3. Pleading and practice relating to breach of promissory warranty or condition	1505
4. Persons affected by forfeiture	1519
5. Necessity and sufficiency of proceedings to give effect to forfeiture	1536
6. Grounds of forfeiture of marine policies in general	1543
7. Deviation or other change of voyage	1567
8. Illegality of voyage as ground of forfeiture	1592
9. Change in general condition and location of the property insured	1597
10. Change in use or occupancy of insured premises or premises containing personal property insured	1624

XI. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WARRANTIES OR CONDITIONS SUBSEQUENT—INSURANCE OF PROPERTY—(Cont'd).	Page
11. Vacancy of premises as ground of forfeiture.....	1652
12. Keeping and use of prohibited articles as ground of forfeiture	1687
13. Forfeiture by reason of change of title, interest, or possession in general.....	1713
14. Forfeiture by reason of voluntary change of title or interest	1726
15. Forfeiture by reason of involuntary change of title or interest	1747
16. Subsequent incumbrance of property insured as ground of forfeiture	1765
17. Special circumstances and conditions affecting the risk....	1783
18. Failure to comply with conditions as to precautions against loss as ground of forfeiture.....	1796
19. Breach of "iron-safe clause" as ground of forfeiture.....	1813
20. Violation of condition as to other insurance as ground of forfeiture	1831
21. Unauthorized assignment of policy as ground of forfeiture..	1859
22. Nonpayment of premiums or assessments as ground of forfeiture	1867
23. Suspension of risk and relation of ground of forfeiture to cause of loss.....	1883
24. Effect of breach of warranty or condition as to part of property insured—Entire and divisible contracts.....	1894

VOLUME III.

XII. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY—LIFE AND ACCIDENT INSURANCE.	
1. Distinction between warranties and representations.....	1931
2. Effect of misrepresentation or breach of warranty as dependent on materiality and on knowledge and intent of applicant	1950
3. Pleading and practice with reference to warranties and representations in general.....	1964
4. Statutory provisions relating to avoidance of policy for misrepresentation or breach of warranty.....	1983
5. Effect of misrepresentation or breach of warranty as dependent on time and circumstances.....	2001
6. Concealment and its effect on the policy.....	2007
7. Persons affected by misrepresentation or breach of warranty	2018

XII. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY—LIFE AND ACCIDENT INSURANCE—(Cont'd).		Page
8. Effect of misrepresentation or breach of warranty as to age of insured	2023	
9. Effect of misrepresentation or breach of warranty as to status—Married or single.....	2034	
10. Effect of misrepresentation or breach of warranty as to residence and place of birth.....	2036	
11. Effect of misrepresentation, breach of warranty, or concealment as to occupation of insured.....	2039	
12. Effect of misrepresentation, breach of warranty, or concealment as to use of alcoholic stimulants, drugs, and narcotics	2051	
13. Effect of misrepresentation or breach of warranty as to relationship or interest of beneficiary.....	2065	
14. Effect of misrepresentation, breach of warranty, or concealment as to rejection of prior applications for insurance	2071	
15. Effect of misrepresentation, breach of warranty, or concealment as to other existing insurance.....	2083	
16. Effect of misrepresentation, breach or warranty, or concealment as to special circumstances regarded as affecting the risk	2090	
17. Effect of misrepresentation, breach of warranty, or concealment as to physical condition and health of insured.....	2096	
18. Pleading and practice as to matters relating to health of insured	2124	
19. Effect of misrepresentation, breach of warranty, or concealment as to injury or bodily infirmity.....	2149	
20. Effect of misrepresentation, breach of warranty, or concealment as to consultation of or attendance by physicians..	2156	
21. Effect of misrepresentation, breach of warranty, or concealment as to matters relating to family history of insured..	2171	
22. Effect of misrepresentation, breach of warranty, or concealment as dependent on relation of fact misrepresented or concealed to cause of loss.....	2182	
XIII. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WARRANTIES OR CONDITIONS SUBSEQUENT—LIFE AND ACCIDENT INSURANCE.		
1. Nature of promissory warranties and representations and conditions subsequent	2189	
2. Grounds of forfeiture in general.....	2199	
3. Change in occupation or entering prohibited occupation or military service	2205	
4. Breach of condition as to travel or residence in proscribed regions	2220	
5. Excessive use of intoxicating liquors or narcotics.....	2229	

XIII. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WARRANTIES OR CONDITIONS SUBSEQUENT—LIFE AND ACCIDENT INSURANCE—(Cont'd).	Page
6. Effect of breach of promissory warranty or condition subsequent	2237
7. Pleading and practice with reference to promissory warranties or conditions subsequent.....	2252
XIV. FORFEITURE OF LIFE OR ACCIDENT INSURANCE CONTRACTS FOR NON-PAYMENT OF PREMIUMS OR ASSESSMENTS.	
1. Default in payment of premiums as ground of forfeiture..	2259
2. Necessity of notice and sufficiency thereof.....	2281
3. Payment or tender of premium.....	2302
4. Forfeiture of mutual benefit certificates for nonpayment of dues and assessments.....	2336
5. Rights of insured after forfeiture for nonpayment of premiums or assessments.....	2393
6. Pleading and practice in relation to forfeiture for nonpayment of premiums or assessments.....	2425
XV. AVOIDANCE AND FORFEITURE IN GUARANTY AND INDEMNITY INSURANCE.	
1. Avoidance of contract for concealment, misrepresentation, or breach of warranty or condition precedent.....	2435
2. Forfeiture of contract for breach of promissory representation or warranty or condition subsequent.....	2447
XVI. ESTOPPEL AND WAIVER AS TO MATTERS AVOIDING OR FORFEITING THE CONTRACT.	
1. Application of doctrines of estoppel and waiver to insurance contracts	2459
2. Powers of officers and agents in general.....	2473
3. Powers of agents and officers as limited by the policy or application	2497
4. What constitutes knowledge or notice as essential to estoppel or waiver.....	2516
5. Estoppel by fraud, mistake, or negligence of agent.....	2555
6. Form, requisites, and construction of waiver in general....	2594
7. Estoppel and waiver by issuance and delivery of policy and acts prior thereto.....	2619
8. Estoppel and waiver by acts and conduct subsequent to delivery	2653
9. Estoppel and waiver by acceptance and retention of premiums or assessments in general.....	2683
10. Estoppel and waiver as to nonpayment of premiums and assessments	2699
11. Estoppel and waiver by requiring proofs, participating in adjustment and payment of loss.....	2733
12. Effect of provisions declaring policy incontestable or nonforfeitable	2753
13. Estoppel and waiver in guaranty and indemnity insurance..	2764
14. Pleading and practice with reference to estoppel and waiver	2768

XVII. CANCELLATION, SURRENDER, AND RESCISSION OF CONTRACT.	Page
1. Cancellation by insurer—Insurance of property.....	2789
2. Cancellation and rescission of contract of property insurance by the insured or by mutual consent.....	2815
3. Cancellation and rescission of life and accident policies and actions therefor	2829
4. Surrender of life or accident policy by the insured under the terms of the contract.....	2862
XVIII. RISK AND CAUSE OF LOSS—MARINE INSURANCE.	
1. Place and cause of loss in general.....	2877
2. Excepted risks and proximate cause of loss.....	2895

VOLUME IV.

XIX. EXTENT OF LOSS AND LIABILITY OF INSURER—MARINE INSURANCE.	
1. Extent of loss in general.....	2920
2. Constructive total loss and right to abandon therefor.....	2928
3. Abandonment and effect thereof.....	2949
4. Limitation of liability by memorandum clause and exception of particular average.....	2968
5. Amount of liability and determination thereof.....	2980
XX. RISK AND CAUSE OF LOSS—FIRE AND CASUALTY INSURANCE.	
1. Place and cause of loss and excepted risks.....	3006
2. Pleading and practice in relation to risk and cause of loss..	3035
XXI. EXTENT OF LOSS AND LIABILITY OF INSURER—FIRE AND CASUALTY INSURANCE.	
1. Extent of loss.....	3046
2. Limitation of liability by charter or by policy.....	3053
3. Extent of liability in general.....	3061
4. Value of property or interest.....	3078
5. Effect of other insurance and apportionment of loss.....	3098
6. Pleading and practice with reference to extent of liability in general	3117
XXII. RISK AND CAUSE OF LOSS—LIFE AND ACCIDENT INSURANCE.	
1. Cause of death and excepted risks in life insurance.....	3129
2. Cause of death or injury in accident insurance.....	3156
3. Excepted risks in accident insurance.....	3175
4. Suicide as an excepted risk in life and accident insurance..	3224
XXIII. EXTENT OF LOSS AND LIABILITY OF INSURER—LIFE AND ACCIDENT INSURANCE.	
1. Extent of liability in life insurance.....	3270
2. Extent of liability in accident and health insurance.....	3287

XXIV. CAUSE OF LOSS AND EXTENT OF LIABILITY—GUARANTY AND INDEMNITY INSURANCE.	Page
1. Risk and cause of loss.....	3313
2. Extent of liability.....	3330
XXV. NOTICE AND PROOFS OF LOSS.	
1. Necessity of notice and proof of loss.....	3347
2. Time and manner of service of notice and proofs of loss...	3356
3. Persons by whom and to whom notice may be given and proofs furnished	3372
4. Form and sufficiency of notice and proofs of loss.....	3380
5. Pleading and practice relating to necessity and sufficiency of notice and proofs of loss.....	3402
6. Fraud and false swearing in proofs of loss.....	3412
7. Effect of proofs of loss.....	3433
8. Necessity and sufficiency of notice and proofs of death or injury	3440
9. Time within which notice and proofs of death or injury must be furnished.....	3456
10. Effect of notice and proofs of death or injury.....	3466
11. Waiver of notice and proof of loss, death, or injury—General rules	3477
12. Powers of officers and agents to waive notice and proofs of loss, death, or injury.....	3486
13. Acts and conduct constituting waiver and estoppel as to notice and proofs—In general.....	3510
14. Waiver of notice and proofs of loss, death, or injury by denial of liability.....	3531
15. Waiver of defects in notice or proofs by failure to object...	3544
16. Questions of practice relating to waiver of notice and proofs of loss, death, or injury.....	3556
17. Notice and proofs of marine losses.....	3563
18. Notice and proofs of loss in guaranty and indemnity insurance	3570
XXVI. ADJUSTMENT OF LOSS.	
1. Adjustment in general.....	3584
2. Necessity of arbitration or appraisal.....	3595
3. Validity and effect of arbitration.....	3629
4. Waiver of arbitration or appraisal.....	3658
5. Arbitration in life and accident insurance and submission to tribunals of fraternal orders.....	3675
XXVII. RIGHT TO PROCEEDS.	
1. Persons entitled to proceeds—Insurance of property.....	3688
2. Right to proceeds in life and accident insurance.....	3720
3. Rights of creditors and assignees.....	3787
4. Actions to determine rights.....	3812
XXVIII. PAYMENT, DISCHARGE, AND SUBROGATION.	
1. Insurer's right to repair or rebuild.....	3823
2. Payment and discharge—Insurance other than life.....	3836

XXVIII. PAYMENT, DISCHARGE, AND SUBROGATION—(Cont'd).	Page
3. Payment and discharge of life and accident policies.....	3863
4. Penalties for refusal of, or delay in making, payment—Attorney's fees	3884
5. Subrogation	3892
XXIX. REINSURANCE.	
1. Special matters relating to reinsurance contracts.....	3932
XXX. SPECIAL MATTERS RELATING TO THE REMEDY.	
1. Jurisdiction and venue.....	3944
2. Limitation of actions.....	3954
3. Process	4000

VOLUME V.

TABLE OF CASES CITED.....	4021
INDEX TO VOLS. 1-4.....	

BRIEF BOOK
ON
INSURANCE
VOLUME 1

B. B. Lwa

(1)

I. THE CONTRACT IN GENERAL.

1. What constitutes a contract of insurance.
 - (a) Definition.
 - (b) Forms of insurance.
 - (c) Casualty insurance.
 - (d) Insurance against loss by theft.
 - (e) Indemnity insurance.
 - (f) Guaranty insurance.
 - (g) Same—Fidelity insurance.
 - (h) Same—Credit insurance.
 - (i) Same—Guaranty of revenue from lands.
 - (j) Same—Title insurance.
 - (k) Same—Contract insurance.
 - (l) Same—Judicial insurance bonds.
2. What constitutes a contract of life insurance.
 - (a) Nature and essentials.
 - (b) Contracts in the nature of loans.
 - (c) Annuities and endowments.
 - (d) Marriage endowment contracts.
 - (e) Railway relief associations.
 - (f) Accident insurance.
3. Membership in mutual benefit association as a contract of insurance.
 - (a) Nature of contract.
 - (b) Contracts construed as insurance contracts.
 - (c) Same—Contra.
 - (d) Insurance or benevolence.
 - (e) Sick or funeral benefits.
 - (f) Social and fraternal features.
 - (g) Ancient Order of United Workmen.
 - (h) Royal Arcanum—Modern Woodmen.
 - (i) United Ancient Order of Druids.
 - (j) Knights of Pythias, Endowment Rank.
 - (k) Masonic relief associations.
 - (l) Odd Fellows relief associations.
4. Power to write insurance.
 - (a) In general.
 - (b) Pennsylvania.
 - (c) Ohio.
 - (d) Illinois.
 - (e) New York.
 - (f) Alabama.
 - (g) Missouri.
 - (h) Other states.
 - (i) Pleading.

5. Insurance companies and associations.
 - (a) In general.
 - (b) Stock companies.
 - (c) Mutual companies.
 - (d) Lloyd's associations.
 - (e) Mutual benefit associations—Co-operative assessment companies.
 - (f) Same—Fraternal insurance associations.
 - (g) Regulation and control of insurance companies and associations.
 - (h) Same—Mutual benefit associations.
 - (i) Conduct of business.
 - (j) Same—Mutual benefit associations.
 - (k) Same—Management of mortuary fund.
 - (l) Agents.
 - (m) Same—Subordinate lodge as agent.
6. Who may take out insurance.
 - (a) Right in general.
 - (b) Married women.
 - (c) Infants—Fire insurance.
 - (d) Same—Life insurance.
 - (e) Corollary—Insurance on life of child.
7. General nature of the insurance contract.
 - (a) General features of the contract.
 - (b) Fundamental characteristics.
 - (c) Risk an essential element.
 - (d) Insurance as a unilateral contract.
 - (e) Insurance as a personal contract.
 - (f) Policy as property.
8. Contracts of insurance as contracts of indemnity.
 - (a) Insurance of property.
 - (b) Guaranty insurance.
 - (c) Employer's liability—Carrier's liability.
 - (d) Life and accident insurance.
 - (e) Same—Amount payable is predetermined.
 - (f) Same—Necessity of insurable interest.
 - (g) Same—Assignment of policy.
 - (h) Same—Creditor's policies.
 - (i) Same—General principles of construction.
 - (j) Conclusion.
9. Life insurance policy as an entire contract or contract from year to year.
 - (a) Early doctrine.
 - (b) Doctrine of *Manhattan Life Ins. Co. v. Warwick*.
 - (c) Doctrine of *New York Life Ins. Co. v. Statham*.
 - (d) Doctrine in other states.
 - (e) Effect of form of policy.
 - (f) Mutual benefit and fraternal insurance.
10. What may be the subject of insurance.
 - (a) Fundamental principles.
 - (b) Property and its incidents.
 - (c) Same—Rents, use, and occupancy.

10. What may be the subject of insurance—(Cont'd).
 - (d) Same—Marine insurance.
 - (e) Existence and condition of property.
 - (f) Same—Retrospective policies.
 - (g) Subjects of life or accident insurance.
 - (h) Subjects of guaranty and indemnity insurance.
11. General rights and liabilities incident to the contract.
 - (a) Rights of policy holders in general.
 - (b) Right to possession of policy.
 - (c) Right to loan on policy.
 - (d) Rights under endowment, participating, and tontine policies.
 - (e) Matters peculiar to mutual companies.
 - (f) Matters peculiar to mutual benefit associations.
 - (g) Same—Expulsion of members.
 - (h) Same—Remedies of members.

1. WHAT CONSTITUTES A CONTRACT OF INSURANCE.

- (a) Definition.
- (b) Forms of insurance.
- (c) Casualty insurance.
- (d) Insurance against loss by theft.
- (e) Indemnity insurance.
- (f) Guaranty insurance.
- (g) Same—Fidelity insurance.
- (h) Same—Credit insurance.
- (i) Same—Guaranty of revenue from la
- (j) Same—Title insurance.
- (k) Same—Contract insurance.
- (l) Same—Judicial insurance bonds.

(a) Definition.

Insurance has been defined in general terms as a contract by which one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

The writers and the courts have formulated many definitions which are substantially the same as that given in the text. For examples, see *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457, where the definition given in the leading English case of *Lucena v. Craufurd*, 2 B. & P. 300, is quoted with approval; *Cross v. National Fire Ins. Co.*, 132 N. Y. 183, 30 N. E. 390; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; *Insurance Co. of North America v. Jones*, 2 Bin. (Pa.) 547.

A large majority of the definitions of insurance are based on the principle that they are essentially contracts of indemnity. It has

been denied, however, that life insurance contracts are contracts of indemnity, and it is also said that accident insurance contracts are not always contracts of indemnity.¹ Perhaps a better definition is that a contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest.² This is substantially the definition given in the Massachusetts statute.³ Possibly both definitions are necessary to cover all the various kinds of insurance now in vogue.

(b) Forms of insurance.

Contracts of insurance may properly cover all sorts of property or interests and promise compensation for loss or damage due to all sorts of risks. The commoner forms of insurance are marine insurance, insuring against sea perils; fire insurance, insuring against loss or damage to property by fire; insurance against hail, tornadoes, etc.; life insurance, insuring against loss or damage due to the death of the person insured; accident insurance, insuring against loss or damage due to accidental injury to the person insured and resulting in disability or death; and health insurance, insuring against loss due to illness.

These various kinds of insurance have been defined or illustrated in numerous cases. Reference may be made to the following: For marine insurance, *Matheson v. Equitable Marine Ins. Co.*, 118 Mass. 209, 19 Am. Rep. 441; fire insurance, *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; loss by storm, *Mutual Fire Ins. Co. v. Dehaven*, 5 Atl. 65, 18 Wkly. Notes Cas. 125; hail insurance, *Barrett v. Des Moines Hail & Cyclone Ins. Ass'n*, 120 Iowa, 184, 94 N. W. 473; life insurance, *Commonwealth v. Wetherbee*, 105 Mass. 149; accident insurance, *Standard Life & Acc. Ins. Co. v. Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194; health insurance, *Whalen v. Equitable Acc. Co.*, 99 Me. 231, 58 Atl. 1037.

In addition to these, in recent years insurance has been extended to cover injury to, or destruction of, property by accident, loss of

¹ Contracts of insurance as contracts of indemnity, see post, p. 85.

² Interest in subject-matter as the basis of insurance, see post, p. 105.

³ St. 1887, c. 214, § 3. For other statutory definitions, see California Civ. Code 1901, § 2527; Dakota Code 1883,

§ 1474; Sanders' Mont. Civ. Code 1895, § 3370; North Dakota Rev. Codes 1899, § 4441; Alabama Civ. Code 1896, § 2576; Nevada Comp. Laws 1900, § 942; and Georgia Civ. Code 1895, §§ 2089, 2120, 2134, 2141.

property by burglary or theft, loss due to strikes by employ  s, liability of employers for injuries to employ  s or other persons, loss through the dishonesty of employ  s, loss due to insolvency of debtors, loss due to defects in titles to land, and loss due to failure to perform contracts generally.

(c) Casualty insurance.

As said in *Employers' Liability Assurance Corporation v. Merrill*, 155 Mass. 404, 29 N. E. 529, accident insurance is confined to accidents resulting in injury to, or death of, human beings. Its field is not to insure against loss or damage to property, though occasioned by accident. So far as insurance has been developed with reference to accidental injury to, or destruction of, property, as by explosion of boilers, breakage of glass, and injury generally by accident, including perhaps injury to, and sickness and death of, animals, it is known as casualty insurance.

Such classes of insurance are recognized generally in *People v. Fidelity & Casualty Ins. Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, and *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422. Contracts of indemnity against loss of, or damage to, property by reason of explosion of boilers are regarded as insurance contracts in *Chicago Sugar Refining Co. v. American Steam Boiler Co.* (C. C.) 48 Fed. 198, affirmed in 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572, and *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512. A contract of indemnity against loss of packages transported by mail is in the nature of a contract of insurance. *Banco de Sonora v. Bankers' Mutual Casualty Co.* (Iowa) 95 N. W. 232. Contracts to indemnify against loss by the breaking of plate glass are properly contracts of insurance. *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa, 555, 93 N. W. 569, 60 L. R. A. 838, 97 Am. St. Rep. 330.

A contract to indemnify the members of an association for accidents to or death of live stock was regarded as an insurance contract in *State v. Vigilant Ins. Co.*, 30 Kan. 585, 2 Pac. 840. And in *State v. Northwestern Mut. Live Stock Ass'n*, 16 Neb. 549, 20 N. W. 852, a certificate of membership in an association, which, after valuing the live stock of the member, recites that the member, on the death of the animals from accident or disease, or injury depreciating the value, is entitled to indemnity not exceeding the value thereof, was held to be a contract of insurance, though in form the contract was simply a certificate of membership. But in *Commonwealth v. Provident Bicycle Ass'n*, 178 Pa. 636, 36 Atl. 197, 36

L. R. A. 589, a contract to repair the bicycles of members of the association and to replace those destroyed by accident, but not to pay any money as indemnity, was held not to be a contract of insurance. The court held that the provisions as to repairing and replacing did not make it an insurance contract, though most fire policies contain a provision that the insurer may repair or replace the property destroyed. In *People ex rel. Woodward v. Rosendale*, 142 N. Y. 126, 36 N. E. 806, reversing 5 Misc. Rep. 378, 25 N. Y. Supp. 769, the court, while recognizing that a contract to indemnify owners, lessees, or tenants of buildings against loss or damage to life or health arising from imperfect sanitary conditions, and to indemnify landlords, lessees, tenants, or occupants from loss to buildings, furniture, or goods due to defective plumbing, was properly insurance, held that the inspection and certification of sanitary conditions is not within the purview of insurance, and could not be carried on by a company incorporated under the statutes relating to the incorporation of insurance companies.

(d) Insurance against loss by theft.

Loss of property by theft has long been recognized as one of the risks that might be covered by stipulation in marine policies. In fire policies it is usually an excepted risk. That separate contracts to indemnify against loss of property by theft are within the scope of insurance as defined by the laws of Illinois is held in *People v. Fidelity & Casualty Ins. Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, and *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422. So, too, contracts of indemnity against loss by burglary are recognized as insurance contracts in *United States Fidelity & Guaranty Co. v. Linehan* (N. H.) 58 Atl. 956.

A leading case is *State v. Vigilant Ins. Co.*, 30 Kan. 585, 2 Pac. 840. The purpose of the corporation, as disclosed by its charter, was to afford mutual indemnity and protection to its members in case of loss by theft of live stock, the indemnity being secured by the collection and disbursement of assessments in case of loss. The company claimed that it did not do an insurance business; but, in view of the fact that it was engaging in the business of indemnifying for loss by theft, the court regards the contract as one of insurance, pure and simple. In *Matter of Solebury Mutual Protective Society*, 3 Del. Co. R. (Pa.) 139, it was held that the contract of a corporation the object of which is the recovery of property stolen from its members, or in event of failure to recover to pay the loser

such part of its value as may be determined by the by-laws, the fund for such payment being raised by assessment on the members, is a contract of insurance, as the prime object is indemnity against a loss. But in *Commonwealth v. Provident Bicycle Ass'n*, 178 Pa. 636, 36 Atl. 197, 36 L. R. A. 589, a contract by an association, in consideration of a specified annual sum, to replace bicycles stolen from its members, but not to pay any money therefor, is held not to be an insurance contract.

(e) Indemnity insurance.

A contract to indemnify an employer against liability for personal injuries suffered by his employés is regarded as a contract of insurance.

Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 853, 30 L. R. A. 689, and *Chicago Sugar Refining Co. v. American Steam-Boiler Co. (C. C.)* 48 Fed. 198, affirmed in 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; *People v. Fidelity & Casualty Ins. Co.*, 153 Ill. 25, 38 N. E. 752, 28 L. R. A. 295; and *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422.

Similarly a contract to indemnify a carrier against loss occurring from injury to passengers has been construed as a contract of insurance (*Trenton Passenger Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213). In *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 529, a contract to protect an employer against liability for accidental injuries to persons other than employés is regarded as a contract of insurance. But in *French v. Vix*, 21 N. Y. Supp. 1016, 2 Misc. Rep. 312, affirmed in 143 N. Y. 90, 37 N. E. 612, a stipulation in a building contract that the contractor would indemnify the owner for loss due to injuries to passers-by or neighbors during the progress of the work is held not to be a contract insuring a neighbor's property against injury so as to give such neighbor a right of action thereon.

(f) Guaranty insurance.

An important class of contracts that have come before the courts in recent years are agreements to indemnify another against loss due to the dishonesty of employés, insolvency of debtors, breach of contract by contractors, and defects in title to real estate. Such agreements have in many instances been construed as contracts of insurance, and are denominated contracts of guaranty insurance.

The distinction between contracts of guaranty insurance and ordinary contracts of suretyship or guaranty has not been very clearly drawn. The main features of contracts of guaranty insurance seem to be: (1) The consideration or premium is proportioned to the amount and term of the risk; (2) the causes of loss are limited in number and kind; (3) the liability of the insurer is limited to a specified amount; (4) the contract is based on an application and the representations of the person to be indemnified; (5) in contracts of fidelity, credit, or contract insurance, the employé, debtor, or contractor is not usually a party to the agreement to indemnify. When the contract to be construed is drawn substantially on those lines, the courts generally regard it as a contract of insurance.

Mr. Frost⁴ distinguishes three kinds of guaranty insurance, the first covering fidelity bonds, the second covering contract, credit, and title insurance, and the third covering administration and statutory bonds incident to legal proceedings. See, also, *Cowles v. United States Fidelity & Guaranty Co.*, 72 Pac. 1032, 32 Wash. 120, 98 Am. St. Rep. 838.

(g) Same—Fidelity insurance.

A contract to indemnify an employer against any breach of fidelity on the part of an employé is regarded as a contract of insurance in *Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464, though the issue was not directly raised. In *People ex rel. Kasson v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124, the question was directly considered, however, and it was held that contracts to guaranty the fidelity of persons holding places of public or private trust are contracts of insurance.⁵ The status of such contracts was discussed at some length in *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682, where the contract was in the form of a bond to secure the bank against any loss from the fraudulent acts of its cashier. Such bond, the court says, seems to have been modeled on some form of insurance policy, and is based on an application containing a large number of questions, the answers to which are made conditions precedent. The court regards the contract as partaking of the nature of an insurance contract. The same contract was considered on a second appeal in 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682. The court says that bonds

⁴ Law of Guaranty Insurance, § 1.

⁵ See Georgia Civ. Code 1895, § 2141.

such as that in suit must be placed in the class of insurance policies and construed on the same general principles. The surety company has voluntarily become what may be called a "common surety," not exactly in the nature of a common carrier like railroad and telegraph companies, but still one of those public agencies to which are given unusual powers. Since they make such regulations as seem necessary for their own protection, the stipulations will be liberally construed against them to prevent a forfeiture of the indemnity for which alone the bond is given. This seems to be the distinction between ordinary suretyship or guaranty and the contracts of these guaranty or surety companies. The ordinary surety or guarantor is the favorite of the law, and the contract is construed most liberally in his favor. On the other hand, contracts of these guaranty or surety companies are regarded as the contracts of common sureties doing business for a valuable consideration, under conditions fixed by themselves, and therefore must be construed most liberally against them.

Contracts to indemnify against loss by the breach of fidelity of an employé are regarded as insurance contracts in *Eickhoff v. Fidelity & Casualty Co.*, 74 Minn. 139, 76 N. W. 1030; *Fidelity & Casualty Co. v. Crays*, 76 Minn. 450, 79 N. W. 531; *Mechanics' Savings Bank & Trust Co. v. Guarantee Co. (C. C.)* 68 Fed. 459; *People ex rel. National Surety Co. v. Feltner*, 31 Misc. Rep. 433, 65 N. Y. Supp. 523, affirmed without opinion 54 App. Div. 633, 66 N. Y. Supp. 1140; *People ex rel. National Surety Co. v. Feltner*, 166 N. Y. 129, 59 N. E. 731; *Champion Ice Mfg. & Cold-Storage Co. v. American Bonding & Trust Co.*, 75 S. W. 197, 25 Ky. Law Rep. 239.

The rules governing insurance contracts are applied in *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117, 23 C. C. A. 65; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Id.*, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987; *Perpetual B. & L. Ass'n v. U. S. Fidelity & Guarantee Co.*, 118 Iowa, 729, 92 N. W. 686. See, also, *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754.

(h) Same—Credit insurance.

The contracts issued by the so-called credit guaranty companies have proved to be a fruitful source of discussion, the question being whether they are contracts of suretyship or guaranty, or contracts of insurance. In view of the definitions of insurance, and the prin-

ciple that guaranty is, in its essential elements, an undertaking by one person that another shall perform his contract or fulfill his obligation, or that if he does not the guarantor will do it for him, the courts have declared the contracts of credit guaranty companies to be contracts of insurance. These contracts generally provide, in effect, that, in consideration of a certain sum paid, the company will purchase, at a fixed price, the accounts which a certain merchant or manufacturer shall have during a limited period against ascertained insolvent debtors or debtors against whom executions shall have been returned unsatisfied. After defining a contract of insurance as one whereby one party agrees to indemnify another wholly or partially for loss or damage which he may suffer from a specified peril, the court in the leading case of *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, says that the peril of loss by the insolvency of customers is as definite and real a peril as peril of loss by accident, fire, lightning, or tornado, and a contract to indemnify against such loss is therefore as legitimately a contract of insurance as one which indemnifies against loss due to the more familiar, but in fact less frequent, peril of fire. A similar conclusion was arrived at in *Clafin v. U. S. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, and *Tebbets v. Mercantile Credit Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281; the court in the latter case remarking that the fact that the company called itself a "guaranty" or "surety" company did not alter the nature of the contract. In *State v. Phelan*, 66 Mo. App. 548, the court, citing the *Clafin* Case, said that, while it might have some features of suretyship or guaranty, a contract to indemnify a merchant against loss of claims through the insolvency of debtors is one of indemnity against loss of property, and is consequently nothing but insurance.

These contracts have also been regarded as insurance contracts in *Mercantile Credit Guarantee Co. v. Wood*, 68 Fed. 529, 15 C. C. A. 563; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264; *American Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161; *People ex rel. Kasson v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; *American Credit Indemnity Co. v. Cassard*, 83 Md. 272, 34 Atl. 703; *Strouse v. American Credit Indemnity Co.*, 91 Md. 244, 46 Atl. 323; *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245, 69 N. W. 916; *United States Credit System Co. v. Robertson*, 57 N. J. Law, 12, 29 Atl. 421; *Lauer v. Gray*, 55 N. J. Eq. 544, 37 Atl. 53; *Gray v. Reynolds*, 55 N. J. Eq. 501, 37 Atl. 461; *People v. Mercantile Credit Guarantee*

Co., 166 N. Y. 416, 60 N. E. 24; and U. S. Credit System Co. v. American Indemnity Co. (C. C.) 51 Fed. 751. This last case was one of the earliest, and is interesting in that it was a suit for infringement of complainant's patent on the system. The court held that, as it was simply a system of insurance, it was not patentable.

Reference may also be made to *Ellicott v. U. S. Ins. Co.*, 8 Gill & J. (Md.) 166, a case decided in 1836. The charter of the defendant company authorized it to make insurance against loss or damage from any cause, hazard, or liability whatsoever on "buildings, goods, * * * choses in action, * * * etc.," and the court held that a guaranty by the company of a note was, in effect, a policy of insurance against loss, notwithstanding the form of the contract.

(i) Same—Guaranty of revenue from lands.

A very peculiar contract was construed in *Re Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759. The contract was in the form of an option granted to a farmer to sell his crops to the company involved, for a certain sum, if he should so elect, irrespective of their condition, the farmer warranting title and proper husbandry. The contract was, in effect, a guaranty of a certain revenue per acre from the farming lands. The court regarded the contract as practically one to indemnify against loss by hail, tornado, drought, etc. Following the decision in the *Claffin Case*, the court holds this to be a contract of insurance, saying that a contract to purchase damaged crops at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase bad accounts and judgments at a fixed price, irrespective of value.

(j) Same—Title insurance.

A contract to indemnify against loss through defects in the title to real estate or liens or incumbrances thereon has been regarded as a contract of title insurance. Such a contract was held, as early as 1891, to be an insurance policy in *Gauler v. Solicitors' Loan & Trust Co.*, 9 Pa. Co. Ct. R. 634.

A similar construction has been given to like contracts in *Wheeler v. Real Estate Title Ins. & Trust Co.*, 160 Pa. 408, 28 Atl. 849; *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575; *Minnesota Title Ins. & Trust Co. v. Drexel*, 70 Fed. 194, 17 C. C. A. 56; and *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116.

The contract is one of insurance against defects in title, unmarketability, liens, and incumbrances. The risks of title insurance end

where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or incumbrances that may affect or burden his title when he takes it. (*Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 176 N. Y. 65, 68 N. E. 132.) Where a certificate of title issued by a title insurance company to a landowner, as to the title of the latter, recites that the guarantor shall not be liable for damages to exceed a certain sum, and shall defend the guarantee, or his successors or heirs, as to every claim adverse to the title guaranteed, the instrument is not rendered a mere guaranty of the correctness of the certificate by the additional provision that the company guarantees the certificate to be correct (*Purcell v. Land Title Guarantee Co.*, 67 S. W. 726, 94 Mo. App. 5).

(h) Same—Contract insurance.

As already stated, Mr. Frost has regarded contracts whereby the insurer agrees to indemnify the insured in a designated amount against loss or damage arising through a failure on the part of third parties to specifically perform contracts of a nonfiduciary character as contracts of insurance. He cites numerous cases as instances of this kind of insurance, many of which do not, as far as the decision is concerned, support his view, except by inference.

United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526;
American Surety Co. v. Thorn-Hallwell Cement Co., 9 Kan. App. 8, 57 Pac. 237.

That insurance contracts covering such perils may properly be written is, however, recognized in other cases.

People ex rel. Kasson v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124;
People ex rel. National Surety Co. v. Feltner, 31 Misc. Rep. 433, 65 N. Y. Supp. 523, affirmed without opinion in 54 App. Div. 633, 66 N. Y. Supp. 1140; and *People ex rel. National Surety Co. v. Feltner*, 166 N. Y. 129, 59 N. E. 731.

In *Union Trust Co. v. Citizens' Trust & Surety Co.*, 185 Pa. 217, 39 Atl. 886, a contract guarantying the performance of a building contract was regarded as being, in effect, a policy of guaranty insurance and construed according to the rules governing such contracts. So in *German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682, a contract to indemnify the plaintiff corporation against loss which might result to it as

a purchaser of ground rents on unimproved land by reason of the noncompletion of buildings to be erected thereon was regarded as a policy of contract insurance. On the other hand, in *Cole v. Haven* (Iowa) 7 N. W. 383, an agreement by a lightning rod dealer on a sale of lightning rods to pay all damages from lightning to the building on which they were placed for a given period was held to be a contract of guaranty and not of insurance. The same question had been raised in *Cook v. Weirman*, 51 Iowa, 561, 2 N. W. 386, but was not determined.

(1) Same—Judicial insurance bonds.

There is still another class of guaranty contracts which have been distinguished as judicial insurance. These are agreements whereby the insurer agrees to indemnify another against loss arising from the official misconduct of a third party in his capacity as an appointee of the court, or the failure of a person to faithfully perform the conditions of his undertaking, entered into as a litigant before the court. These contracts are differentiated as administration insurance bonds and statutory insurance bonds; the first including bonds of executors, guardians, trustees, receivers, etc., and the second, appeal bonds, cost bonds, attachment bonds, etc. As an instance of the latter class is the contract in *Epstein v. U. S. Fidelity & Guaranty Co.*, 29 Misc. Rep. 295, 60 N. Y. Supp. 527, where a bond on attachment was given by the surety company. In *American Surety Co. v. Thurber*, 43 App. Div. 528, 60 N. Y. Supp. 198, the contract was a bond of the committee of the estate of an insane person. The court appears to regard the contract as essentially a contract of insurance, and for that reason denied the surety company relief under the statute relating to release of sureties, holding that a surety company was not contemplated by the statute. This decision was reversed in 162 N. Y. 244, 56 N. E. 631, as to the application of the statute relating to release of sureties, but the court apparently regards the contract as in the nature of an insurance contract which could be forfeited by nonpayment of premium. An interesting case is *Industrial & General Trust, Limited, v. Tod*, 56 App. Div. 39, 67 N. Y. Supp. 362. The contract involved in this case was that of the Lawyers' Surety Company, and was in the nature of an undertaking on appeal. The undertaking was objected to as invalid on the ground that the company was an insurance company, and, the amount of the undertaking being in excess of 10 per cent. of the capital and surplus, the company had

assumed a risk on a single contract greater than it was authorized to do under the insurance laws. This contention was sustained, the court holding that the contract was, in effect, one of insurance.

2. WHAT CONSTITUTES A CONTRACT OF LIFE INSURANCE.

- (a) Nature and essentials.
- (b) Contracts in the nature of loans.
- (c) Annuities and endowments.
- (d) Marriage endowment contracts.
- (e) Railway relief associations.
- (f) Accident insurance.

(a) Nature and essentials.

As stated in the preceding brief in discussing the nature of insurance contracts in general, a large majority of the decisions construing contracts alleged to be contracts of insurance are based on the principle that such contracts are essentially agreements of indemnity. In view of the general opinion that life insurance contracts are not contracts of indemnity, and that contracts of accident insurance are not always contracts of indemnity,¹ a definition of life insurance, to be acceptable, should, perhaps, avoid making indemnity an essential feature. This requirement is well met by the definition of a contract of life insurance given by Justice Gray in *Commonwealth v. Wetherbee*, 105 Mass. 149. A contract of insurance is an agreement by which one party for a consideration, which is usually paid in money, either in one sum or at different times during the continuance of the risk, promises to make a certain payment of money, on the destruction or injury of something in which the other party has an interest. In fire and marine insurance, the thing insured is property; in life or accident insurance, it is the life or the health of a person. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract. This statement has been approved by the courts and writers as the clearest definition of life insurance.² The Court of Appeals of New York in an early case (*St. John v. American Mut. Life Ins.*

¹ Contracts of insurance as contracts of indemnity, see post, p. 85.

² See Mass. St. 1887, c. 214, § 8. See, also, Georgia Civ. Code 1895, § 2114.

Co., 13 N. Y. 31, 64 Am. Dec. 529) thus defines life insurance: "An insurance upon the life of an individual is a contract by which the insurer, for a certain sum of money or premium proportioned to the age, health, profession, and other circumstances of the person whose life is insured, engages that, if such person shall die within the period limited in the policy, the insurer will pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted."

Other definitions, varying somewhat in language but identical in substance with that of Justice Gray, may be found in *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *Supreme Council American Legion of Honor v. Larmour*, 81 Tex. 71, 16 S. W. 633; *Grimes v. Northwestern Legion of Honor*, 97 Iowa, 315, 64 N. W. 806; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220; and *Rockhold v. Canton Masonic Mut. Ben. Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141; *Murdy v. Skyles*, 101 Iowa, 549, 70 N. W. 714, 63 Am. St. Rep. 411; *Elliott v. Des Moines Life Ass'n*, 163 Mo. 132, 63 S. W. 400; *State v. Benefit Ass'n*, 6 Mo. App. 163; *Endowment & Ben. Ass'n v. State*, 10 Pac. 872, 35 Kan. 253; *State v. Mutual Ben. Soc.*, 72 Mo. 146; *Ritter v. Mutual Life Ins. Co.*, 18 Sup. Ct. 300, 169 U. S. 139, 42 L. Ed. 693; *Cason v. Owens*, 28 S. E. 75, 100 Ga. 142; *Fuller v. Metropolitan Life Ins. Co.*, 41 Atl. 4, 70 Conn. 647.

It is not regarded as essential that the amount to be paid on the death of the insured is specified to be a certain amount if it is capable of being rendered certain, according to *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *State v. Farmers' & Mechanics' Mut. Benevolent Ass'n*, 18 Neb. 276, 25 N. W. 81; *State v. Citizens' Benevolent Ass'n*, 6 Mo. App. 163; *Masonic Aid Ass'n v. Taylor*, 2 S. D. 331, 50 N. W. 93; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220; and *Rockhold v. Canton Masonic Mut. Benevolent Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141. Certainty as to the time and mode of payment of the premiums or assessments, which are the consideration of the contract, is regarded as not necessary in *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *Supreme Commandery Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Masonic Aid Ass'n v. Taylor*, 2 S. D. 331, 50 N. W. 93; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220; and *Rockhold v. Canton Masonic Mut. Benevolent Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141. In *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Farmers' & Mechanics' Mut. Benevolent Ass'n*, 18 Neb. 276, 25 N. W. 81; *Chartrand v. Brace*, 16 Colo. 19, 29 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; and *Rockhold v. Canton Masonic Mut. Benevolent Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141—the fact that there is no

method of enforcing the payment of the consideration, except by forfeiture of the contract, is not regarded as affecting the nature of the contract.

The term "life insurance" is not applicable to insurance for the full period of one's life only, but may include insurance for a term of years or until the person insured shall arrive at a certain age.

Endowment & Ben. Ass'n v. State, 35 Kan. 253, 10 Pac. 872; *New York Life Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680.

So, too, contracts indemnifying against loss by reason of disability due to sickness or ill health may be regarded as contracts of life insurance (*Whalen v. Equitable Acc. Co.* [Me.] 58 Atl. 1057).

(b) Contracts in the nature of loans.

Some anomalous contracts have been tested by these rules. In *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560, there was a loan of money secured by mortgage for which the debtor executed promissory notes payable in monthly installments. It was provided that the mortgage should run 10 years, and in case of the debtor's death before all the payments were made the unpaid portion of the debt should be released if all prior payments had been promptly met. The debtor also agreed to pass a medical examination and pay the fee therefor. The trust company, under a general contract between it and a certain insurance company, obtained from the latter a policy on the debtor's life which fully indemnified it from any possibility of loss in case of the debtor's death before full payment of the notes. It was contended that the contract was usurious, and that it was in effect an insurance contract and void because the trust company had not complied with the insurance laws. The court assumed, without deciding, that the contract was not an insurance contract, and decided the case wholly on the question of usury. The same kind of a contract was, however, considered in *Krumseig v. Missouri, K. & T. Trust Co.* (C. C.) 71 Fed. 350. The court regarded the contract as having in it certain features of life insurance on a plan which was denominated as the reverse of endowment insurance. That it was not an ordinary life insurance, in the general acceptance of the term, was regarded as certain, but rather that the policy was a renewable, reducing, term policy, issued for 10 years, decreasing in the amount payable each year, so that as payments were made on the loan the amount of insurance on the life of the borrower also decreased. As the case

was finally decided on the question of usury in the contract, the point as to its character as a contract of insurance cannot be said to have been definitely decided. The Circuit Court of Appeals in *Missouri, K. & T. Trust Co. v. Krumseig*, 77 Fed. 32, 23 C. C. A. 1, regarded the contract from the standpoint of an insurance contract, holding that it was so intended by the officers of the trust company as well as the actuary of the insurance company, and that it was therefore practically a contract of life insurance on the endowment plan. The case was carried to the United States Supreme Court, and is reported in 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474. The Supreme Court says that the precise character of the contract is not clear, though it resembles in some features a contract of life insurance, notwithstanding the fact that it is a loan of money. The point, however, was not settled, as the case was decided on the question of usury.

Another case involving a peculiar contract is *United Security Life Ins. & Trust Co. v. Bond*, 16 App. D. C. 579. The company is an insurance company incorporated under the laws of Pennsylvania, but its scheme differs from the ordinary scheme of life insurance in important particulars. Instead of making payment of a stipulated sum of money, at the end of life or of a definite period of years, in consideration of the punctual payments by the insured of specified periodical premiums, a sum of money in gross is paid to the insured in the first instance, and in consideration of this the insured covenants to pay a stipulated sum in each and every month for a term of years, or until his death, if his death should occur during such term. In the present case the term was 20 years. He covenants further to comply with certain requirements not substantially different from those contained in ordinary policies of life insurance. To secure these monthly payments the insured executes and delivers to the company a bond in double the amount paid to him, conditioned for the faithful performance of his agreement, and as security for the bond he executes and delivers to the company a deed of trust on real estate. The court in determining the character of this contract says that it seems to combine with the ordinary plan of insurance something of the principle of annuities, as well as some features of the scheme on which building and loan associations, so called, have been established. The agreement would seem to involve some of the elements of a loan, and accordingly to necessitate a proportionately larger premium to be paid by the assured person, which would include not only an adequate consideration for the

risk of the duration of life, but also some equivalent for interest on the money advanced. And yet the contract is not one of loan; for there is no agreement, express or implied, that the amount advanced by the insurance company to the person insured shall ever be repaid by the latter with or without interest. The contract is that, in consideration of the sum of money paid to him in gross by the company, the assured person shall make to the company a certain specified monthly payment in each and every month for 20 years, or for life only, if life should terminate before the end of that period; and the security taken for the faithful performance of the contract by the assured is not as a guaranty for the repayment of the gross sum advanced in the first instance, but as a guaranty merely for the monthly payments and for the due safeguarding of the life on which their continuance depends. The scheme is purely and simply one of life insurance, although somewhat different from the ordinary life insurance.

A contract whereby, on the payment of stipulated installments by one party, the other agrees to advance money for the purchase or erection of a home for the first party, with a proviso that in case of the total disability or death of the first party the promisor will discharge the indebtedness and convey to the beneficiary of such first party a clear title to the property, is in effect a contract of life insurance. It is a valuable promise made to the contract holder for consideration, contingent on his death or disability, within the general definition of a life insurance contract. (*State v. Beardsley*, 88 Minn. 20, 92 N. W. 472.)

(c) Annuities and endowments.

In *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. C. 198, the Court of Appeals of New York held that contracts for annuities are not contracts of life insurance. There is, however, a class of contracts by which the insurer agrees to pay to the insured a certain sum at the end of a certain period, or if he dies before the expiration of the term fixed, to pay the amount to a person designated as beneficiary. These are "endowment policies." That such policies are in all essential features policies of life insurance was held in the leading case of *Briggs v. McCullough*, 36 Cal. 542. The contract provided that the life insurance company, in consideration of a sum of money deposited with it, should pay to the depositor, at the end of ten years, a certain sum, together with such dividends as his deposits should earn, or, if he died be-

fore the expiration of the period, the sum should be paid to his widow or heirs. The court holds that such a contract is a life insurance contract, and that its character is not changed by the fact that it is not necessarily for the full term of the life of the insured, calling attention to the fact that an ordinary life insurance policy may be for merely a term of years. The provision for payment at the expiration of the period, though the insured had not died, is merely a new and additional element in the contract not inconsistent with its character as a contract of life insurance.

This conclusion has met with approval in *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669; *International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040; *Endowment & Benevolent Ass'n v. State*, 35 Kan. 253, 10 Pac. 872; *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512; *Union Central Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180; *State v. Orear*, 144 Mo. 157, 45 S. W. 1081; *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *State v. Farmers' & Mechanics' Mut. Ben. Ass'n*, 18 Neb. 276, 25 N. W. 81; *Hendel v. Reverting Fund Assur. Ass'n*, 2 Pa. Dist. R. 116; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220; *Rockhold v. Canton Masonic Benefit Ass'n*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141; and dissenting opinion of Justice Hamersley in *Fawcett v. Supreme Sitting Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815.

It does not affect the nature of the contract that the fund from which payment is made is obtained by assessment.

State v. Federal Investment Co., 48 Minn. 110, 50 N. W. 1028; *Fawcett v. Supreme Sitting Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815 (dissenting opinion); *International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040; *Endowment & Benevolent Ass'n v. State*, 35 Kan. 253, 10 Pac. 872; and *Rockhold v. Canton Masonic Benefit Ass'n*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141.

On the other hand, so far as the endowment feature of these contracts is concerned, they are not regarded as life insurance contracts, the endowment being regarded as a mere incident to the life insurance contract.

Tennes v. Northwestern Mut. Life Ins. Co., 26 Minn. 271, 3 N. W. 346; *Talcott v. Field*, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662; and *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512.

Reference has already been made to *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028. The scheme proposed by this company was to provide means for profitably investing, for cer-

tificate holders, small sums of money to be paid in monthly installments until the sum so accumulated shall reach a sufficient amount to redeem, in the order of their issuance, all outstanding certificates of the company in force. The court regarded the certificates issued to members as being in no respect contracts of indemnity against loss of any kind, and as their payment was contingent neither upon the duration of human life nor the happening of any casualty they were in no respect contracts of life, endowment, or casualty insurance, or in fact insurance of any kind.

In *Haydel v. Mutual Reserve Fund Life Ass'n*, 104 Fed. 718, 44 C. C. A. 169, affirming (C. C.) 98 Fed. 200, the policy required the payment of a fixed premium; that is to say, a stated sum at stated periods, or such multiple thereof as should be determined by the directors. The excess of the amount above what was required to meet current mortuary claims was paid into a reserve or emergency fund, and after a certain number of years the policy holder was given the option of surrendering the policy, and receiving as its surrender value a certain per cent. of the amount remaining in the reserve fund directly contributed by him, or of having the same applied to extend the insurance. The court held that such a policy is not an endowment policy, but an ordinary contract on the assessment plan.

(d) Marriage endowment contracts.

Among the contracts that have been construed in the light of the definitions of insurance are contracts of marriage endowment associations. In *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586, the court called attention to the fact that such contracts, unlike contracts of insurance on life or property, are not to become payable on the occurrence of some accident or casualty not under the control of the other party, but are simple wagers as to the time the member will marry.³ In *State v. Towle*, 80 Me. 287, 14 Atl. 195, the Supreme Court of Maine, construing a contract whereby the association agreed that if the member paid certain fees and dues for nine years, and until he was married, and an assessment on the marriage of any associate, and promised on pain of forfeiture that he would not marry for two years, the association would pay his wife \$1,000, to be raised by assessment, declared that this was not a contract of insurance, there being no loss, casualty, or peril for

³ See, also, *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151.

which indemnity was promised, but a contract in restraint of marriage. The Supreme Court of Alabama, in *White v. Equitable Nuptial Benefit Union*, 76 Ala. 251, 52 Am. Rep. 325, arrived at the same conclusion regarding a contract to pay a certain amount to members of the association on marriage, and providing for forfeiture if marriage occurs within three months. In this case, as in the *Chalfant Case*, the court applies the principle of insurable interest, and denies a recovery on the contract on the ground that the persons seeking to recover have no interest in the fund.

In *State v. Critchett*, 37 Minn. 13, 32 N. W. 787, a single men's endowment association, organized to endow the wife of each member, when he shall have married, with a sum of money equal to as many dollars as there shall then be members, to be collected from the members by assessment, was held not to be a benevolent association, the relation being a contractual one. See, also, *State v. Trubey*, 37 Minn. 97, 33 N. W. 554; *State v. Steele*, 37 Minn. 428, 34 N. W. 903; and *Adams v. Northwestern Endowment & Legacy Ass'n*, 63 Minn. 184, 65 N. W. 360.

(c) Railway relief associations.

Whether membership in a railway relief association creates the relation of insurer and insured has been an issue in several cases. In *Johnson v. Philadelphia & Reading R. Co.*, 163 Pa. 127, 29 Atl. 854, it was held, without much discussion of the question, that such associations are to be regarded as beneficial associations, and not insurance companies. In *Beck v. Pennsylvania R. R. Co.*, 63 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 211, the question was discussed at some length. The company had established a relief fund under regulations requiring the members of the association, all of whom were employes of the company, to contribute certain sums out of their wages, out of which was made payment of certain specified benefits to sick or injured members, or, in case of death, to a beneficiary named by the member. If the fund was insufficient to make the payment, the company supplied the deficiency. The court held that such a contract was not one of insurance; that the scheme of the relief department does not contemplate a business of that sort. It is limited to such of the employes of the company as voluntarily apply for admission and are admitted. The contract of the company is merely to take charge of the fund raised by voluntary contributions, to administer it at its own expense, and to guarantee that it shall be sufficient to furnish the specified relief. Such

a contract is not one of insurance, but has only the elements of a labor contract.

A similar organization, the Burlington Voluntary Relief Dept., was involved in *Donald v. Chicago, Burlington & Quincy Ry. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492. The court, following the *Johnson Case*, held that this was not an insurance organization. This decision was subsequently followed in *Maine v. Chicago, Burlington & Quincy Ry. Co.*, 109 Iowa, 260, 70 N. W. 630. See, also, *State ex rel. Sheets v. Pittsburg, C., C. & St. L. Ry. Co.*, 68 Ohio, 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635.

In *Mason v. Mason*, 160 Ind. 191, 65 N. E. 585, a joint relief association, unincorporated, composed of different railroads paying a benefit to relatives or other beneficiaries of employes of the various roads, was regarded as an insurance company.

(2) Accident insurance.

A policy of accident insurance is defined as a contract to indemnify against loss by reason of injury by accident or death resulting therefrom.

Healey v. Mutual Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637; *State v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *Employers' Liability Assurance Corporation v. Merrill*, 155 Mass. 404, 29 N. E. 529; *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948; and *Standard Life & Accident Ins. Co. v. Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194.

Such contracts, whether issued by a company writing only insurance against accidents or ordinary life insurance companies, so far as they indemnify for death resulting from accidents, are regarded as essentially life policies.

State v. Federal Investment Co., 48 Minn. 110, 50 N. W. 1028, and *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948.

In the *Logan Case* it is said that the fact that the policy contains a provision for indemnity in case of disability not resulting in death does not change its character as a policy of insurance on life. A provision incorporated in a general life policy covering loss of life from external, violent, and accidental means would not change its character. Consequently a policy covering such loss of life only is different from an ordinary life policy merely in that the risks are limited in number. On the other hand, it would seem from the decision in *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. 79,

22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618, that such contracts are not regarded as life policies in Pennsylvania. This view is sustained by *Standard Life & Accident Ins. Co. v. Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194, where the court, discussing the status of a Pennsylvania contract, said that policies insuring only against bodily accidents are not included in the term "life insurance policies," as used in the act of May 11, 1881, providing that to all life policies a copy of the application must be attached. In *Employers' Liability Assurance Corporation v. Merrill*, 155 Mass. 404, 29 N. E. 529, contracts insuring an employer against liability for accidental injuries to others than employes by horses or vehicles of the employer and for which the employer is legally liable, contracts insuring against accidental personal injuries caused by elevators or their appurtenances for which injuries the employer might be liable, contracts insuring against liability for claims for accidental injuries to any person other than employes or persons injured by elevators and for which the insured might be legally liable in his capacity as landlord or tenant of certain premises, and contracts insuring builders and contractors against liability for accidental injuries to workmen employed by other contractors and to the public, caused by the insured or by his own workmen, are, in view of the court, accident insurance policies within the definition of such contracts. A somewhat noted case is *Commonwealth v. Philadelphia Inquirer*, 3 Pa. Dist. R. 742, where a newspaper published a coupon offering to pay a specified sum to the legal heir of any one meeting death by accident if a copy of the paper containing the coupon, or the coupon, was found on his person at the time of the accident resulting in death. The court held that this contained all the elements of a contract of insurance.

3. MEMBERSHIP IN MUTUAL BENEFIT ASSOCIATION AS A CONTRACT OF INSURANCE.

- (a) Nature of contract.
- (b) Contracts construed as insurance contracts.
- (c) Same—Contra.
- (d) Insurance or benevolence.
- (e) Sick or funeral benefits.
- (f) Social and fraternal features.
- (g) Ancient Order of United Workmen.
- (h) Royal Arcanum—Modern Woodmen.
- (i) United Ancient Order of Druids.
- (j) Knights of Pythias, Endowment Rank.
- (k) Masonic relief associations.
- (l) Odd Fellows relief associations.

(a) Nature of contract.

The general rules that have been applied by the courts in determining whether a given contract is a contract of insurance, and the application of those rules to specific contracts, have been discussed in the preceding briefs. Among the contracts that have been construed in the light of those principles the most numerous and important are the certificates of membership in co-operative, fraternal, or mutual benefit associations paying a death benefit. Most frequently the real issue has been whether these organizations are insurance companies within the purview of the laws regulating such companies—a question which is discussed in a subsequent brief.¹ In a large number of such cases it has been necessary to determine, first, the nature of the contract. They are therefore sometimes valuable as authorities on that question, and in this discussion will be cited so far as they are in point. These various organizations may be divided into two classes—those which are essentially co-operative or mutual benefit associations, and those which are secret fraternal societies, conducted generally on the lodge system, with ritualistic ceremonies. A third class may be distinguished, comprising those organizations which, though not themselves operated on the lodge system, are more or less closely affiliated with one of the secret societies and accept as members only members of some such society. The principles on which the cases are determined are not essentially different in these general classes, and, except in so far as the courts may have called attention to

¹ Regulation of insurance companies, see post, p. 60.

differences, decisions construing one class of contracts may well be regarded as authority in construing contracts of another class.

The general system of operation is much the same in all of these associations. To obtain membership the applicant must answer the usual questions propounded to applicants for ordinary life insurance and undergo a medical examination. The premium or assessment he is to pay is graduated according to age. The certificate of membership provides for the payment of some amount to a designated beneficiary on the death of the member. In most instances only members of the family of the applicant or those dependent on him can be designated as beneficiaries. The provisions as to payment may conform to one of these plans: First, the society agrees, on certain conditions, to pay a certain sum of money on the death of a member; second, the society agrees to pay, on certain conditions, as many dollars as there are members in the society in good standing at the time of the death of the member; third, the society agrees, on certain conditions, on the death of a member, to levy an assessment of a certain amount on the surviving members, and pay the proceeds of such assessment to the beneficiary.²

(b) Contracts construed as insurance contracts.

The leading case involving the nature of these contracts is *Commonwealth v. Wetherbee*, 105 Mass. 149. The contract involved was made by an organization known as the Connecticut Mutual Benefit Company. It provided that the member should pay a fixed sum at the inception of the contract, certain annual assessments, and a supplementary assessment on the death of any member of the division to which he belonged. On the death of a member by a peril insured against the company promised to pay as many dollars as there were members in the class to which the deceased member belonged. After defining "life insurance," Justice Gray, who delivered the opinion, says: "This is not the less a contract of insurance because the amount to be paid is not a gross sum, but a sum graduated by the number of members holding similar contracts, nor because a portion of the premium is paid at uncertain periods, nor because in case of nonpayment of an assessment the contract provides no means of enforcing payment, but merely declares the contract to be at an end. The contract is an insurance

² These are the divisions made by Mr. Niblack in his work on *Benefit Societies*, p. 637.

contract, though the object of the organization is benevolent, and not speculative." Similar to this contract is the one considered in *State v. Citizens' Ben. Ass'n*, 6 Mo. App. 163. The agreement on the part of the association in this case was to pay to the beneficiary such an amount as might be collected by assessment on other members of the class to which the member belonged. Relying on the principles stated in the *Wetherbee Case*, the court regarded this contract as one of insurance. In *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168, affirming 38 Ill. App. 111, it appeared that the laws of the association provided that, in case of the death of a member, the association should assess and collect from each survivor the sum of \$2.50 for the benefit of the widow, heirs, or devisees of the deceased, and pay them an amount not exceeding \$2,500. The court regarded the benefits provided for by the laws of the association as in the nature of life insurance, saying that the contract between the association and the member evidenced by the constitution, by-laws, and membership certificate is in substance a policy of insurance, though the certificate bore on its face no promise of indemnity. In *Supreme Commandery Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, the contract provided that on the death of a member the commandery would pay to the person named in the certificate \$2,000 in consideration that the member had paid the admission fee and all assessments made by the supreme commandery. The court regarded the contract as embracing all the essential elements of a contract of life insurance made by a mutual insurance company with one of its members.

Contracts of similar purport have been regarded as life insurance contracts in *Rensenhouse v. Seeley*, 72 Mich. 603, 40 N. W. 765; *Grand Lodge v. Ohnstein*, 85 Ill. App. 355; *Golden Star Fraternity v. Martin*, 59 N. J. Law, 207, 35 Atl. 908; *Barton v. Provident Relief Ass'n*, 63 N. H. 535, 3 Atl. 627; *Mellows v. Mellows*, 61 N. H. 137; *Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165; *Miner v. Michigan Mut. Ben. Ass'n*, 63 Mich. 338, 29 N. W. 852; *McCorkle v. Texas Benevolent Ass'n*, 71 Tex. 149, 8 S. W. 516; *Supreme Council American Legion of Honor v. Larmour*, 81 Tex. 71, 16 S. W. 633; *State v. Farmers' & Mechanics' Benevolent Ass'n*, 18 Neb. 276, 25 N. W. 81; *Endowment & Benevolent Ass'n of Kansas v. State*, 35 Kan. 253, 10 Pac. 872; *State v. Merchants' Mut. Aid Ass'n*, 35 Kan. 51, 9 Pac. 956; *Bloomington Mut. Life Ben. Ass'n v. Cummings*, 53 Ill. App. 530; *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Tucker*, 157 Ill. 194, 204, 42 N. E. 398; *Same v. Leonard*, 62 Ill. App. 477; *Railway Con-*

ductors' Mut. Aid Ass'n v. Swartz, 54 Ill. App. 445; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Danielson v. Wilson*, 73 Ill. App. 287; *Conyne v. Jones*, 51 Ill. App. 17; *Commercial League Ass'n v. People*, 90 Ill. 166; *Folmer's Appeal*, 87 Pa. 133; *Young v. Temperance Benevolent Society*, 42 Mo. App. 485; *State v. Iowa Mut. Aid Ass'n*, 59 Iowa, 125, 12 N. W. 782; *Corley v. Travelers' Protective Ass'n*, 105 Fed. 854, 46 C. C. A. 278; *Elkhart Mut. Aid Benevolent & Relief Ass'n v. Houghton*, 98 Ind. 149; *Id.*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Presbyterian Assurance Fund Ass'n v. Allen*, 106 Ind. 593, 7 N. E. 317; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Erdmann v. Mutual Ins. Co. of the Order of Hermann's Sons*, 44 Wis. 376; *Durian v. Central Verein Hermann's Sons*, 7 Daly (N. Y.) 168; *International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040; *Id.*, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; *Bolton v. Bolton*, 73 Me. 299; *Lubrano v. Imperial Council Order of United Friends*, 20 R. I. 27, 37 Atl. 345, 38 L. R. A. 546; *Supreme Assembly Royal Society of Good Fellows v. McDonald*, 59 N. J. Law, 248, 35 Atl. 1061; *Murdy v. Skyles*, 101 Iowa, 549, 70 N. W. 714, 63 Am. St. Rep. 411; *Supreme Lodge, Knights of Honor, v. Davis*, 26 Colo. 252, 58 Pac. 595.

Where the petition declares that the association is, and was at the time of making the contract, a corporation engaged in the life insurance business in the state, and the answer was that "defendant admits being a corporation and doing business in the state, and admits the issuance of a beneficiary certificate to" the deceased, and does not set up what kind of a corporation it is, the status of the defendant is thereby fixed, for the purposes of the case, as an ordinary life insurance company (*Cauveren v. Ancient Order of Pyramids*, 72 S. W. 433, 98 Mo. App. 141).

(c) Same—Contra.

The case most often cited in opposition to the doctrine of the preceding cases is *Commonwealth v. National Mut. Aid Ass'n*, 94 Pa. 481. The association involved was an Ohio corporation, and the suit was to impose a penalty on the association for an alleged violation of the Pennsylvania laws regulating insurance companies. The association had no fixed capital, and by its contracts did not bind itself to pay any fixed sum on the death of a member, but so much only as should be voluntarily paid by the surviving members. The court held that it was substantially a beneficial or mutual aid association, and not an insurance company, as defined by the laws of Pennsylvania; citing as authority for its holding *State v. Mutual Protective Society*, 26 Ohio St. 19. It is evident that the language used does not support the contention that the court regards

the contracts of these associations to be other than insurance contracts, but merely that such associations are not insurance companies, within the purview of the statute regulating such companies. That is all that is decided in *State v. Mutual Protective Society*, 26 Ohio St. 19, cited by the Pennsylvania court as authority. In that case the court said, definitely, that the only question they regarded as before them was whether the association was within the statute relating to insurance companies. This interpretation of the decision in the Pennsylvania case is supported by the subsequent case of *National Mut. Aid Society v. Lupold*, 101 Pa. 111, where the Supreme Court of Pennsylvania expressly limited the effect of the former decision, saying that all that was decided in that case was that the association was excepted from the operation of the act relating to insurance companies, and that the case cannot be regarded as deciding that the contract of the association is not an insurance contract. *Commonwealth v. Equitable Beneficial Ass'n*, 137 Pa. 412, 18 Atl. 1112, has always been quoted in opposition to the principle that a mutual benefit certificate is a contract of insurance. The case, however, does not go that far. The issue was whether the association was an insurance company within the operation of the statute regulating such companies. After defining the difference between insurance companies and benefit associations, the court says that there is nothing in the case to indicate what class of business is being conducted by the association in suit, and consequently they cannot pass upon the question at issue.

Donlevy v. Supreme Lodge Shield of Honor, 11 Pa. Co. Ct. Rep. 477; *Supreme Council Order of Chosen Friends v. Fairman*, 62 How. Prac. (N. Y.) 386, 10 Abb. N. C. (N. Y.) 162; *Durlan v. Central Verein Hermann's Sons*, 7 Daly (N. Y.) 168—have also been cited as holding that certificates of membership in mutual benefit societies are not contracts of insurance, but the cases involved only the issue whether such organizations are insurance companies subject to the operation of statutes regulating insurance companies.

The contract involved in *Swift v. San Francisco Stock Exchange Board*, 67 Cal. 567, 8 Pac. 94, is somewhat different from those that have hitherto been considered. This was a voluntary association composed of 100 persons, who combined for the purpose of facilitating dealing in stocks. The rules provided for a trust fund in charge of a trust fund committee, out of which, on the death of a member of the board, should be paid to such person or persons as

may have been designated in writing by the deceased member the sum of \$10,000. If no designation was made the amount should be paid to the widow; if no widow, to the child or children surviving; and if no widow, children, or designation made, there was to be no payment. The court held that there was no contract of insurance in such case, the payment being merely an absolute donation, the character of which was not changed by the fact that it was designated as a life insurance fund, or that a candidate for benefit must file with the secretary of the board a medical certificate attesting his fitness to be accepted as a participant in the fund.

(d) Insurance or benevolence.

It has often been contended that these organizations are benevolent associations, and on this contention is based the argument that certificates of membership cannot be regarded as contracts of insurance. In the leading case (*State v. Merchants' Exchange Mut. Benevolent Society*, 72 Mo. 146) where such contention was made the court held that the contract was one of insurance, saying that all insurance was originally based on the idea of benevolence. The benevolence in this case does not flow from mere good will, but from legal obligation. Its gifts are not bestowed without consideration, but depend on mutual promises; and if defendants are exercising charity and benevolence by means of contracts for the payment of money on the death of a member they are doing an insurance business. This view was approved in *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89, where it was contended that the association was a fraternal beneficial society. The court regarded the words "fraternal beneficial" to designate an association engaged in some work that is of a fraternal and beneficial character; in other words, an association the members of which belong to the same or a very similar calling, avocation, or profession, and who are working in unison to accomplish some worthy object. Such words do not contemplate an association organized for the sole and only purpose of transacting an insurance business.

Another case that is justly regarded as a leading one is *Berry v. Knights Templars & Masons' Life Indemnity Co.*, 46 Fed. 439, affirmed in 50 Fed. 511, 1 C. C. A. 561. The company contended that it was a corporation for benevolent purposes. The court held that the fact that the members of the company, its officers and agents, belong to the Masonic order, and that it insures only members of that order, does not constitute it a benevolent association.

Its business is insurance, and it deals with its members on strict business principles. The policy holder gets nothing for which full value has not been paid. The company claims that it exercises benevolence by contract, and through contractual relations, instead of mere voluntary, and therefore uncertain, gifts; but that is precisely the kind of benevolence practiced by all insurance companies as long as they pay their honest losses. Similarly, in *Block v. Valley Mut. Ins. Ass'n*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166, where the contract contained no reference to any purpose other than insurance, and provided ordinary safeguards against the acceptance of bad risks as well as against the continuance of accepted risks, unless stipulated payments were promptly made, the court regarded the contract as in no way differing from those of ordinary mutual insurance companies. Affording relief to representatives of the deceased is exactly what insurance companies are required to do. This is not benevolence, for it is undertaken for a stipulated profit. The contract must be regarded as an ordinary insurance policy.

These principles have been approved in *State v. Citizens' Benefit Ass'n*, 6 Mo. App. 163; *State v. Brawner*, 15 Mo. App. 597; *Order of International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040; *Foster v. Moulton*, 35 Minn. 458, 29 N. W. 155; *Walter v. Odd Fellows Mut. Ben. Society*, 42 Minn. 204, 44 N. W. 57; *Holland v. Supreme Council of the Order of Chosen Friends*, 25 Atl. 367, 54 N. J. Law, 490; *McConnell v. Iowa Mut. Aid Ass'n*, 79 Iowa, 757, 43 N. W. 188; *State v. Standard Life Ass'n*, 38 Ohio St. 281; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220.

Commonwealth v. Equitable Beneficial Ass'n, 137 Pa. 412, 18 Atl. 1112, has sometimes been regarded as sustaining the opposite view of these contracts. In this case the court said that the general object or purpose of an insurance company is to offer indemnity or security against loss. Its engagement is not founded on any benevolent or charitable principle. What is known as a beneficial association has a different object and purpose in view. The great underlying purpose of this organization is not to indemnify or secure against loss. Its design is to accumulate a fund from the contributions of its members for beneficial or protective purposes, to be used in their own aid or relief in the misfortunes of sickness, injury, or death. The benefits, though secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies are rather

of a philanthropic or benevolent character. The real issue, however, was whether the organization was an insurance company, within the purview of the statute regulating such companies, or a beneficial association, within the statute defining such associations. Moreover, in view of the general doctrine approved by the Pennsylvania courts that a contract of life insurance is not a contract of indemnity, the reasoning in this case seems to be inconsistent. The court apparently loses sight of the fact that the benevolence exercised by these associations is rather in protecting the contract than in the contract itself.

(e) Sick or funeral benefits.

It was held in *Lafond v. Deems*, 8 Abb. N. C. (N. Y.) 344, that an organization, the object of which is to secure to its members sympathy and relief in time of sickness and distress, and, in the event of death, the decent observance of the necessary funeral obsequies, occupies an entirely different position from institutions of a financial character; and in *State v. Taylor*, 56 N. J. Law 49, 27 Atl. 797, an association which confined its agreement to the payment of sick benefits and burial expenses was regarded as not conducting an insurance business.

Rensenhause v. Seeley, 72 Mich. 603, 40 N. W. 765, and *Bauer v. Samson Lodge No. 32, Knights of Pythias*, 102 Ind. 262, 1 N. E. 571, appear to take a different view, but are of doubtful authority on this point.

On the other hand, that the payment of sick benefits or funeral expenses does not affect the status of the contract as one of insurance is held in *Farmer v. State*, 69 Tex. 561, 7 S. W. 220. The court said that it made no difference in the construction of the certificate of membership that the member was entitled to benefits in case of sickness. Insurance can be effected on the health as well as on the life of its members. Such benefits are incidental only to the main objects, and the certificates are none the less policies of insurance, though the insured derives sums of money from the contract other than those for which he has specially bargained.

(f) Social and fraternal features.

It has been attempted to differentiate from the associations heretofore discussed those known as fraternal orders having social or secret features. That the existence of such features does not affect the character of the contract as one of insurance is held in a number of cases. In *State v. Miller*, 66 Iowa, 26, 23 N. W. 241, where

there was an age limit for membership in the association involved, and the applicant was obliged to pass a medical examination, and on the payment of certain dues and assessments his beneficiary, after his death, became entitled to a certain sum, and the laws of the order provided for government on the lodge system, the court regarded the contract as one of life insurance; remarking that if the provisions of a fraternal character were eliminated its primary and only purpose would be that of a life insurance organization. Purely fraternal associations do not require that their members should be insurable. In *State v. Nichols*, 78 Iowa, 747, 41 N. W. 4, where it was urged that the association was purely a benevolent, social, or fraternal association, the court says that, though the objects of the order as stated in its constitution and laws are social and literary, and generally for the mental, moral, and physical improvement of its members, the laws of the order make provision only for the benefit features, and almost completely ignore the other alleged objects. The fact that it is or may have other objects does not destroy its character as an insurance organization. As said in *Masonic Aid Ass'n v. Taylor*, 2 S. D. 331, 50 N. W. 93, though the courts have intimated that possibly there is a distinction between a society the primary object of which is to contract with its members for insurance on their lives, and a society organized for social, literary, or benevolent purposes, to which a feature of mutual insurance is added, the distinction is merely that the latter cannot be regarded as carrying on a general life insurance business within the purview of statutes regulating general life insurance companies.

This reasoning is also the basis of the decisions in *Grimes v. Northwestern Legion of Honor*, 97 Iowa, 315, 64 N. W. 806; *Danther v. Grand Lodge A. O. U. W.*, 10 Utah, 110, 37 Pac. 245; and *Fawcett v. Supreme Sitting Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614. 24 L. R. A. 815, where Justice Hamersley in a dissenting opinion discusses the distinguishing features of fraternal and ordinary benefit societies. This doctrine is also approved in *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89; *State v. Farmers' & Merchants' Mut. Aid Ass'n*, 35 Kan. 51, 9 Pac. 956; *State v. National Accident Society*, 103 Wis. 208, 79 N. W. 220; *Mulroy v. Supreme Lodge Knights of Honor*, 28 Mo. App. 463; *Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252, 58 Pac. 595; *Sims v. Commonwealth*, 114 Ky. 827, 71 S. W. 929.

The general principle that a certificate of membership in a fraternal society which, in the certificate or in its constitution or by-laws, provides for payment of a death benefit, is in effect a contract of life insurance, is supported by *District Grand Lodge No. 5, Ind.*

Order of B'Nai Brith, v. Jedidijah Grand Lodge No. 5, 65 Md. 236, 8 Atl. 104; Goodman v. Jedidijah Lodge No. 7, Ind. Order of B'Nai Brith, 67 Md. 117, 9 Atl. 13; Holland v. Supreme Council Order of Chosen Friends, 54 N. J. Law, 490, 25 Atl. 367; Supreme Assembly Royal Society of Good-Fellows v. McDonald, 59 N. J. Law, 248, 35 Atl. 1061; Lady Lincoln Lodge No. 702, Knights and Ladies of Honor, v. Faist, 52 N. J. Eq. 510, 28 Atl. 555; Schiff v. Supreme Lodge Order of Mutual Protection, 64 Ill. App. 341; Grand Lodge A. O. U. W. v. Jesse, 50 Ill. App. 101; Bastian v. Modern Woodmen, 166 Ill. 595, 46 N. E. 1090; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; State v. Miller, 66 Iowa, 26, 23 N. W. 241; Brown v. Modern Woodmen, 115 Iowa, 450, 88 N. W. 965; Saunders v. Robinson, 144 Mass. 306, 10 N. E. 815; State v. Benton, 35 Neb. 463, 53 N. W. 567; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Barton v. International Fraternal Alliance, 85 Md. 14, 36 Atl. 658; Chartrand v. Brace, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765.

(g) Ancient Order of United Workmen.

A certificate of membership in the Ancient Order of United Workmen is regarded as a contract of insurance in *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110, 37 Pac. 245. The controlling object of the order seems to be to provide a benefit fund out of which a certain stipulated sum is to be paid to the beneficiary of each member in good standing, on his death. Good health is requisite to membership, and every application must be accompanied by a physician's certificate to that effect. That an applicant is insurable is one of the qualifications for admission. A certificate in the nature of an insurance policy is issued to the member. It is evident that the main object of the order is protection of the beneficiaries of its deceased members by insurance, and that its fraternal character is merely incidental. The contract between the association and each of its members does not essentially differ from an ordinary contract of mutual life insurance.

To the same effect are *Grand Lodge Ancient Order of United Workmen v. Jesse*, 50 Ill. App. 101; *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; *State v. Miller*, 66 Iowa, 26, 23 N. W. 241; *State v. Nichols*, 78 Iowa, 747, 41 N. W. 4; and *Lamphere v. Grand Lodge A. O. U. W.*, 47 Mich. 429, 11 N. W. 268.

(h) Royal Arcanum—Modern Woodmen.

A certificate of membership in the Royal Arcanum was construed in *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116, the court

holding that membership in a benevolent association, such as the Royal Arcanum appears to be, is in the nature of a mutual insurance contract.

A similar construction was adopted in *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. 815; *State ex rel. Royal Arcanum v. Benton*, 35 Neb. 463, 53 N. W. 567; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561.

In so far as the benefit feature of the organization is concerned, membership in the Modern Woodmen is regarded as in the nature of a contract of insurance.

Brown v. Modern Woodmen of America, 115 Iowa, 450, 88 N. W. 965; and *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090.

(1) United Ancient Order of Druids.

The Missouri Court of Appeals took a different view of such memberships in *Barbaro v. Occidental Grove*, No. 16, 4 Mo. App. 429, where membership in the United Ancient Order of Druids was involved. The charter recited that the association was formed for the purpose of rendering aid and comfort to the members and families of members in case of accident, sickness, or death. The action was brought by a child of a deceased member to recover the quarterly stipend claimed under the by-laws of the association. The court held that the payment of a small stipend to the helpless children of a deceased member is merely carrying out the objects of the association, and, in view of the fact that the charter expressly provides that the powers granted therein shall not be used for insurance purposes, the contract sued on is not a contract of life insurance. But membership in the same organization has been regarded as substantially a contract of insurance.

Schunk v. Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369, and *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162.

(5) Knights of Pythias, Endowment Rank.

In *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 374, the certificate was of membership in the Endowment Rank of the Knights of Pythias. This constitutes, the court said, the life insurance department of the order, and it regards the certificate of membership as a contract of insurance governed by the rules that control in the construction of ordinary life insurance contracts. Basing its decision on this case, and on *Elkhart Mut. Aid Benevolent & Relief Ass'n v. Houghton*, 98 Ind. 149, the court in *Bauer v. Samson Lodge*, No. 32, Knights of Pythias, 102 Ind. 262, 1 N.

E. 571, regarded the relation existing between the association and its members as a contract of insurance. It is doubtful, however, if, strictly speaking, the relation here is one of insurance. The benefit involved in this case was merely a sick benefit, and it does not appear that the member was a member of the Endowment Rank, which, it must be remembered, is the life insurance division of the order. In *Toomey v. Supreme Lodge Knights of Pythias*, 74 Mo. App. 507, it was held that the business done by the Endowment Rank of defendant order is life insurance pure and simple. This was affirmed in *Toomey v. Supreme Lodge Knights of Pythias*, 147 Mo. 129, 48 S. W. 936, where the court distinguished the case of *Theobald v. Supreme Lodge Knights of Pythias*, 59 Mo. App. 87, cited in opposition to the holding of the court below, calling attention to the fact that no question was raised in that case as to the character of the association, as it was alleged by the defendant and conceded by demurrer that it was a fraternal benevolent association, the only issue being as to its subjection to certain statutes relating to insurance companies.

Certificates of membership in the Endowment Rank are also construed as insurance contracts in *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 480, 20 N. E. 479, 3 L. R. A. 409; *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn. 158, 31 S. W. 493, 30 L. R. A. 838; *Supreme Lodge Knights of Pythias v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163; and *Stork v. Supreme Lodge Knights of Pythias*, 113 Iowa, 724, 84 N. W. 721.

In the last case plaintiff alleged that defendant was a life insurance company duly incorporated as such. Defendant entered a general denial, and averred the fraudulent procurement of plaintiff's certificate. It was held that defendant must be regarded as an insurance company, and not a fraternal society, since no facts were specially pleaded to put plaintiff's allegation in issue.

(k) Masonic relief associations.

The third class of organizations, the contracts of which have been regarded as insurance contracts, is made up of associations which, though not in themselves secret or fraternal, are affiliated with secret orders, and confine their membership to members of such orders. Among these are the Masonic benefit or relief associations. A leading case is *Bolton v. Bolton*, 73 Me. 299, which involved the contract of a Masonic relief association. The by-laws provided that any member of a lodge of Masons, not over 60 years of age, could become a member on application, under certain conditions and on payment of a membership fee. On the death of a member an assessment of \$1 was laid on each surviving member, and from the

fund thus raised as many dollars, not exceeding \$1,000, as there were surviving members who had paid their assessments, was paid to the widow of such deceased member. The court held that this was a contract of insurance, notwithstanding the fact that the association took no note of biological contingencies, or that the membership was limited to persons belonging to the Masonic order, basing its decision on the *Wetherbee Case* (105 Mass. 160). The same kind of a contract was discussed in *Masonic Aid Ass'n v. Taylor*, 2 S. D. 331, 50 N. W. 93. It was contended in that case that the fact that the right to a benefit was dependent on the member being a member of a Masonic society removed the contract from the realm of insurance; but the court said that such fact was not controlling, in view of the further fact that he must also be of insurable age and physical condition. If the restriction of membership to Masons was eliminated, the primary and only purpose of the association was life insurance.

The contracts of such associations have been held to be contracts of insurance in *Rockhold v. Canton Masonic Mut. Ben. Ass'n* (Ill.) 19 N. E. 710; *Masons' Benevolent Soc. v. Winthrop*, 85 Ill. 537; *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, reversing 71 Ill. App. 366; *Lake v. Minnesota Masonic Relief Ass'n*, 61 Minn. 96, 63 N. W. 261, 52 Am. St. Rep. 538; *Illinois Masons' Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Masonic Mut. Benefit Soc. v. Burkhardt*, 110 Ind. 189, 10 N. E. 79; *Prader v. National Masonic Accident Ass'n*, 95 Iowa, 149, 63 N. W. 601; *Haynie v. Knights Templars' & Masons' Life Indemnity Co.*, 139 Mo. 416, 41 S. W. 461; *Ellerbe v. United Masonic Ben. Ass'n*, 114 Mo. 501, 21 S. W. 843; *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 439, affirmed in *Knights Templars' & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561; and *Jarman v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 95 Fed. 70.

This view of these contracts has been regarded as opposed by *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810, which is often cited as holding the contrary doctrine. The association in this case was incorporated under the laws of the state of Illinois, and its object was stated to be to secure pecuniary aid to the widows, orphans, heirs, and devisees of deceased members. The court holds that the contract is not a contract of insurance, within the law of Pennsylvania relating to the liability of funds derived from such sources for the debts of the decedent. The court says that under the laws of the state of

Illinois such an association is not an insurance company, and certificates issued by it in the state of Illinois are not contracts of insurance. The court cites *Commonwealth v. Equitable Benefit Ass'n*, 137 Pa. 412, 18 Atl. 1112; but, as has been already seen, that case passed only on the question as to whether mutual benefit associations are insurance companies within the statute regulating such companies. It is more than doubtful, too, whether the decision is justified by the state of the law in Illinois. In *Rockhold v. Canton Masonic Mut. Ben. Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420, affirming 26 Ill. App. 141, the Supreme Court of Illinois did, it is true, hold that such associations are not insurance companies within the purview of the statutes regulating such companies; but it was also held that the contract of the association involved in that case was a contract of insurance. Similarly, *Masonic Benevolent Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25, has been cited as opposed to the prevailing doctrine; but the only point decided in that case was that the association was not to be deemed an insurance company within the statutes relating to such companies.

(1) Odd Fellows relief associations.

Associations similar to the Masonic associations above described also exist the membership of which is confined to the members of the Independent Order of Odd Fellows. As is said in *Anthony v. Carl*, 28 Misc. Rep. 200, 58 N. Y. Supp. 1084, the order of Odd Fellows is not a pecuniary benefit, or mutual insurance society, but a fraternal association, organized for relief and benefits other than financial. This distinguishes the order itself, however, from the affiliated associations organized to insure members of the order. These associations have been regarded as issuing contracts in the nature of life insurance.

Elsley v. Odd Fellows' Mut. Life Ass'n, 142 Mass. 224, 7 N. E. 844; *Smith v. Bullard*, 61 N. H. 381; *Walter v. Odd Fellows' Mut. Ben. Soc.*, 42 Minn. 204, 44 N. W. 57; and *Odd Fellows' Protective Ass'n v. Hook*, 9 Ohio Dec. 89.

4. POWER TO WRITE INSURANCE.

- (a) In general.
- (b) Pennsylvania.
- (c) Ohio.
- (d) Illinois.
- (e) New York.
- (f) Alabama.
- (g) Missouri.
- (h) Other states.
- (i) Pleading.

(a) In general.

That any person competent to contract is empowered to write insurance would seem to be fundamental, yet, under the statutory provisions in certain states, the power has been seriously questioned and in some instances denied. In most cases the question has arisen in relation to fire insurance contracts, but they are illustrative of the general principles, and may well be regarded as applicable to any insurance contract. Under the common law it was undoubtedly the rule that insurance could be written by any individual who was competent to contract.

Henning v. United States Ins. Co., 47 Mo. 425, 4 Am. Rep. 332; *State v. Citizens' Benefit Ass'n*, 6 Mo. App. 163; *Hoadley v. Purifoy*, 107 Ala. 276, 18 South. 220, 30 L. R. A. 351; *Barnes v. People*, 168 Ill. 425, 48 N. E. 91; *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298; and *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603 (dissenting opinion).¹

So while at common law a number of people may enter into mutual covenants to indemnify each other against loss by fire (*Clark v. Spafford*, 47 Ill. App. 160), and a married woman may insure her husband's life for her own benefit, it does not follow that a number of married women may form a mutual insurance company for the purpose of insuring the lives of each other's husbands (*Bruner v. Thiesner*, 12 Mo. App. 289).

(b) Pennsylvania.

The Pennsylvania statute of February 4, 1870, provides that it shall be unlawful for any person, partnership, or association to issue, sign, seal, or in any manner execute any policy of insurance

¹ See, also, *Spelling, Extraordinary Remedies*, vol. 2, § 1808.

against loss by fire or lightning without authority expressly conferred by a charter of incorporation. The effect of this statute was considered in *Arrott v. Walker*, 118 Pa. 249, 12 Atl. 280, where it was sought to enforce a contract made by an agent to procure insurance. The court held, however, that such contract could not be enforced, as personal contracts of insurance are void under the act cited. The leading case in Pennsylvania, however, is *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603, in which the constitutionality of the act in question was considered. It was contended that the act was in violation of the fourteenth amendment of the federal Constitution prohibiting states from making any law abridging the privileges or immunities of citizens of the United States, or denying to any person the equal protection of the laws; that it was in conflict with section 1 of the state Constitution, declaring that all men have certain inherent and inalienable rights, among which are those of acquiring, possessing, and protecting property; and, further, that the act was an improper exercise of the police power. The court, however, sustained the constitutionality of the act, seemingly basing its reasons on the admitted power of the state to regulate any business operations which involve large public interests, asserting that insurance was such a business. It justified the act on the ground that numerous states have entered on legislation regulating the insurance business. It was also asserted that the state has power to require all persons desiring to enter into the business to comply with the same conditions, and, if necessary, to obtain a charter of incorporation in order to render such compliance certain. The court took the ground that the act is not a prohibition operating on natural persons for the benefit of corporations, but its effect is merely to secure compliance with necessary regulations; that the business of insurance against fire affects so many persons as to make it necessary for public protection that it should be subject to supervision and control of government; and that such supervision cannot be exercised over private persons. Three of the seven justices constituting the court dissented, and Justice Dean wrote a dissenting opinion, in which he calls attention to the fact that the right of natural persons to make contracts of indemnity against loss by fire or shipwreck was for centuries a common-law right, and says that under the constitutional right to acquire, possess, and protect property there is necessarily included the right to make reasonable con-

tracts concerning it.³ He does not deny the right of the Legislature to regulate the business of fire insurance, but denies the right to absolutely forbid the making of such a contract by individuals and to confer on corporations a monopoly of the business.⁴ Such a right cannot be monopolized unless it has become of such public concern as requires its exercise by the state or by a corporation to whom the state's power is delegated. From those cases in which the police power of the state is discussed the only rule to be deduced is that while a business affected by public interest may be regulated, yet, when not inimical to the health, morals, or safety of the people, it cannot be prohibited.⁴ An exclusive grant to a

³ For a general statement of the principle of the liberty of an individual to contract and to pursue any lawful calling, see *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *In re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *The Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394 (dissenting opinion); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585 (concurring opinion of Justice Bradley); *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253 (see, especially, dissenting opinion of Justice Field); *Leep v. St. Louis, I. M. & S. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *In re Maguire*, 57 Cal. 604, 40 Am. Rep. 125; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (dissenting opinion); *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (dissenting opinion); *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682; *Dayton Coal & Iron Co. v. Barton*, 108 Tenn. 604, 53 S. W. 970; *American Steel & Wire Co. v. Wire Drawers*, etc., *Unions (C.*

C.) 90 Fed. 608; *United States v. Sweeney (C. C.)* 95 Fed. 434; *United States v. Joint Traffic Ass'n*, 171 U. S. 572, 19 Sup. Ct. 25, 43 L. Ed. 259; *Hopkins v. United States*, 171 U. S. 603, 19 Sup. Ct. 40, 43 L. Ed. 290; *Allgeyer v. State of Louisiana*, 165 U. S. 583, 17 Sup. Ct. 430, 41 L. Ed. 832; *Cooley, Constitutional Limitations*, p. 744; and *Tiedeman, State & Federal Control*, vol. 1, p. 294, § 94.

⁴ The right to regulate trades and occupations in the exercise of police power does not include the right to prohibit or destroy is held in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 320, 6 Sup. Ct. 334, 29 L. Ed. 636; *Kuhn v. Detroit*, 70 Mich. 534, 38 N. W. 470; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Stockton Laundry Case (C. C.)* 26 Fed. 611; *Austin v. Murray*, 16 Pick. (Mass.) 121.

⁴ Legislation prohibiting an individual from engaging in any occupation he may choose cannot be upheld as a proper exercise of the police power, except as to occupations which are injurious or offensive to the community. See *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *Barling v. West*, 29 Wis. 315, 9 Am. Rep. 576; *In re Ah Jow (C. C.)* 29 Fed. 181;

class is not a regulation, but a prohibition, and therefore unconstitutional. The regulations of various states restricting the business of banking he does not regard as analogous. Referring to the New York act regulating banking, he calls attention to the fact that the courts of that state had construed the act only as applying to associations of individuals, requiring them to have corporate authority to do a banking business, and that it did not prohibit individuals from doing such business except as to issuing bank notes.

Mr. Tiedeman, commenting on the decision in this case, says:⁵ "Banking and insurance are in one sense of the word ordinary callings, which the man of sufficient capital could successfully pursue, and in the case of banking he could without doubt safeguard the interests of depositors within the utmost reason. It is probably true that this could be effected in the case of all kinds of insurance other than life, inasmuch as marine, fire, storm, and other like kinds of insurance are taken out usually to cover only one, three, and five years; but in a policy of life insurance interests are created and acquired which it might require many years to realize. To permit private individuals, no matter how wealthy they are, to engage in the business of life insurance, would be a gross wrong to policy holders, because by no measures could their interests be safeguarded against the likely accident of the death of the insurer. A statute which would prohibit any person or corporation from issuing a policy of life insurance unless expressly authorized by the laws of the state would be clearly constitutional, and it would not be unconstitutional to prohibit absolutely a natural person from issuing a policy of life insurance under any circumstances; but it would

Hayden v. Noyes, 5 Conn. 391; Austin v. Murray, 16 Pick. (Mass.) 121; Stockton Laundry Case (C. C.) 26 Fed. 611; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Ames v. Port Huron L. D. & B. Co., 11 Mich. 140, 83 Am. Dec. 731; Wynehamer v. People, 13 N. Y. 378; Rockwell v.

Nearing, 35 N. Y. 307; Hudson v. Thorne, 7 Paige, 263; Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470; Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; Livestock D. & B. Asso. v. Crescent City L. S. L. & S. H. Co., 1 Abb. 388, Fed. Cas. No. 8,408; Butchers' U. S. H. & L. S. S. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

⁵ See Tiedeman, State & Federal Control, vol. 1, p. 574, § 130.

be more open to question how far the business of marine, fire, and other like insurance could by statute be converted into a monopoly or exclusive franchise and be denied altogether to natural persons. That the business may be subject to regulations which are needed to assure the policy holder of the possession by the insurer of ample funds to pay the losses under the policies when they occur is unquestioned, but this can be readily accomplished, in all other kinds of insurance other than life, without denying to the natural person absolutely the right to issue a policy of insurance."

The contention of the court in this case that the act is not a prohibition of the business as to individuals, for the reason that all it is necessary for them to do if they wish to embark in the business is to secure a charter of incorporation, is well answered by the remarks of the court in *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756, where an act restricting the banking business to corporations was involved. The court in that case said that, while it is true that the act did not prevent individuals from associating themselves together as a corporation so as to transact the business, a citizen cannot be required to abandon a business, not injurious to the community, which he is carrying on, and compelled to invest his capital in a corporation over which he may have no control, except as a mere stockholder, or otherwise be deprived of his right to pursue his lawful calling. It would seem, too, that the Pennsylvania act grants to corporations privileges and immunities which are denied to individual citizens.

The decision in the *Arrott and Vrooman Cases* was adhered to in *Weed v. Cumming*, 198 Pa. 442, 48 Atl. 409. Judging from the decision in *Commonwealth v. Reinoehl*, 163 Pa. 287, 29 Atl. 896, 25 L. R. A. 247, the Supreme Court of Pennsylvania does not deny the right of individuals to write insurance other than fire insurance. In this case the question was whether a person acting as agent for an association known as the *Guaranty & Accident Lloyd's* was within the act of May 1, 1876, § 47, declaring it a misdemeanor to act as agent for a foreign insurance company without certificate of authority. The court held that the association in question was not a corporation, within the meaning of the act.

As the question as to the right of individuals to transact banking business is strictly analogous to the right to transact the insurance business, the state of the law on that point may properly be adverted to in discussing the question from an insurance standpoint.

The case of *Bristol v. Barker*, 14 Johns. (N. Y.) 205, is often cited as supporting the principle that the state may restrict the right of banking. It arose under the New York act of April 6, 1813; but the court held that the only intention of the act was to restrain unincorporated associations from exercising banking privileges. So in *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243, the right of an individual to engage in banking was not involved, but merely the right of the corporation organized as an insurance company to also transact a banking business; the court holding that it could not transact such business, as a corporation has no rights except such as are specially granted and those necessary to carry into effect the powers so granted. Judge Spencer, in a dissenting opinion in which he held that the act organizing the insurance company was broad enough to give them banking privileges, said, however, that if defendants claimed and exercised the right of banking as private individuals they might have been punished as usurping a franchise, but he does not appear to contend that an individual cannot exercise the banking privilege under the act.

The state of North Dakota in 1890 passed a law declaring, in effect, that the business of banking should be carried on only by corporations. The court in *State v. Woodmansee*, 1 N. D. 240, 46 N. W. 970, 11 L. R. A. 420, held that this was a valid exercise of the police power, basing its decision on reasoning similar to that employed by the Supreme Court of Pennsylvania in the *Vrooman Case*. It was said that the business of banking involved such public interest that it must be considered a proper subject of legislative control, and that such control could be secured only by the power of visitation and supervision over corporations. A similar statute was adopted in South Dakota in 1891, and the constitutionality of the act was considered in *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 753. The court held, contrary to the North Dakota doctrine, that the statute was unconstitutional, in so far as it prohibited individuals from engaging in the business of banking. After showing that the only franchise connected with the banking business under the common law was the right to issue bills, the court held that the other and incidental powers of banking have never become, either at common law or under state or federal Constitutions, a franchise, but are privileges that always belong to the citizens of the country generally. The court questions the right of the Legislature to create a franchise by depriving citizens of such rights and bestowing it on corporations. The law cannot be regarded as a valid exercise of the police power, as such power is restricted to the regulation and supervision of trades, and cannot prohibit the transaction of a trade altogether, unless injury to the public is inherent in the character of the business. The law in question is an infringement of the right of the citizen to pursue any calling, occupation, or business not necessarily injurious to the

community, who is willing to comply with the reasonable regulations imposed upon it. The right to regulate the business of banking is distinctly recognized, but the court regards the law in question unconstitutional because of its discrimination against individuals.

(c) Ohio.

An important and leading case is *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298. The action was brought to test the right of Ackerman and others, who were associated together under the name of Guaranty & Accident Lloyd's, to do an insurance business. Though the case has often been cited as asserting the principle that the insurance business may be prohibited to individuals, it does not in fact decide any such principle. The point at issue was whether the association was exercising the powers of a corporation without having been incorporated, it having been claimed by defendants that the laws of Ohio relating to insurance companies did not apply to them, as they were not a corporation, but that in making contracts of insurance each individual associate acted for himself. The court concedes that an individual may write insurance, but, after examining the plan pursued by the defendants, concludes that though not incorporated they were in effect exercising the powers of a corporation and unlawfully acting as such. It was held that the defendants, if they wished to carry on the business of insurance, must either act openly on their own responsibility as individuals or become incorporated. The decision does indeed hold that the privilege of carrying on the business of insurance granted by the statute is a franchise.⁶ But there is nothing in the decision to indicate that the court regarded the business of insurance as a franchise which could not be exercised by an individual.⁷

(d) Illinois.

The decision in the *Ackerman* Case, discussed in the preceding paragraph, was based largely on *Greene v. People* (Ill.) 21 N. E. 605, reaffirmed on rehearing 37 N. E. 842, 150 Ill. 513. This case also involved the rights of an unincorporated association transact-

⁶ See *Spelling, Extraordinary Remedies*, vol. 2, §§ 1807, 1808.

⁷ Right of individuals to exercise franchises, see *Bank of Augusta v.*

Earle, 13 Pet. 519, 10 L. Ed. 274; *Chicago v. People*, 91 Ill. 80; *State v. Weatherby*, 45 Mo. 17.

ing an insurance business, the issue being that the association was unlawfully exercising the powers of a corporation. The court said that the fact that the persons thus associated may be held liable individually on any policies they may issue does not relieve them from the charge of having, without authority, acted as a corporation. The court does not decide that an individual cannot write insurance, but simply that an association of individuals cannot exercise corporate powers without being incorporated. A similar question was raised in *Barnes v. People*, 168 Ill. 425, 48 N. E. 91. The action was brought to recover the penalty for acting as agent of an insurance company without authority. The defendant had acted as agent for a Lloyd's association. The court recognizes the right of individuals to make insurance contracts, unless prevented by statute or public policy. Not only is there no statute in Illinois prohibiting a citizen of the state from transacting all insurance business, but there is no statute with which he must comply as a condition precedent thereto, the only restrictions being those imposed on corporations. Since the act requiring agents to procure authority as a condition precedent does not apply to citizens of this state, it cannot be applied to citizens of other states, under the constitutional provision guarantying citizens of other states the right to pursue such lawful business or calling within this state as citizens of this state may pursue.* The court also interprets the decision in the *Greene Case* as recognizing the right of an individual to engage in the insurance business.

Reference may also be made to *Clark v. Spafford*, 47 Ill. App. 160, where it was said that at common law a number of people may enter into mutual covenants to indemnify each other against loss by fire, and unless restricted by statute such agreements will be valid.

(e) New York.

People v. Loew, 19 Misc. Rep. 248, 44 N. Y. Supp. 42, has been regarded as denying the right of individuals to engage in the busi-

* Corporations are not citizens, within the meaning of the constitutional provision guarantying equal privileges and equal protection of the laws. See *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650;

Norfolk & Western Railway Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.

ness of insurance under the New York statute. Laws 1892, c. 690. provides that no person or association shall make insurance except through corporations or persons possessed of the capital required, and under regulations established for the government of corporations. The court regarded the business of insurance to be in the nature of a franchise, and of such large public concern as to be essentially of a public character, as to which the Legislature had the right to guard and protect the people of the state. The business must be considered a franchise from the time the Legislature first began to enact regulations in regard thereto, and consequently the sufferance of insurance by private persons, prior to the act of 1892, did not establish the sacredness of that form of business as a personal right. On a matter of public interest the Legislature may provide the methods by which persons or associations may transact business. The issue in this case was not the right of an individual to transact insurance business, but the right of an association, known as Lloyd's, to carry on the business of insurance with a limited personal liability. This, the court says, is the exercise of corporate rights, and held the association to be engaged unlawfully in business, as it was exercising corporate rights without having been incorporated. It is true the court cites the Vrooman Case, but it also cites the Ackerman Case, and, in view of the peculiar question involved, it cannot be regarded that the court decides that the business of insurance cannot be carried on by individuals under proper restrictions.

(f) Alabama

Though the question as to the right of an individual to transact insurance business has not come up directly in Alabama it was indirectly involved in *Noble v. Mitchell*, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238. Code 1886, § 1206, imposes certain liabilities on any person acting as agent of a foreign insurance company not licensed to do business. Section 1207 provides that the term "insurance company" as used in the preceding sections of the act includes every company, corporation, association, or partnership organized for the purpose of transacting the business of insurance. The court holds that section 1207 is in effect amendatory of the other sections, and may be regarded as substituting the words "corporation, association, or partnership" for the words "insurance company," so as to render the sections separable in their provisions.

Consequently the act, while valid as against foreign corporations, need not be declared unconstitutional on the ground that it contravened the provisions of the state and federal Constitution by limiting the privileges of citizens, in so far as it concerned partnerships or associations of individuals. This view of the statute was sustained by the Supreme Court of the United States in *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472. The question arose also in *Hoadley v. Purifoy*, 107 Ala. 276, 18 South. 220, 30 L. R. A. 351, where the court, citing the *Noble Case*, said that there was no doubt that an individual may engage in and carry on an insurance business in Alabama, and that there is nothing in such business that is unlawful or against public policy.

(g) Missouri.

In *Henning v. United States Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332, it was asserted as a general principle that the business of insurance is not a corporate franchise, but that any person may engage in it when not forbidden by law. In *State v. Citizens' Benefit Ass'n*, 6 Mo. App. 163, the court, though acknowledging that at common law any person might insure, regarded the right as now controlled by statute. The exercise of such right is the assertion of a grant from the state to exercise the privilege, if the contract is made by a corporation, and it must be shown that such privilege has been granted. The association in this case was not incorporated under the law relating to insurance corporations, and the court held that it could not therefore transact such business.⁹ It is to be noted that the only point in the case is that a corporation cannot exercise the right of making insurances unless it has been incorporated for that purpose, or, in other words, has received the grant of a franchise for that purpose. The headnote to the case, however, states that the business of making assurance on lives cannot be carried on without the grant of a franchise for that purpose. It does not limit the decision to corporations, and, apparently on the authority of the headnote, the case has sometimes been cited as denying the right of individuals to make insurance, whereas in fact the decision does not sustain such a contention. That

⁹ See, also, *Commonwealth v. Philadelphia Inquirer*, 3 Pa. Dist. R. 742, where it was held that a corporation

chartered to do a publishing business cannot write insurance against accidents.

this is so is shown by the decision in *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388, where it is said that the statute regulating insurance corporations contemplates the making of insurance by individuals, and holds that such statute applies to the business of individuals as well as to that of corporations. In this respect it differs from the decision in the *Hoadley Case*, but agrees with that case in holding that individuals may make insurance.

(h) Other states.

In *Fort v. State*, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86, the status of the association known as Guaranty & Accident Lloyd's, already referred to, was considered. The court held that the act of October 24, 1887, requiring an insurance company to procure a license as a necessary prerequisite to the transaction of business in the state did not apply to unincorporated associations. This would seem to justify the inference that in Georgia individuals may write insurance. In *Beck v. Pennsylvania R. Co.*, 63 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 211, the question was raised whether under the laws of New Jersey a contract of insurance can be made by any one but a corporation organized for that purpose. The court, however, does not decide the question, the final decision of the case resting on other grounds.

Reference may also be made to *Schenck v. State*, 60 N. J. Law, 381, 37 Atl. 724, and *Sun Ins. Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693.

The right of individuals and unincorporated associations to write insurance is recognized in Florida (*State ex rel. Hoadley v. Board of Insurance Com'rs*, 37 Fla. 564, 20 South. 772, 33 L. R. A. 288), and in Minnesota (*State v. Beardsley*, 88 Minn. 20, 92 N. W. 472).

In *Union Ins. Co. v. Smart*, 60 N. H. 458, and *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, the right of individuals to make insurance is recognized *sub silentio*.

(i) Pleading.

In *Feeny v. People's Fire Ins. Co.*, 25 N. Y. Super. Ct. 599, the complaint was objected to on the ground that it did not allege that defendant company had express authority by charter to make contracts of insurance. The court says, however, that a corporation is presumed to be capable of making any contract a natural person can make. Defendants must bring themselves within the exception

of Rev. St. pt. 1, c. 18, tit. 3, § 3, providing that no corporation shall possess any power except such as shall be necessary to the exercise of powers given in the charter or enumerated in sections 1 and 2, declaring that every corporation shall have certain powers, though not enumerated in the charter.

5. INSURANCE COMPANIES AND ASSOCIATIONS.

- (a) In general.
- (b) Stock companies.
- (c) Mutual companies.
- (d) Lloyd's associations.
- (e) Mutual benefit associations—Co-operative assessment companies.
- (f) Same—Fraternal insurance associations.
- (g) Regulation and control of insurance companies and associations.
- (h) Same—Mutual benefit associations.
- (i) Conduct of business.
- (j) Same—Mutual benefit associations.
- (k) Same—Management of mortuary fund.
- (l) Agents.
- (m) Same—Subordinate lodge as agent.

(a) In general.

The "Brief Book" is intended to include a discussion of only those principles of law which relate directly to the contract of insurance. The status of insurance companies and associations as such, the regulation of the business of such organizations by the state, and kindred subjects are not within the scope of the work. Nevertheless it is deemed advisable to state, in a general way, the elementary principles of the law relating to the organization and control of insurance companies and associations, in so far as those principles may appear to be incident to the contract. It is not pretended that this treatment of the subject is exhaustive, or even complete. It is introduced merely to furnish a foundation for, and in some sense an explanation of, the particular discussion of the peculiarities of the insurance contract.

(b) Stock companies.

The associations engaged in the business of writing insurance vary according to the plan on which they are organized. The majority of those engaged in writing insurance on property and a large proportion of those engaged in writing life and accident risks

are ordinary corporations or stock companies. A stock company is one which possesses a fixed amount of capital stock owned by shareholders, who constitute the corporation, and act through officers selected by them. These companies are in their organization and internal government controlled by the rules of law governing corporations generally,¹ so far as they are applicable, and also by special rules applicable only to insurance companies.² The shareholders in an insurance company have, in general, the same rights as the shareholders in any other corporation (*Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1, 14 South. 490, 42 Am. St. Rep. 17), and the officers are generally invested with the powers usually appertaining to corporate officers. On the insolvency of an insurance company not only will the principles of law relating to the insolvency and dissolution of corporations generally be operative so far as they are applicable, but also the special rules applicable only to corporations of this character.³

(c) Mutual companies.

Mutual companies ordinarily possess no capital stock, but are made up of all the policy holders who take the place of the stockholders in an ordinary corporation, and act through agencies selected by themselves. The capital of such organizations usually consists of either cash or assessable premium notes, or both, contributed by the members to the common fund out of which each is entitled to indemnity in case of loss.

Spruance v. Farmers' & Merchants' Ins. Co., 9 Colo. 73, 10 Pac. 285;
Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

As a general rule the fund is made up of assessable premium notes, but this is not essential. They may pay an all cash premium. (*Lehigh Valley Fire Ins. Co. v. Schimpf*, 13 Phila. [Pa.] 515.) This is, in fact, usually the method in the so-called mutual life insurance companies.⁴ While mutual companies can by corporate action taken at a meeting of the corporation change from the mutual to the joint-stock plan (*Schwarzwalder v. Tegen*, 58 N. J. Eq. 319, 43 Atl. 587), the character of a mutual company is not

¹ See *Century Digest*, vol. 12, "Corporations."

² See *Century Digest*, vol. 28, "Insurance," §§ 37-49.

³ See *Century Digest*, vol. 12, "Cor-

porations," §§ 2150-2289; vol. 28, "Insurance," §§ 50-63.

⁴ As to the special rules applicable to mutual insurance companies, see *Century Digest*, vol. 28, "Insurance," §§ 64-98.

varied by the fact that a guaranty fund is established by mutual pledges to a certain amount, divided into shares, of which each member may possess a proportionate number. This does not make the company a stock company.

Corey v. Sherman (Iowa) 60 N. W. 232; *Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149.

While, in a stock company, a stockholder is not necessarily insured, and one insured by the company sustains no relation thereto except that of contract, it is a distinguishing feature of a mutual company that one insuring therein becomes a member of the association.

Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 68; *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402.⁵ And this is true even in a mutual life company. *Clark v. Mutual Reserve Fund Life Ass'n*, 14 D. C. App. 154, 43 L. R. A. 390.

The members and stockholders of a mutual insurance company are therefore identically the same. That is to say, a stockholder of a mutual insurance company is simply one who has paid into the capital of the company by way of premiums, and who is responsible for its losses to that extent, and who is entitled, when such premiums shall have accumulated to a larger sum than is required to pay the losses, to pro rata division thereof as profits (*Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371); and it would seem that the fundamental principle of a mutual insurance company is that the company in no case can insure property not owned by one of its own members (*Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490). It is clear, therefore, that the members of mutual companies sustain a double relation, in that they are insurers and the parties insured; for it is the whole membership of a mutual company which contracts to indemnify each of the members with respect to the loss insured against (*Lehigh Valley Fire Ins. Co. v. Schimpf*, 13 Phila. [Pa.] 515). It is equally clear that until the insurance is actually granted one who is merely an applicant for such insurance is in no sense a member of the company.

Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407, 45 N. W. 356; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Ellenberger v. Protective*

⁵ See, also, *Century Digest*, vol. 28, "Insurance," § 67.

Mut. Fire Ins. Co., 89 Pa. 464; Fidelity Mut. Fire Ins. Co. v. Lowe (Neb.) 98 N. W. 749; Bluegrass Ins. Co. v. Cobb, 72 S. W. 1099, 24 Ky. Law Rep. 2182.

Mixed companies sometimes exist in which a small amount of capital stock is furnished by certain shareholders but all the policy holders become members of the corporation, as in the case of an ordinary mutual company. Many of the mutual life companies are organized on this plan. The members of such companies do not, however, bear the same relation to the company as in the case of ordinary mutual companies. The insurance is still between the corporation and the insured.

Mutual Benefit Life Ins. Co. v. Hillyard, 87 N. J. Law, 444, 18 Am. Rep. 741; Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.

(d) Lloyd's associations.

The business of insurance is sometimes carried on by associations known as Lloyd's associations, which are modeled more or less closely after the English Lloyd's. They are unincorporated voluntary associations of a number of individual underwriters, who usually contribute to a common guaranty fund. The business is usually carried on by certain persons who have been appointed attorneys in fact of the individual members. These attorneys in fact, with or without the supervision of an executive committee or advisory board, approve risks, issue policies, and settle losses. (State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.) Each individual underwriter is liable, on any given policy, to the amount set opposite his name in the signature to the contract, but he is not liable for the whole or any part of the liability of the other underwriters (Barnes v. People, 168 Ill. 425, 48 N. E. 91) The liability assumed by each underwriter is as separate and as much an individual liability as if he had issued a separate policy for the amount subscribed by him (Imperial Shale-Brick Co. v. Jewett, 60 N. Y. Supp. 35, 42 App. Div. 588). To the extent that he is a subscriber, however, the underwriter is absolutely liable, and he cannot restrict his liability by the amount subscribed by him to the guaranty fund. Such a restriction is regarded as in effect an attempt by an unincorporated association to act as a corporation, and therefore prohibited by statute.

State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298; Greene v. People (Ill.) 21 N. E. 605.

(e) Mutual benefit associations—Co-operative assessment companies.

There are two other classes of associations engaged in writing life and accident insurance, which in plan of organization and methods of business differ in essential particulars from ordinary insurance companies. These are the co-operative assessment companies and the fraternal insurance associations, generally classed together as mutual benefit associations. Strictly speaking, it is only the fraternal insurance associations that should be designated as mutual benefit associations; but, in the view taken by the courts generally, co-operative assessment companies, since they are not organized for profit, are also to be regarded as falling within the designation. (*Hesinger v. Home Benefit Ass'n*, 41 Minn. 516, 43 N. W. 481.)

Co-operative assessment companies, though usually incorporated, have no capital stock (*State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 499), and, theoretically at least, are not organized for profit (*Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810), though the distribution of profits is sometimes disguised by designating them as salaries, fees, and expenses (*Sherman v. Commonwealth*, 82 Ky. 102). The theory of these associations is that they are conducted for the sole benefit of the members or policy holders (*State v. Matthews*, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418).

The relief societies for railroad employes, though not incorporated, may be regarded as mutual benefit associations. *Donald v. Chicago, B. & Q. Ry. Co.*, 61 N. W. 971, 93 Iowa, 284, 33 L. R. A. 492; *Maine v. Chicago, B. & Q. R. Co.*, 70 N. W. 630, 109 Iowa, 260.

These associations may fairly be regarded as varying forms of ordinary mutual companies, heretofore described (*Block v. Valley Mut. Ins. Ass'n*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166). The members are not partners (*Lafond v. Deems*, 81 N. Y. 507), but, as in the case of mutual companies, sustain the double relation of insurer and insured.

Generally speaking, the question whether an insurance company is or is not an assessment company is to be determined by the character of the contract (*McDonald v. Bankers' Life Ass'n*, 154 Mo. 618, 55 S. W. 999). The predominant and distinguishing feature of all mutual benefit associations is that the payment of losses by death or injury is not met by a fixed premium payable in advance, as in the case of ordinary insurance companies, nor by deposit notes, as in the case of mutual companies, but by post mortem

assessments, intended to liquidate specific losses, and levied only on surviving members.

State v. Matthews, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418; **Mutual Benefit Life Ins. Co. v. Marye**, 85 Va. 643, 8 S. E. 481; **State v. National Accident Soc.**, 103 Wis. 208, 79 N. W. 220.

But it is not essential that the whole amount payable by the insured should be in the form of post mortem assessments. A company which has an established rate of premium, which it is authorized to receive in advance, is nevertheless an assessment company if its contracts expressly provide that it may levy assessments on the death of members in addition to the amount of the fixed premium.

State ex rel. Covenant Mut. Ben. Ass'n v. Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271; **Haydel v. Mutual Reserve Fund Life Ass'n** (C. C.) 98 Fed. 200; **Corley v. Travelers' Protective Ass'n**, 105 Fed. 854, 46 C. C. A. 278.

It is, however, the rule in Ohio that to constitute an assessment company, within the statute of that state, the chief source of revenue must be post mortem assessments; and if the revenues of the company are derived primarily from fixed premiums payable in advance the mere reservation of a right to levy assessments will not convert the company into an assessment company (**State ex rel. National Life Ass'n v. Matthews**, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418).

Another limitation under the Ohio statute is that the beneficiary must be a member of the family or the heir of the insured. **State ex rel. Attorney General v. Central Ohio Mut. Relief Ass'n**, 29 Ohio St. 899; **State v. Moore**, 39 Ohio St. 486.

It does not affect the character of the company as a co-operative or assessment company that it has established and maintains an emergency or guaranty fund, to insure the more prompt payment of its losses.

State v. Bankers' & Merchants' Mut. Ben. Ass'n, 23 Kan. 499; **State ex rel. Covenant Mut. Ben. Ass'n v. Root**, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271.

The right of a co-operative or assessment company to change its plan of organization to the legal reserve, flat premium plan of what is known as old-line insurance (stock companies) is recognized in **Wright v. Minnesota Mut. Life Ins. Co.**, 24 Sup. Ct. 549, 193 U. S.

657, 48 L. Ed. 832, where the court said that the legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat premium plan of old-line insurance does not work a violation of the contract with those certificate holders who fail to change to the new plan, although their assessments may have increased because of the less number subject to the assessment.

(f) Same—Fraternal insurance associations.

The second class of mutual benefit associations comprises the fraternal benefit societies. Like the co-operative assessment companies, these possess no capital stock, and are not organized for profit, but for the sole benefit of the members and their beneficiaries (*Baltzell v. Modern Woodmen*, 98 Mo. App. 153, 71 S. W. 1071).

A corporation which has a capital stock in which many of the members do not share, and which conducts its business for the pecuniary benefit of the stockholders, cannot be regarded as a fraternal benefit association, though its charter provides that it is organized not only for insurance, but for social or fraternal beneficial purposes (*International Fraternal Alliance v. State*, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187).

These societies also are in the nature of mutual insurance companies (*Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252, 58 Pac. 595), in which the member on entering the order becomes insured and at the same time an insurer of the lives of his fellow members (*Splawn v. Chew*, 60 Tex. 532). The payment of death losses is secured by post mortem assessments (*Modern Woodmen v. Colman* [Neb.] 94 N. W. 814); and beneficiaries must usually be members of the family, heirs, or dependents of the member (*Golden Rule v. People*, 118 Ill. 492, 9 N. E. 342).

Though in the characteristics just mentioned the fraternal benefit society resembles a co-operative assessment company, the former possesses a distinguishing feature, which is absolutely essential if the association is to be regarded, in the eye of the law, as a fraternal benefit society. This class of associations has been well defined in *Supreme Commandery Order of the Golden Cross v. Hughes*, 70 S. W. 405, 24 Ky. Law Rep. 984, where it is said that a fraternal insurance society is one in which the business is carried on by secret fraternal lodge or council, under the supervision of a grand or supreme body, and which secures its members through the lodge system exclusively, paying no commissions and employing

no agents except in the organization and supervision of the work of the local lodges. It is the existence of the lodge system and the secret ritual that are the important elements distinguishing the fraternal insurance societies from the co-operative assessment companies.

Reference may also be made to *Knights Templar & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561, affirming (C. C.) 46 Fed. 439; *Corley v. Travelers' Protective Ass'n*, 105 Fed. 854, 46 C. C. A. 278; *Fawcett v. Supreme Sitting Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815; *Supreme Lodge A. O. U. W. v. Zuhlke*, 129 Ill. 298, 21 N. E. 789; *State v. National Ass'n*, 85 Kan. 51, 9 Pac. 956; *International Fraternal Alliance v. State*, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; *Baltzell v. Modern Workmen*, 98 Mo. App. 153, 71 S. W. 1071; *Ancient Order of United Workmen v. Shoher*, 16 S. D. 513, 94 N. W. 405.

It must be observed that in fraternal insurance societies the member is insured by virtue of his membership in the order. Hence a distinction must be drawn between fraternal insurance societies as described and insurance associations which, though limiting their membership to the members of some secret order, are not themselves secret societies, and moreover do not admit to membership all members of the designated order. Associations of this character are co-operative assessment companies.

Reference may be made to *Toomey v. Supreme Lodge K. of P. of the World*, 74 Mo. App. 507; *Masonic Aid Ass'n v. Taylor*, 2 S. D. 331, 50 N. W. 93. See, also, *Anthony v. Carl*, 58 N. Y. Supp. 1084, 28 Misc. Rep. 200.

But an insurance company, though organized to insure only Odd Fellows, which transacts its business through local branches at secret meetings held according to a prescribed ritual, may be regarded as a fraternal insurance society. *Brotherhood Acc. Co. v. Linehan*, 71 N. H. 7, 51 Atl. 266.

(g) Regulation and control of insurance companies and associations.

The important position occupied by insurance companies as factors in the social and business life of the country has impelled the legislatures of the different states to pass laws especially intended to regulate and control the business of insurance in all its forms. The privilege of doing business as an insurer is regarded as a franchise, and as such subject to legislative regulation (*People v. Loew*, 19 Misc. Rep. 248, 44 N. Y. Supp. 42). Laws regulating insurance companies are legitimate exercise of police power inherent in the

sovereignty of the state (*Fire Department v. Helfenstein*, 16 Wis. 136), and have been declared constitutional in many well-considered opinions.

Reference may be made to *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; *Eagle Ins. Co. v. State*, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778, affirming 50 Ohio St. 252, 33 N. E. 1056; *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 440; *Dugger v. Mechanics' & Traders' Ins. Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796. That such statutes are not objectionable as an attempt to regulate or interfere with interstate commerce is asserted in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; and *Hooper v. California*, 155 U. S. 658, 15 Sup. Ct. 207, 39 L. Ed. 297. So, too, the Legislature may enact a law relative to one class of insurance, so long as it is general in its terms as to that particular business, without rendering it objectionable as a local act. *Idaho Mut. Co-op. Ins. Co. v. Myer* (Idaho) 77 Pac. 628.

Even a company organized under a special charter is subject to such reasonable regulations as the legislature may prescribe so long as they are not repugnant to the privileges and franchises granted in the charter (*State v. Eagle Ins. Co.*, 50 Ohio St. 252, 33 N. E. 1056, affirmed in 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778), and the regulating statutes are applicable to mutual as well as stock companies.

People v. Howard, 50 Mich. 239, 15 N. W. 101; *State v. Northwestern Mut. Live Stock Ass'n*, 16 Neb. 549, 20 N. W. 852.* The contrary rule has been followed in Massachusetts, so far as restrictions dependent on the amount of capital stock are concerned. *Williams v. Cheney*, 3 Gray, 215; *Atlantic Mutual Fire Ins. Co. v. Concklin*, 6 Gray, 73. But regulations as to the publication of statements and relating to agents do apply. *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray, 376; *General Mut. Ins. Co. v. Phillips*, 13 Gray, 90.

A foreign insurance company doing business in the state is subject to the laws in relation to insurance companies, equally with domestic companies (*Rothschild v. New York Life Ins. Co.*, 97 Ill. App. 547); and on principles of comity it has been held that in the absence of express prohibitory statute a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, though such a corporation could not be organized under the laws of Illinois (*People v.*

* Regulation and control of insurance companies, see *Century Digest*, vol. 28, "Insurance," §§ 3-11.

Fidelity & Casualty Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295). There may be, however, special statutes governing foreign insurance companies doing business in the state.

The power of the Legislature to prescribe conditions under which foreign companies may transact business in the state is recognized in *List v. Commonwealth*, 118 Pa. 322, 12 Atl. 277, following *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; *Indiana Millers' Mut. Fire Ins. Co. v. People*, 65 Ill. App. 355; *Insurance Company of North America v. Brim*, 111 Ind. 281, 12 N. E. 315; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705. See, also, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638, where it was held that a corporation is not a citizen, within the constitutional provision relating to the privileges and immunities of citizens of the different states.⁷ In this connection reference may also be made to *Ætna Ins. Co. v. Brigham*, 120 Ga. 925, 48 S. E. 348.

The validity of such laws being established, it follows as a matter of course that a company incorporated in one state can do business in another only after complying with the laws of such other state.

Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; *Thorne v. Travelers' Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89. But this relates only to the business of insurance companies as such. *Smith v. Local Branch No. 714 Iron Hall*, 77 Ill. App. 469.

It is held in some states that the laws regulating foreign insurance organizations apply only to incorporated companies, and not to individual insurers.

Noble v. Mitchell, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238; *Hoadley v. Purifoy*, 107 Ala. 276, 18 South. 220, 30 L. R. A. 351; *Barnes v. People*, 168 Ill. 425, 48 N. E. 91; *State v. Campbell*, 17 Ind. App. 442, 46 N. E. 944.

It has therefore been held that the laws do not apply in the case of Lloyd's associations. *Fort v. State*, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; *State ex rel. Hoadley v. Board of Insurance Commissioners*, 37 Fla. 564, 20 South. 772, 33 L. R. A. 288; *Commonwealth v. Reinoehl*, 163 Pa. 287, 29 Atl. 896, 25 L. R. A. 247; *Barnes v. People*, 168 Ill. 425, 48 N. E. 91. But the rule will be otherwise if the association usurps corporate powers by restricting the liability of the members. *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298; *Greene v. People (Ill.)* 21 N. E. 605.

⁷ Regulation and control of foreign insurance companies, see *Century Digest*, vol. 28, "Insurance," §§ 12-27.

The rule is not uniform, however, and in other jurisdictions it has been held that the statutes apply to all insurers, incorporated or not incorporated, associations, co-partnerships, and individuals.

Seamans v. Christian Brothers Mill Co., 66 Minn. 205, 68 N. W. 1065;
State v. Beardsley, 88 Minn. 20, 92 N. W. 472; *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388.

(h) Same—Mutual benefit associations.

Whether co-operative assessment companies should be regarded as insurance companies, within the meaning of the laws regulating insurance companies, and therefore subject to the provisions and restrictions of such laws, is a question on which the courts are apparently not in agreement.

In the following cases co-operative assessment companies are regarded as within the purview of the statutes: *Knights Templar & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561, affirming (C. C.) 46 Fed. 439; *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89, 40 U. S. App. 95; *Corley v. Travelers' Protective Ass'n*, 105 Fed. 854, 46 C. C. A. 278; *Rockhold v. Canton Masonic Mut. Ben. Soc.*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *State ex rel. Bradford v. National Ass'n of Farmers' & Merchants' Mutual Aid Ass'n*, 35 Kan. 51, 9 Pac. 956; *Sherman v. Commonwealth*, 82 Ky. 102; *State ex rel. Attorney General v. Merchants' Exchange Mutual Benevolent Society*, 72 Mo. 146; *State v. Farmers' & Mechanics' Mut. Benevolent Ass'n*, 18 Neb. 276, 25 N. W. 81; *State v. Taylor*, 56 N. J. Law, 49, 27 Atl. 797; *Farmer v. State*, 69 Tex. 561, 7 S. W. 220.

In nearly all cases in which it is held that co-operative assessment companies are not within the purview of the general insurance laws, there are special statutory provisions either regulating such companies or excepting them from the operation of the general insurance laws.

Reference may be made to *State v. Iowa Mut. Aid Ass'n*, 59 Iowa, 125, 12 N. W. 782; *Donald v. Railway Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Elsev v. Odd Fellows' Mutual Relief Ass'n*, 142 Mass. 224, 7 N. E. 844; *Brown v. Greenfield Life Ass'n*, 172 Mass. 498, 53 N. E. 129; *Reusenhouse v. Seeley*, 72 Mich. 603, 40 N. W. 765; *Northwestern Masonic Aid Ass'n v. Waddill*, 138 Mo. 628, 40 S. W. 648; *Brotherhood Accident Co. v. Linehan*, 71 N. H. 7, 51 Atl. 266; *Ronald v. Mutual Reserve Fund Life Ass'n*, 132 N. Y. 378, 30 N. E. 739; *Perry v. Mutual Reserve Fund Life Ass'n*, 58 N. Y. Supp. 844, 41 App. Div. 626; *State v. Mut. Protective Ass'n*, 26 Ohio St. 19; *City of Easton v. Temperance Mut. Ben. Ass'n*, 5 Lanc. Law Rev. (Pa.) 349; *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. 412, 18 Atl. 1112; *Northwestern Masonic Aid Ass'n v. Jones*,

154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *State v. Whitmore*, 75 Wis. 332, 43 N. W. 1133; *State v. National Acc. Soc. of New York*, 103 Wis. 208, 79 N. W. 220.

But even when exempt from the operation of the insurance laws, such companies are still amenable to the general laws (*Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191), and are therefore subject to the statutory provisions relative to the venue in actions against insurance companies.

Railway Passenger & Freight Conductors' Mutual Aid & Benefit Ass'n v. Robinson, 147 Ill. 138, 35 N. E. 168; *Prader v. National Masonic Acc. Ass'n*, 95 Iowa, 149, 63 N. W. 601; *Miner v. Michigan Mut. Ben. Ass'n*, 63 Mich. 338, 29 N. W. 852.

As to fraternal insurance societies, the general rule is that these are not amenable to the general insurance laws.

Reference may be made to *Marshall v. Grand Lodge A. O. U. W. of Cal.*, 133 Cal. 686, 66 Pac. 25; *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *State ex rel. Royal Arcanum v. Benton*, 35 Neb. 463, 53 N. W. 567; *Durlan v. Central Verein Hermann's Soehne*, 7 Daly (N. Y.) 168; *Sup. Council Order of Chosen Friends v. Fairman*, 62 How. Prac. (N. Y.) 386, 10 Abb. N. C. (N. Y.) 162. But see *State ex rel. Graham v. Nichols*, 78 Iowa, 747, 41 N. W. 4; *Brown v. Modern Woodmen of America*, 88 N. W. 965, 115 Iowa, 450.

It has been held in Missouri (*Kern v. Supreme Council American Legion of Honor*, 67 S. W. 252, 167 Mo. 471) that in the absence of a special statute to that effect foreign fraternal associations will not be exempt; but under the provisions of a late statute (Rev. St. 1899, §§ 1408-1410) foreign as well as domestic fraternal societies are exempt from the operation of the general insurance laws.

Shotliff v. Modern Woodmen, 100 Mo. App. 138, 73 S. W. 326; *Hudnall v. Modern Woodmen*, 103 Mo. App. 356, 77 S. W. 84.

Where there are special statutory provisions regulating co-operative assessment companies and fraternal insurance societies they will, of course, be controlled thereby.

Lehman v. Clark, 71 Ill. App. 366; *Bastian v. Modern Woodmen of America*, 166 Ill. 595, 46 N. E. 1090; *Brotherhood Acc. Co. v. Linehan*, 51 Atl. 266, 71 N. H. 7; *Wisconsin Independent Order of Foresters v. Insurance Com'r*, 98 Wis. 94, 73 N. W. 326.

And the statutes will apply as well to foreign as to domestic associations.

Toomey v. Supreme Lodge Knights of Pythias of the World, 74 Mo. App. 507; *McDermott v. Modern Woodmen of America*, 71 S. W. 833, 97

Mo. App. 636; *Hudnall v. Modern Woodmen of America*, 77 S. W. 84, 103 Mo. App. 356; *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342.

A recent statute of the state of Washington (Laws 1901, p. 362, c. 174, § 12) requires subsequently formed fraternal insurance associations to adopt mortuary assessment rates, not lower than those indicated as necessary in the Fraternal Congress Mortality Table; and it has been held that though it does not apply to previously formed foreign associations, and does apply to subsequently formed domestic associations, it does not violate Const. art. 12, § 7, providing that no foreign corporation shall be allowed to transact business on more favorable conditions than similar domestic corporations (*State v. Fraternal Knights and Ladies*, 77 Pac. 500, 35 Wash. 338).

A fraternal insurance society is not necessarily subject to the laws regulating co-operative assessment companies.

Fawcett v. Supreme Sitting Order of Iron Hall, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815; *Commonwealth v. Keystone Beneficial Ass'n*, 171 Pa. 465, 32 Atl. 1027; *Ancient Order of United Workmen v. Shober*, 94 N. W. 405, 16 S. D. 513.

(1) Conduct of business.

While an insurance company has power to engage in all transactions which are necessarily incident to and implied from its right to transact an insurance business, it cannot engage in such transactions as a principal business.

People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *City of Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *People ex rel. Woodward v. Rosendale*, 142 N. Y. 126, 36 N. E. 806, reversing 25 N. Y. Supp. 769, 5 Misc. Rep. 378.

Thus while an insurance company may, under authority to invest its capital in bonds and mortgages, loan money (*Daly v. National Life Ins. Co.*, 64 Ind. 1), it is not authorized to conduct the business of a building and loan association (*Huter v. Union Trust Co.* [Ind. Sup.] 51 N. E. 1071). But the investment of the profits of insurance companies in loans secured by mortgage cannot be considered as doing a banking business (*Life Association of America v. Levy*, 33 La. Ann. 1203).^{*} So a mutual insurance company has power,

^{*} Powers of insurance companies in general, see *Century Digest*, vol. 28, "Insurance," §§ 41-44, 71.

incidental to the general power to insure, to establish a guaranty fund for the protection of its policy holders, and this though no express authority was conferred in its charter.

Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 51; *Hope Mut. Life Ins. Co. v. Perkins*, 38 N. Y. 404; *Dwinnell v. Minneapolis Fire & Marine Ins. Co.*, 90 Minn. 383, 97 N. W. 110.

In the absence of a statute it is not illegal for insurance companies to organize a board of underwriters for the purpose of fixing rates (*State ex rel. Crow v. Ætna Ins. Co.*, 150 Mo. 113, 51 S. W. 413). A statute forbidding foreign insurance companies from entering into combinations for the maintenance of rates was declared constitutional in *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; but a different view was taken by the court in *Niagara Fire Ins. Co. v. Cornell* (C. C.) 110 Fed. 816, where a Nebraska statute was involved.

An interesting case involving the methods that may be pursued in the conduct of the business of an insurance company is *London Guarantee & Acc. Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185. An employers' liability policy issued by the company provided for cancellation on five days' notice, and empowered the company to defend all actions brought by employes for injuries and also the right to conduct all negotiations for settlement. The company, being unable to settle a loss with the person injured, threatened to have him discharged from his employment. After a final unsuccessful effort to settle the claim the representative of the company stated to the insured that he must discharge the employé or the policy would be canceled on that date. Thereupon the insured discharged the employé, though he had expected to give him work the year round. It was held that this act on the part of the company was not done in the line of competition in business, but as a malicious interference with the rights of the employé, not justified by the contract, for which the company was liable in damages to the employé.

(j) Same—Mutual benefit associations.

Mutual benefit societies are creations of the statute, and are incapable of exercising any power not therein expressed or clearly implied (*Ferbrache v. Grand Lodge A. O. U. W.*, 81 Mo. App. 268). It is a generally recognized rule that fraternal insurance associations cannot engage in a general insurance business (*Commonwealth v. The Order of Vesta*, 2 Pa. Dist. R. 254).

The business of fraternal benefit societies is usually conducted through subordinate lodges or councils, acting under a grand lodge or council in each state, with possibly a national or supreme lodge or

council made up of representatives from the grand lodge, and constituting the governing body (*Saunders v. Robinson*, 144 Mass. 306, 10 N. E. 815). The subordinate lodges usually have very limited power (*Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165). The legislative power is not vested in the membership as a whole, but in the grand or supreme body, the acts of which are the supreme law of the order (*Park v. Modern Woodmen*, 181 Ill. 214, 54 N. E. 932). The supreme lodge, though the superior body, must act in accord with the laws it has enacted, and is bound to discharge its constitutional obligations to the subordinate councils and their members (*Hall v. Supreme Lodge Knights of Honor [D. C.]* 24 Fed. 450). For example, the supreme lodge cannot delegate to a subordinate managing committee, known as the board of control or executive committee, the legislative power vested by the charter in the supreme lodge alone.

Supreme Lodge Knights of Pythias v. Kutscher, 72 Ill. App. 462; *Supreme Lodge Knights of Pythias v. Stein*, 75 Miss. 107, 21 South. 559, 37 L. R. A. 775, 65 Am. St. Rep. 589; *Supreme Lodge v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

The supreme body is, however, the final arbiter as to the construction of its own acts. Consequently the executive officer of the supreme body is, subject to the approval of the body itself, the one to construe and interpret the laws of the order. (*State ex rel. Schrempf v. Grand Lodge A. O. U. W.*, 70 Mo. App. 456.)

The individual liability of members and officers of these associations has been considered in several cases. *Lawler v. Murphy*, 8 L. R. A. 113, 58 Conn. 294, 20 Atl. 457, was an action on a certificate executed by three defendants signing themselves, respectively, as the secretary, treasurer, and president of the insurance fund, the certificate being headed "Connecticut State Insurance Fund of the Ancient Order of Hibernians." It was held, on demurrer to the complaint, that it did not appear as a matter of law that the defendants were not personally liable, as the company might be only an unincorporated association, acting under an associate name. The court said that if the organization consisted simply of individuals united under a distinguishing associate name for business purposes, they did not thereby acquire either corporate power or immunity from individual liability. Consequently it could not appear as a matter of law from the contract declared on that the defendants made no personal contract or agreement on which they were personally liable. It was, however, held in Pennsylvania that though under Act April 28, 1876, unincorporated mutual benefit

societies are partnerships, the members are exonerated from individual liability, and an action cannot be brought against officers of the association individually (*Kurz v. Eggert*, 9 Wkly. Notes Cas. 126).

(k) Same—Management of mortuary fund.

The fund raised by assessment for the payment of death claims by mutual benefit associations is known as the mortuary fund, death benefit fund, or by some other equivalent term. By the provisions of the laws of fraternal insurance societies transacting business through local subordinate lodges, this mortuary fund, though collected by the subordinate lodge, is under the exclusive control of the supreme body, though it has been held that, where a foreign mutual benefit association has failed to comply with the statutes authorizing it to do business in the state, funds raised by a local branch thereof belong to the members of the branch, and not to the supreme body. (*Supreme Sitting Order of Iron Hall v. Grigsby*, 158 Ill. 57, 52 N. E. 956, affirming 78 Ill. App. 300.) There may be also a reserve or emergency fund set aside for the purpose of meeting extraordinary demands or death losses (*Home Life Assur. Co. v. Attorney General*, 112 Mich. 497, 70 N. W. 1031). The mortuary fund thus maintained for the payment of death claims is in the nature of a trust fund.

Wilber v. Torgerson, 24 Ill. App. 119; *Knights Templars' & Masons' Life Indemnity Co. v. Vail*, 208 Ill. 404, 68 N. E. 1108, affirming 105 Ill. App. 331; *Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964; *Insurance Com'r v. Provident Aid Soc.*, 36 Atl. 627, 89 Me. 413; *Blair v. Supreme Council A. L. H.*, 57 Atl. 564, 208 Pa. 262.

Being in the nature of a trust fund for a special purpose, it cannot, as a rule, be diverted and appropriated to any other purpose.

Cathcart v. Equitable Mut. Life Ass'n, 111 Iowa, 471, 82 N. W. 964; *Parish v. New York Produce Exchange*, 61 N. E. 977, 169 N. Y. 34, 56 L. R. A. 149; *Milbank v. American Surety Co.*, 43 N. Y. Supp. 474, 14 App. Div. 250; *Ridley v. Paillard*, 57 N. Y. Supp. 693, 26 Misc. Rep. 513; *Sherman v. Harbin* (Iowa) 100 N. W. 629.

But, of course, the governing body may, if the rules so provide, set aside a certain percentage of the assessments for expense purposes (*Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321); and a mutual benefit association may be authorized to loan its mortuary fund on real estate (*Allen v. Thompson*, 56 S. W. 823, 22 Ky. Law Rep. 164).

B.B.INS.—5

(1) Agents.

Contracts of insurance are usually negotiated by the insurer through the intervention of agents, and this is so of necessity when, as is usually the case, the insurer is an incorporated company (*Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282, 16 South. 798). By reason of this necessity the whole law of agency is brought into the law of insurance as a complicating factor.⁹ The conduct of an insurance agency is regarded as so far a matter of public concern as to make it the proper subject of legislative control (*Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, affirming 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483).¹⁰ The questions of agency which arise in connection with insurance contracts are of a special difficulty by reason of the peculiar character of the insurance contract, and by reason of the efforts made by insurance companies to secure, by means of stipulations in their policies, all the benefits to be derived from carrying on the business by representatives without any of the burdens usually accompanying such method of doing business. These questions are discussed in connection with the special features of the contract to which they relate. It is necessary to refer here only to the general relation of the agent to the insurer and the insured.

Controversy has frequently arisen as to who is represented by the agent taking part in the negotiation of an insurance contract. In some instances it is sought to avoid such a controversy by an agreement set forth in the policy or application. It was formerly held in New York (*Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451) that where the insured had contracted that the person who had procured the insurance should be deemed his agent he must abide by such agreement. This doctrine was also expressed in *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76. But subsequently the Court of Appeals (*Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330) limited this doctrine to acts performed in connection with the original application. In still another case (*Patridge v. Commercial Fire Ins. Co.*, 17 Hun, 95) the Supreme Court regarded the agency clause as a distinct fraud on the insured, and said that whether one is an agent of another is a question of mixed law and fact; that if the contract was in fact made through the agent of the insured a declaration to the contrary would not change such fact.

⁹ See Century Digest, vol. 40, "Principal and Agent." For special rules relating to insurance agents, see vol. 28, "Insurance," §§ 99-135.

¹⁰ See Century Digest, vol. 28, "Insurance," §§ 26-27.

The rule may now be regarded as well established that the question is clearly one of fact, and not of stipulation, and is to be determined from the facts of each case, and not from mere words used.

That the declaration in the policy or by-laws that in all cases the person forwarding applications shall be deemed the agent of the insured, and not of the insurer, is inoperative as against the actual fact that such person was the regularly appointed agent of the insurer, is upheld in the following cases: *Nassauer v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. 509; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 81 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *North British & Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458; *Rosencrans v. Insurance Co.*, 66 Mo. App. 352; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282, 16 South. 798; *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

The contrary rule prevails in Massachusetts and Rhode Island: *Lohnes v. Insurance Co.*, 121 Mass. 439; *Batchelder v. Insurance Co.*, 135 Mass. 449; *Reed v. Insurance Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496. But the general rule is adopted when the agent is a general agent.

The rule applies though the stipulation is contained in the application instead of in the policy.

Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Royal Neighbors v. Boman*, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

In many states statutes have been enacted declaring that any person who solicits insurance shall in all cases be deemed the agent of the insurer, anything in the application or policy to the contrary notwithstanding.¹¹

Though a duly appointed agent of an insurance company must, as regards that company, be regarded as the agent of the insurer, yet, as to other companies in which he procures insurance for a property

¹¹ Ala. Code 1886, § 1205; Ga. Laws 1887, p. 121, § 9; Conn. Gen. St. 1888, §§ 2898, 2923; Iowa Code 1888, § 1732; Me. Rev. St. 1883, p. 445, § 19; Mass. St. 1887, c. 214, § 87; Minn. Laws 1895, c. 175, §§ 25, 88, 91; Miss. Code 1892, § 2327; Mo. Rev. St. 1889,

§ 5915; Neb. Comp. St. 1891, § 427; N. H. Laws 1889, c. 94, § 2; N. D. Laws 1891, p. 203, § 28; Ohio Rev. St. 1890, § 3644; Tex. Rev. St. 1895, art. 3093; Vt. Rev. Laws 1880, § 3620; Wis. Rev. St. 1898, § 1977.

owner, he may be considered the agent of the insured (*Smith & Wallace Co. v. Prussian National Insurance Co.*, 68 N. J. Law, 674, 54 Atl. 458). So he may by special agreement, as by an agreement to keep an owner's property insured, become the agent of the insured (*Johnson v. North British & Mercantile Ins. Co.*, 66 Ohio St. 6, 63 N. E. 610).

An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service. He is therefore usually the agent of the insured, and will be so considered, though a statute may declare that whoever in any manner aids or assists in making a contract of insurance on behalf of any insurance corporation or property owner shall be held to be an agent of the corporation for all intents and purposes.

United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282, 16 South. 798; *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309.

Though under special circumstances a broker may be the agent of the insurer (*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131), the mere fact that he receives a commission from the insurer for placing the insurance with him does not change his character as agent of the insured.

Seamans v. Knapp-Stout & Co. Company, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373.

A stipulation in the policy that any broker employed in effecting the insurance should be considered as the agent of the insured is no more than a declaration of the common rule (*Fire Association v. Hogwood*, 82 Va. 342, 4 S. E. 617). But it has been held in Indiana that a recital in the policy that a broker obtaining the insurance is the agent of the insured is not conclusive on that subject (*Indiana Insurance Co. v. Hartwell*, 100 Ind. 566).

(m) Same—Subordinate lodge as agent.

An interesting phase of the question of agency arises in cases involving the relation of the subordinate lodge of a fraternal benefit society to the supreme body. In view of the general principle that the functions and powers of a subordinate lodge can be only such as are granted by the constitution and by-laws of the order, it is obvious that

in a general sense the question whether a subordinate lodge or an officer thereof is such an agent of the supreme lodge as to bind the supreme body by his acts depends upon the provisions of the constitution and by-laws. (*O'Connell v. Supreme Conclave Knights of Damon*, 102 Ga. 143, 28 S. E. 282, 66 Am. St. Rep. 159.) But though a by-law of the association declares that the subordinate lodge and its officers shall be the agents of the members, and not the agents of the supreme body, this declaration is not determinative (*Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252, 58 Pac. 595). The effect of such a declaration was considered in *Schlosser v. Grand Lodge Brotherhood of Railroad Trainmen*, 94 Md. 362, 50 Atl. 1048, where the constitution of the association declared that in all matters pertaining to the insurance department the subordinate lodges and the officers thereof shall not act as the agents of the grand lodge, unless specially authorized so to do. The court said that the whole scheme of the organization is at variance with this declaration. The grand lodge is the central body. The contract of insurance is made with it, and not with the subordinate lodge, though it is made with the grand lodge through the agency, and exclusively through the agency, of the subordinate lodge. There is no relation between the grand lodge and the members of the order, except through the intervening agency of the subordinate lodge. Every act done by the latter in respect to the insurance is an act done for the grand lodge. The subordinate lodges are clothed with the duties, and intrusted with the power and authority, of agents, and no declaration that such agency does not exist can restrict or limit the liability of the principal. A leading case, containing a careful and full discussion of the question, is *Supreme Lodge Knights of Pythias v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762, Id., 89 Fed. 160, 32 C. C. A. 182, where the court expressed the opinion that **the status of an officer of a subordinate lodge as agent of the supreme body must be determined by his actual power and authority, and not by the name which the supreme body chooses to give him.** They cannot invest him with the duties of an agent and deny his agency. Consequently a declaration that officers of the subordinate body are the agents of members, contained in the general laws of the order, cannot control the actual facts; and if such an agency clause is inconsistent with other clauses of the policy conferring power and authority upon the agent, he will be treated as the agent of the company rather than of the insured.

Whiteside v. Supreme Conclave I. O. of H. (C. C.) 82 Fed. 275; *Modern Woodmen v. Tevis*, 111 Fed. 113, 49 C. C. A. 256 (but see opinion on

rehearing 117 Fed. 369, 54 C. C. A. 293); *Reed v. Ancient Order of the Red Cross*, 8 Idaho, 409, 69 Pac. 127; *Supreme Tent Knights of Maccabees v. Valck*, 79 Ill. App. 185; *Pioneer Reserve Ass'n v. Jones*, 111 Ill. App. 156; *McMahon v. Supreme Tent Knights of Maccabees*, 151 Mo. 522, 52 S. W. 384; *Supreme Lodge Knights of Honor v. Keener*, 6 Tex. Civ. App. 267, 25 S. W. 1084; *Knights of Pythias v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333.

The theory of these and other cases in which this question has been discussed seems to be that where the supreme body has imposed certain duties on an officer of the subordinate lodge, and has arbitrarily designated him as the proper and only official with whom the members shall deal in transactions connected with such duty, such officer is the agent of the supreme body, and the member cannot be held responsible for his default or negligence.

Supreme Lodge Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762, affirming 89 Fed. 160, 32 C. C. A. 182; *Hoffman v. Supreme Council American Legion of Honor (C. C.)* 35 Fed. 252; *Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252, 58 Pac. 595; *Reed v. Ancient Order of the Red Cross*, 8 Idaho, 409, 69 Pac. 127; *National American Ass'n v. Kirgin*, 28 Mo. App. 80; *McMahon v. Supreme Tent Knights of Maccabees*, 151 Mo. 522, 52 S. W. 384; *Boward v. Bankers' Union*, 94 Mo. App. 442, 68 S. W. 369.

It is, however, recognized that the agency of the subordinate lodge or its officers is in the nature of a limited or special, and not a general, agency.

Reed v. Ancient Order of the Red Cross, 8 Idaho, 409, 69 Pac. 127; *Harvey v. Grand Lodge A. O. U. W.*, 50 Mo. App. 472.

6. WHO MAY TAKE OUT INSURANCE.

- (a) Right in general.
- (b) Married women.
- (c) Infants—Fire insurance.
- (d) Same—Life insurance.
- (e) Corollary—Insurance on life of child.

(a) Right in general.

Generally the only question arising, where the right to take out insurance is in issue, is whether the person seeking to insure property or life has such an interest in the subject-matter as will support the

contract. This is discussed elsewhere.¹ The general rule that any person competent to contract may enter into an insurance contract, discussed in the preceding brief as applied to the insurer, is, of course, equally applicable in determining who may insure. Thus it has been held that a corporation may insure its property, in view of the general power of a corporation to make such contracts as are necessary for the transaction of the business for which it was created.²

Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229, and *St. Paul Trust Co. v. Wampach Mfg. Co.*, 50 Minn. 98, 52 N. W. 274.

As a municipal corporation is empowered to erect and maintain certain public buildings, it also has the power, incidental thereto, to contract for indemnity against loss by the burning of such buildings. This right may be exercised by insuring in a mutual, as well as in a stock, company. The scheme of mutual insurance does not fasten on the members any liability which a municipal corporation may not with reasonable safety assume. (*French v. City of Millville*, 66 N. J. Law, 392, 49 Atl. 465, affirmed without opinion in 67 N. J. Law, 349, 51 Atl. 1109.)

Ordinarily one cannot insure for another, unless authorized so to do. Therefore it has generally been held that the master of a vessel or the charterer cannot insure for the owner, nor can a part owner insure for his co-owner.

Seamans v. Loring, 21 Fed. Cas. 920; *Sawyer v. Freeman*, 35 Me. 542; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85. The co-owner may subsequently ratify the contract, and thus render it valid (*Blanchard v. Walte*, 28 Me. 51, 38 Am. Dec. 474). A custom may exist authorizing the master of a vessel to effect insurance on it for the benefit of the owners (*Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 662).

Nevertheless the right of commission merchants or other bailees to insure for the benefit of the owner is generally recognized.

De Forest v. Fulton Fire Ins. Co., 1 Hall (N. Y.) 94; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; *Alliance Marine Assur. Co. v. Louisiana State Ins. Co.*, 8 La. 1, 28 Am. Dec. 117.

(b) Married women.

That a married woman always had the right to insure her husband's life seems to be recognized in *Smith v. Missouri Valley Life Ins. Co.*,

¹ Necessity of insurable interest and nature thereof. see post, pp. 132-329.

² Capacity of corporation to contract, see *Century Digest*, vol. 12, "Corporations," cols. 1834-1838, § 1786.

22 Fed. Cas. 610. But the weight of authority seems to be that under the common law and in the absence of an enabling act a married woman had no authority to take out insurance on the life of her husband.

Continental Life Ins. Co. v. Webb, 54 Ala. 688; *Felrath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319; *Packard v. Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469; *Leonard v. Clinton*, 26 Hun (N. Y.) 288; *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738.

In consequence of this doctrine statutes were passed in many states expressly authorizing married women to insure the lives of their husbands³ and containing certain provisions intended to safeguard their interests in the proceeds. The primary object of such statutes was, however, to remove the disability of coverture.

Continental Life Ins. Co. v. Webb, 54 Ala. 688; *Felrath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319; *Packard v. Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *Wilson v. Lawrence*, 18 Hun (N. Y.) 238, affirmed in 76 N. Y. 585; *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503; *Dannhauser v. Wallenstein*, 65 N. Y. Supp. 219, 52 App. Div. 312. Under the New York act the privilege extends to endowment policies (*Brummer v. Cohn*, 9 Daly, 36, affirmed in 86 N. Y. 11, 62 How. Prac. 171).

It seems to be the doctrine in Rhode Island that the right of a married woman to effect a contract of insurance does not depend upon the special statute relating to insurance contracts, but may be based on the other provisions of the chapter relating to the rights of married women (*McQuitty v. Continental Ins. Co.*, 15 R. I. 573, 10 Atl. 635).

(c) **Infants—Fire insurance.**

Whether an infant may enter into a contract of insurance has been an issue in some interesting cases, and, as might be expected, the decisions have usually been governed by the principles generally applied to the contracts of infants.⁴

³ Laws authorizing married women to take out insurance on life of husband: Alabama, Civ. Code, 1896, § 2535; Arkansas, Sand. & H. Dig. 1893, c. 105, § 4944; Delaware, Rev. Code 1893, c. 76, p. 599, § 3; Illinois, Rev. St. 1898, p. 839, c. 73, § 54; Maryland, Code Pub. Gen. Laws, vol. 2, p. 1277, § 8; Michigan, Comp. Laws 1897, § 8695; Missouri, Rev. St. 1899, c. 119, § 7892; New Jersey, Gen. St. 1895, p. 2018;

New York, Heydecker's Gen. Laws & Rev. St. 1901, p. 3954, c. 48, § 22; North Carolina, Code 1883, c. 42, § 1841; Ohio, Bates' Ann. St. 1904, § 3629; Vermont, St. 1894, § 2653; West Virginia, Code 1899, c. 66, § 5; Wisconsin, Rev. St. 1898, c. 108, § 2347.

⁴ On the general question of the right of an infant to contract, see *Century Digest*, vol. 27, "Infants," cols. 1108-1179, §§ 98-160.

The question as to the right of an infant to enter into a contract of fire insurance appears to have been raised first in *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345. The action was brought on a premium note given by an infant in payment for the policy. The court held that a contract for the insurance of the property of an infant against damage by fire was not a contract for necessities which would bind the infant absolutely, and that, in the absence of any ratification by him after attaining his majority, the contract could not be enforced against him.⁵ The question was also raised in *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797, where the policy was taken by the mother and her minor children, and the company contended that there was no valid contract, for the reason that the minor children were incapable of entering into such contract; that contracts of insurance must be mutual, and, as the company could not have enforced payment of the premium, neither could it be compelled to perform its contract to indemnify. The court, however, held that the contract was binding on the company, basing its decision on the general principle that many contracts which are manifestly for the benefit of the infant are not void, but voidable merely. A contract of insurance is of this class. Infancy is a personal privilege, of which no one can take advantage but the infant himself while living. Such a defense is not open to the company. The court, while apparently basing its decision on the *Noyes Case*, distinguished that case, in that it was there held that an infant is not liable on his premium note as for necessities. A somewhat similar question arose in *Johnson v. Scottish Union & National Ins. Co.*, 93 Wis. 223, 67 N. W. 416, where the court held that the right of an infant to recover on a policy of insurance on her property was not affected by the rule of the company that no risks should be taken on the property of infants, where the agent of the infant who applied for the insurance was ignorant of the private instructions which the company had given to its general agent.

(d) Same—Life insurance.

An important and leading case involving the question of the right of an infant to become a member of a mutual benefit association is *Chicago Mut. Life Indemnity Association v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549. The action was brought to dissolve a mutual benefit association, and one of the grounds on which dissolution was asked was that the association had admitted minors to membership.

⁵ What contracts are for necessities, see *Century Digest*, vol. 27, "Infants," cols. 1123-1135, §§ 114-127.

The act of 1883, under which the association was organized, required that the certificate of association shall state, among other things, the limits as to age of applicants for membership. The certificate in this case stated the limits to be between 10 and 70 years. The court says the statute does not forbid, either expressly or by implication, the admission of minors to membership; consequently, if they are ineligible, it arises from some principle growing out of the nature and object of these associations or the policy of the law applicable thereto. The contention is that the certificate of membership is a personal contract between the member and the association, and, as an infant is capable of making only a voidable contract, his admission to membership is a violation of the principle of mutuality which lies at the base of mutual benefit societies. The court, however, regarded the certificate of membership as a unilateral contract, under which the payment of assessments or dues cannot be enforced against the member; the only remedy being forfeiture of membership. The suggestion that minors should not be admitted to membership, because of their incapacity to act as trustees or perform the duties of members at corporate meetings, was not regarded as important. There is no reason why the capacity to act as trustee should be a necessary qualification for membership. There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising, or even voting. The only objection to their doing so grows out of their inexperience and the immaturity of their judgments. But these are disqualifications which are not necessarily confined to persons under the age of 21 years, and no one would allege them as a legal bar to the admission of an adult to membership.

A similar question arose, also, in *Matter of Globe Mut. Benefit Association*, 17 N. Y. Supp. 852, 63 Hun, 263. The court held that under Acts 1883, c. 175, under which the association was organized, mutuality of obligation is the fundamental principle. The facts in this case are to be distinguished from those in the Illinois case, in that the Illinois statute authorizes the corporation to prescribe the limit as to the age of applicants for membership, whereas the New York statute is silent on the subject. The court, however, criticises the decision of the Illinois court that the making of an assessment or the maturing of dues does not make the member a debtor of the association, so as to authorize it to bring a suit for recovery. This doctrine, they say, is contrary to the rule laid down in *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87. After calling attention to the fact that a minor is not a proper person to act as an incorporator, the court says that after the

act of incorporation it is the members of the society which constitute it a continuing corporation, and it would seem clear that a person who is not competent to act for the purpose of creating a corporation could not be competent to act for the purpose of continuing it as a corporation. Justice Van Brunt dissented as to the reasons given, though concurring in the decision. His concurrence is based wholly on the point that the minor has not the requisite capacity to act as a member of the corporation. As to the legal obligation of members to pay dues and assessments he holds that the only result of failure to pay is a suspension from membership. He distinguishes the present case from the *Ross-Lewin Case*, as in the latter there was an express agreement to pay assessments. It is worth noting that the court in its reasoning takes a ground diametrically opposite to that of the Illinois court, while Justice Van Brunt, though arriving at the same conclusions, reasons on lines parallel with the Illinois court. The decision was subsequently affirmed by the Court of Appeals in 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547; the ground of affirmance being apparently that infants are not capable of managing the affairs of a corporation.

The question raised in the foregoing case came up again in *People v. Industrial Benefit Association*, 92 Hun, 311, 36 N. Y. Supp. 963, affirmed without opinion in 149 N. Y. 606, 44 N. E. 1127, and the doctrine laid down in the former case was reaffirmed.

The right of an infant to become a member of a mutual benefit association was questioned, but not decided, in *Commonwealth v. Keystone Beneficiary Association*, 171 Pa. 465, 32 Atl. 1027; but in *Commonwealth v. People's Mut. Life & Relief Ass'n*, 6 Pa. Dist. R. 561, the right of an infant to become a member of a mutual benefit association was denied on the ground of his incapacity to contract. In Indiana it would appear that infants have the right to take insurance in mutual benefit societies, as the statute in that state⁶ does not limit the age of members (*Gray v. National Benefit Association*, 111 Ind. 531, 11 N. E. 477).

The general question as to the right of infants to take out life insurance, irrespective of the nature of the company, has been raised in Ohio, North Carolina, and Minnesota, and it has been held that such contracts are, at most, voidable only, and not void.

Pippen v. Mutual Benefit Life Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56

⁶ See Rev. St. 1881, § 3727.

Minn. 365, 57 N. W. 934, 26 L. R. A. 187 (on rehearing 56 Minn. 372, 59 N. W. 992, 26 L. R. A. 189, 45 Am. St. Rep. 473); Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 473, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644.

The theory of these cases is apparently the principle that, however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or even the class of contracts which have been held as a matter of law to be beneficial to, and therefore binding on, an infant (*Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560).

The right of the infant to insurance seems also to be supported by *Roddey v. Talbot*, 114 N. C. 287, 20 S. E. 375, and *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

In view of the rule that a contract of life insurance taken out by an infant is voidable at his option, it is held in *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560, that, whatever may be the law elsewhere, in Massachusetts it is not necessary that the infant should put the other party in statu quo. Consequently it is no defense to an action by an infant to rescind his contract that the contract had been partly executed by the company. The relative rights of the parties was also considered in *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187 (on rehearing 56 Minn. 372, 59 N. W. 992, 26 L. R. A. 189, 45 Am. St. Rep. 473). The court held that as the infant had received some value, in that his life had been insured for the four years during which the policy had run, the company having carried the risk for that time, he was not entitled to recover the full amount of the premiums paid in. Nevertheless, as the premiums paid covered something more than the risk for that period, he was entitled to recover something, and the court allowed him the surrender value. Probably the true reserve value would have been a more equitable allowance.

(c) Corollary—Insurance on life of child.

The right of a parent to insure the life of a child is more or less closely connected with the questions discussed in the preceding paragraphs. The right was questioned, though not decided, in *Commonwealth v. Keystone Beneficiary Association*, 171 Pa. 465, 32 Atl. 1027, where the court said that, as infants cannot make a contract of membership in a mutual benefit association for themselves, it is not clear how

the parents can make it for them. The statute authorizes only the insurance of members, and not of other persons in whom the members may have an insurable interest. In *Commonwealth v. People's Mut. Life & Relief Ass'n*, 6 Pa. Dist. R. 561, the insurance of the lives of infants was regarded as impolitic, and the right denied, in the absence of statutory provisions sanctioning such insurance. So, too, the Appellate Court of Indiana has condemned the insurance of infants by other persons, on the ground that the insurance of children who are helpless and under the control and authority of others is susceptible of such possibilities of evil that it should not be encouraged (*Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228).

The New York statute (Laws 1892, c. 690, § 55), provides that a policy may be taken out on the life of an infant for an amount not exceeding \$30. In *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 10 Misc. Rep. 405, 31 N. Y. Supp. 130, the court held that the statute did not forbid taking out several policies for that amount on the life of an infant, but merely limited the amount of a single policy. The validity of the same policies seems to have been involved in *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643, and to have been upheld, though on other grounds. The right, however, to take out policies on the lives of infants, has been limited in New York to policies in ordinary life insurance companies by *People v. Industrial Benefit Association*, 92 Hun, 311, 36 N. Y. Supp. 963, affirmed without opinion in 149 N. Y. 606, 44 N. E. 1127. In this case the court held that in view of the decision in *Matter of Globe Mut. Benefit Association*, only adult persons were contemplated as entitled to membership in mutual benefit associations; consequently, policies on the lives of infants could not be taken out in such associations.

In connection with the general question of insuring the lives of infants, reference may also be made to *Rivers v. Greeg*, 5 Rich. Eq. (S. C.) 274, which involved a policy taken out by a creditor on the life of an infant debtor, though no issue was raised as to the right to insure an infant.

7. GENERAL NATURE OF THE INSURANCE CONTRACT.

- (a) General features of the contract.
- (b) Fundamental characteristics.
- (c) Risk an essential element.
- (d) Insurance as a unilateral contract.
- (e) Insurance as a personal contract.
- (f) Policy as property.

(a) General features of the contract.

Taking a broad view of the contract of insurance as a whole, it may be said that it is characterized by the same features as other contracts. In respect to the subject-matter, the consideration, the parties, and the necessity of mutuality, the rules governing contracts in general are applicable to the contract of insurance, and under ordinary circumstances the contract is to be construed by the same rules as other contracts. A careful analysis of the contract, however, brings to light certain additional characteristics which must be considered in determining the rights of the parties, and which require the application of special rules in order to the proper construction of the contract. Because of these particular, and in some aspects peculiar, features of the contract, it has been regarded in some instances as a promissory note, as an evidence of a debt, as merely an evidence of a contract (*Goodall v. New England Fire Ins. Co.*, 25 N. H. 169), and in still other instances as an instrument testamentary in its nature (*Supreme Council C. K. A. v. Densford*, 56 S. W. 172, 21 Ky. Law Rep. 1574, 49 L. R. A. 776), and, therefore, to be construed liberally in favor of the ones who may naturally be presumed to be the special objects of its bounty (*NcNally v. Metropolitan Life Ins. Co.*, 49 Atl. 299, 199 Pa. 481). Whatever analogies may be discovered between the contract of insurance and other kinds of contracts, there are certain fundamental characteristics of the insurance contract that must be taken into consideration in order to understand the distinctions and qualifications observed in the application of the general rules of law to its interpretation.

(b) Fundamental characteristics.

The contract of insurance is a voluntary contract, in which the insurers have a right to incorporate any conditions, and such conditions will be binding on the insured in the absence of an objection (*Keim v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291).

If the insured objects to any condition in the policy, he is under no obligation to make the contract; but if he voluntarily enters into it he will be bound thereby (*Brown v. United States Casualty Co.* [C. C.] 95 Fed. 935). The contract of insurance is also to be regarded as an executory contract (*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789), and this, though the premium for the entire term is paid. It is a continuing contract, in the sense that it is to be performed in the future (*Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522). Certain duties are to be performed by the insured, and the insurer's promise is executory, inasmuch as it is to be executed by the payment of a certain sum on loss (*Mutual Life Ins. Co. v. Wager*, 27 Barb. [N. Y.] 354). Though the obligation of the insurer attaches upon the completion of the contract, his liability to pay is conditional upon the happening of a specified contingency. **The contract of insurance is, therefore, a conditional contract, and not an instrument for the absolute payment of money.**

McKee v. Metropolitan Life Ins. Co., 25 Hun (N. Y.) 583; *Tyler v. Aetna Fire Ins. Co.*, 2 Wend. (N. Y.) 280; *Anonymous*, 6 Cow. (N. Y.) 41; *Jones v. Insurance Co. of North America*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706.

It is a conditional contract in that it indemnifies the insured only in case the loss does not occur from an excepted cause. So it may be conditional in that it insures the property only while located and contained in a certain place (*Cooledge v. Continental Ins. Co.*, 67 Vt. 14, 30 Atl. 798).

Owing to the peculiar conditions under which insurance on marine risks was made, remote from the subject of the insurance and without opportunity for personal inspection, the insurer was obliged to rely entirely on the statements of the owner in determining whether he should assume the risk. In the view of the courts this created a fiduciary relation, imposing on the applicant the duty of making full and true disclosure as to all the circumstances affecting the risk. From this grew up the doctrine that the contract of insurance is one of the utmost good faith. In the earlier cases this principle was applied especially to the conduct of the insured. In later cases, however, the doctrine has been extended so as to require also the utmost good faith on the part of the insurer.

Germania Ins. Co. v. Rudwig, 80 Ky. 223; *Manhattan Ins. Co. v. Well*, 28 Grat. (Va.) 389, 26 Am. Rep. 364.

(c) Risk an essential element.

Though the contract of insurance is regarded as an aleatory contract (*Alliance Marine Assurance Co. v. Louisiana State Ins. Co.*, 8 La. 1, 28 Am. Dec. 117), it is not a contract of chance in the ordinary meaning of the word. It is a contract contingent on a chance event; that is to say, the liability of the insurer depends on the happening of the contingency. On the other hand, the insured must pay the premium, though the contingency never happens. Nevertheless, the insured is regarded as receiving value in return for the payment made, though the peril insured against never arises. In consideration of the premium, he receives protection which leaves him free to engage in commercial ventures with the assurance that, in case of loss by certain specified perils, the burden of such loss will be shifted to the insurer and ultimately shared by others engaged in similar ventures. This protection is regarded as a valuable consideration. (*Johnson v. Insurance Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.)

From what has been said it is evident that the primary requisite essential to the existence of every contract of insurance is the presence of a risk of loss. The insurer, in return for a consideration paid to him by the insured, assumes this risk, and wherever such risk exists and is assumed by one of the parties to the contract, whatever form a contract may take, it is in fact a contract of insurance. Risk is essentially the subject of the contract. If there be no risk there can be no contract, and until the risk commences the contract does not attach. (*Hart v. Delaware Ins. Co.*, 11 Fed. Cas. 683.)

The principle is also asserted and illustrated in *United States Life Ins. Co. v. Smith*, 92 Fed. 503, 34 C. C. A. 506; *Connecticut Mutual Life Ins. Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Jones v. Insurance Co. of North America*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706; *Forbes v. Church*, 3 Johns. Cas. (N. Y.) 159.

As to the risk which may be insured against, it may be the risk of loss by fire, *Johannes v. Insurance Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; by sea perils, *Bullard v. Insurance Co.*, 4 Fed. Cas. 643; by injury to property by accident, *McMyler v. Union Casualty & Surety Co.* (Sup.) 34 N. Y. Supp. 170; by explosion of steam boilers, *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.*, 57 Fed. 294, 6 C. C. A. 336, 9 U. S. App. 186, 21 L. R. A. 572; by tornado or other windstorm, *Hartford Fire Ins. Co. v. Nelson*, 67 Pac. 440, 64 Kan. 115; by hail, *Farmers' Mut. Hail Ins. Ass'n v. Slattery*, 115 Iowa, 410, 88 N. W. 949; by loss in the mails, *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232; by burglary, *United States Fidelity & Guaranty Co. v. Line-*

han (N. H.) 58 Atl. 956; by sickness and death of animals, *Tripp v. Northwestern Live Stock Ins. Co.*, 91 Iowa, 278, 59 N. W. 1; by injury due to personal accident, *United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; by ill health, *Bishop v. United States Casualty Co. (Sup.)* 91 N. Y. Supp. 176; by death of a person, *Commonwealth v. Wetherbee*, 105 Mass. 149; by insolvency of debtors, *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; by infidelity of persons in places of trust, *Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; by failure of others to perform contracts, *German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682; by defects in title to lands, *Wheeler v. Real Estate Title Ins. & Trust Co.*, 160 Pa. 408, 28 Atl. 849; and by liability for injuries to other persons, *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 529.

The risk which is essential to a contract of insurance must not be so great as to be prohibitory of the enterprise in which it is encountered. There must, in order that there may be successful insurance, be a sufficiently large number exposed to the same risk to make it practicable and advantageous to distribute the loss falling upon a few. As indemnity against loss is at the foundation of insurance, the business must be regarded as a system of distributing losses upon the many who are exposed to the common hazard. (*Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429.) Out of the co-existence of many risks arises the law of average, which underlies the whole business of insurance. This is true, whether the insurance is on property or on lives. Life insurance especially is founded on the law of averages. The average rate of mortality is the basis on which it rests, and by spreading their risks over a large number of cases the companies calculate on the average with reasonable certainty and safety. (*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.)

In strict accord with the principle that risk is essential is the rule that where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered (*Hendy Machine Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33).

As a corollary to the foregoing proposition is the principle that, as regards the risk, the contract of insurance is an entirety, and in the absence of a stipulation to the contrary, if the risk has once attached, no part of the premium is returnable, though the subject insured may be lost by reason of an excepted peril before the expiration of the con-

tract for which the insurance is granted. So if a premium has been paid and the risk incurred for any period, no matter how short, no breach of a subsequent condition for which the insured was responsible would entitle him to a return of any of the premium, though the company thereby ceased to be liable. (*Hendy Machine Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33.) This is illustrated by the case of a policy of marine insurance which attached while the vessel was in port, but did not attach to the voyage by reason of a breach of warranty (*Hendricks v. Commercial Ins. Co.*, 8 Johns. [N. Y.] 1).

(d) Insurance as a unilateral contract.

In a general sense a contract of insurance is synallagmatic and consensual; that is to say, it is based on mutual and reciprocal obligations—the obligation of the insured to pay the premium and the obligation of the insurer to pay the loss (*Alliance Marine Assurance Co. v. Louisiana State Ins. Co.*, 8 La. 1, 28 Am. Dec. 117). Nevertheless it is unilateral, in the sense that there is usually no absolute promise on the part of the insured to pay premiums and no action can be maintained to enforce a payment of the premium; the penalty for nonpayment being usually a forfeiture of the policy (*Clark v. Schromeyer*, 23 Ind. App. 565, 55 N. E. 785). This principle is to be regarded as especially true of the contracts of mutual benefit associations, where the penalty of a failure to pay assessments is a loss of membership.

Lehman v. Clark, 51 N. E. 222, 174 Ill. 279, 43 L. R. A. 648, reversing judgment 71 Ill. App. 366; *Covenant Mutual Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966.

Indeed, life insurance contracts generally must be regarded as unilateral, unless by express terms they are made otherwise. A life policy usually contains no undertaking on the part of the insured to pay premiums, merely giving him an option to pay or not, and thus continue the obligation of the insurer or terminate it at his pleasure. (*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.)

(e) Insurance as a personal contract.

A contract of insurance against loss or damage to property, though in popular language called an "insurance of the property," is in reality a contract to indemnify the owner against loss. It is not an insurance of the specific thing which is the subject of the insurance. (*Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512.) So a contract of insurance with a mortgagee is not an insurance of the debt

or of the payment of the debt, since that would be in effect an insurance of the solvency of the debtor. It is the proprietary interest of the mortgagee that is the subject of the insurance. (*King v. State Mut. Fire Ins. Co.*, 7 Cush. [Mass.] 1, 54 Am. Dec. 683). The contract is essentially a personal contract, each party having in view the character, credit, and conduct of the other. This view of the nature of the policy applies with still greater force in the case of mutual insurance, where each and all the members have an interest in knowing their associates and in deciding who shall become members. (*Wilson v. Hill*, 3 Metc. [Mass.] 66.)

As the contract of insurance is a personal contract, it does not attach to or run with the land in the case of an insurance of real property, nor with the chattel in insurance of personalty (*Cummings v. Insurance Co.*, 55 N. H. 457).

That the contract of insurance is a personal contract, and does not attach to and run with the property insured, is supported by numerous cases. It is deemed sufficient to refer to the following: *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Northern Trust Co. v. Snyder*, 76 Fed. 34, 22 C. C. A. 47; *Lindley v. Orr*, 83 Ill. App. 70; *Cook v. Kentucky Growers' Ins. Co.*, 72 S. W. 764, 24 Ky. Law Rep. 1950; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292; *William Skinner & Sons Shipbuilding & D. D. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485; *Disbrow v. Jones*, Har. (Mich.) 48; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Wyman v. Wyman*, 26 N. Y. 253; *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82, 25 N. E. 1088; *Hubbard v. Austin*, 8 Ohio Dec. 111, 6 Ohio N. P. 249; *Hartford Fire Ins. Co. v. Ransom* (Tex. Civ. App.) 61 S. W. 144; *Davis v. Phoenix Ins. Co.*, 43 Pac. 1115, 111 Cal. 409; *Whitehouse v. Cargill*, 34 Atl. 276, 88 Me. 479.

Since policies of insurance against fire are mere personal contracts, which do not attach to the property as an incident, it cannot be regarded as subject to a lien on the part of the general lien holder (*In re West Norfolk Lumber Co.* [D. C.] 112 Fed. 759). So, too, a policy of insurance taken out by a receiver is not subject to a lien of an attaching creditor (*McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343).

A contract to procure insurance is not necessarily a personal contract. It may be binding upon the representatives and assigns of the parties. (*Tanenbaum v. Greenwald*, 73 N. Y. Supp. 873, 67 App. Div. 473.) But a covenant by a lessee to procure insurance and apply the proceeds

to the reparation of the property in the event of loss or damage is usually regarded as running with the land.

Thomas' Adm'rs v. Vonkapff's Ex'rs, 6 Gill & J. (Md.) 372; *Masury v. Southworth*, 9 Ohio St. 352. But see *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234.

(f) Policy as property.

The issuing of a policy of insurance is not a transaction of commerce, nor is a contract of insurance an article of commerce, in the proper meaning of the word (*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357). It is a mere incident of commercial intercourse (*Hooper v. People*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297). In *Succession of Hearing*, 26 La. Ann. 326, it was said that an insurance policy is not a piece of property, but merely the evidence of a contract that a certain sum of money will be paid on a certain contingency. That the contract is property for certain purposes is, however, well settled in other jurisdictions. Thus it is said in *Steele v. Gatlin*, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129, that a policy of life insurance is, after the death of the insured, unquestionably a chose in action, as it is then simply a promise to pay money; and it has been held in other cases that a policy of life insurance, even before the death of the insured, is a chose in action.

Hutson v. Merrifield, 51 Ind. 24, 19 Am. Rep. 722; *Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285; *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 38, 64 Am. Dec. 529.

A policy of life insurance, payable to the estate of the insured—that is, to his executors, administrators, or assigns—is to be regarded as personal property, so that it may be subject of conveyance on the part of the insured (*Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159). It is personal property, which will descend as part of the estate of the decedent (*Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285). But a paid-up or partially paid-up policy of life insurance is not personal property within the Indiana statutes relating to taxation (*State Board of Tax Com'rs v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826).

A life insurance policy—or at least the rights thereunder, may be regarded as property, so as to pass on an assignment in insolvency. This is especially true in the case of an endowment policy, the sum payable under such policy being payable absolutely on the expiration of the endowment period. (*Bassett v. Parsons*, 140 Mass. 169, 3 N.

E. 547.) So a life endowment policy is property which will pass to a receiver of the insured (*Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 55 N. E. 305, affirming 28 App. Div. 591, 51 N. Y. Supp. 446). An interest in a tontine policy is property which will pass to the trustee of the bankrupt insured (*In re Holden*, 113 Fed. 141, 51 C. C. A. 97; *In re Welling*, 113 Fed. 189, 51 C. C. A. 151).

While the interest of the insured in a life policy stipulating to pay a certain sum to him at the expiration of endowment period is attachable under the provision of the New York Code authorizing attachments on a cause of action arising on contract, yet the interest of the insured in such a policy is not subject to levy and sale on execution (*Kratzenstein v. Lehman*, 18 Misc. Rep. 590, 42 N. Y. Supp. 237, affirmed in 19 Misc. Rep. 600, 44 N. Y. Supp. 369). So an interest in a 20-year distribution policy of insurance on life, which will cease on failure to pay premiums, is not personal estate, within a statute making an execution a lien on the personal estate (*Boisseau v. Bass' Adm'r*, 100 Va. 207, 40 S. E. 647, 57 L. R. A. 380, 93 Am. St. Rep. 956). So far as fire policies are concerned, it is obvious that an interest in such a policy cannot be levied on and sold under execution (*Tradesmen's Bldg. & Loan Ass'n v. Maher*, 9 Pa. Super. Ct. 340).

8. CONTRACTS OF INSURANCE AS CONTRACTS OF INDEMNITY.

- (a) Insurance of property.
- (b) Guaranty insurance.
- (c) Employer's liability—Carrier's liability.
- (d) Life and accident insurance.
- (e) Same—Amount payable is predetermined.
- (f) Same—Necessity of insurable interest.
- (g) Same—Assignment of policy.
- (h) Same—Creditors' policies.
- (i) Same—General principles of construction.
- (j) Conclusion.

(a) Insurance of property.

The determination of the rights of parties under contracts of insurance is sometimes dependent on the nature of the contract as a contract of indemnity. It is not too broad a statement to say that all contracts of insurance against loss or damage to property are strictly contracts of indemnity. As was said in *Cummings v. Cheshire Coun-*

ty Mutual Fire Ins. Co., 55 N. H. 458, indemnity is the general principle running through all contracts of insurance.

The principle is supported as to fire and marine insurance by *Carpenter v. Providence & Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *Watson v. Insurance Co. of North America*, 29 Fed. Cas. 433; *Hedger v. Union Ins. Co. (C. C.)* 17 Fed. 498; *Glen-dale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Illinois Mut. Ins. Co. v. Hoffman*, 81 Ill. App. 295, affirmed in 132 Ill. 522, 24 N. E. 413; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Home Ins. Co. v. Gaddis*, 3 Ky. Law Rep. 159; *Marchesseau v. Merchants' Ins. Co.*, 1 Rob. (La.) 438; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Franklin Fire Ins. Co. v. Hamill*, 6 Gill (Md.) 87; *Whiting v. Independent Mutual Ins. Co.*, 15 Md. 297; *Hemmen-way v. Eaton*, 13 Mass. 108; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141, 25 Am. Dec. 863; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523, 29 Am. Dec. 614; *Wilson v. Hill*, 8 Metc. (Mass.) 66; *Morrison v. Tennessee Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. Law, 506; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Murdock v. Chenango Co. Mut. Fire Ins. Co.*, 2 N. Y. 210; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390, *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11, 43 Am. Rep. 413; *Insurance Co. v. Butler*, 38 Ohio St. 128; *Miner v. Tagert*, 8 Bin. (Pa.) 204; *Hodgson v. Marine Ins. Co.*, 5 Oranch, 100, 3 L. Ed. 48; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205, 78 Am. Dec. 418; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.) 461; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249.

As to insurance of property against damage by accident or loss by theft, the principle is supported in *Chicago Sugar Refining Co. v. American Steam Boiler Co. (C. C.)* 48 Fed. 198; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; *State v. Northwestern Live Stock Ass'n*, 16 Neb. 549, 20 N. W. 852; *State ex rel., etc., v. Vigilant Ins. Co.*, 2 Pac. 840, 30 Kan. 585. Contracts of reinsurance are also regarded as contracts of indemnity in *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517; *Ill. Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362, 16 Am. Rep. 620; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155, 41 N. W. 601; *Chalaron v. Ins. Co. of North America*, 48 La. Ann. 1582, 21 South. 267, 36 L. R. A. 742; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235; *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11, 43 Am. Rep. 413.

The principle that contracts of insurance are contracts of indemnity requires that persons attempting to enforce claims under such contracts must show an interest in the subject-matter commensurate with their claims.

This is the true interpretation of the principle according to *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Hedger v. Union Ins. Co. (C. C.)* 17 Fed. 498; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Morrison v. Tennessee Mar. & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Cummings v. Cheshire County Mutual Fire Ins. Co.*, 55 N. H. 457; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 890; *Insurance Co. v. Butler*, 38 Ohio St. 128; *Spare v. Home Mut. Ins. Co. (C. C.)* 15 Fed. 707; *Illinois Mutual Fire Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Hartford Fire Ins. Co. v. Kenting*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Franklin v. National Insurance Co.*, 43 Mo. 491; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, affirming 51 Barb. (N. Y.) 647; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Commonwealth Ins. Co. v. Globe Mutual Ins. Co.*, 35 Pa. 475; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Hidden v. Slater Mutual Fire Ins. Co.*, 12 Fed. Cas. 121; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Clinton v. Norfolk Mutual Fire Ins. Co.*, 176 Mass. 496, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325; *Insurance Co. v. Allen*, 138 Mass. 27, 52 Am. Rep. 245.

On the theory that contracts of insurance are contracts of indemnity, it has been held that, where insured property is destroyed by fire negligently set out by a railroad company, the owner is not entitled to compensation for his loss from both the insurance company and the railroad company (*Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443). But, where a policy on live stock was assigned as collateral security to a mortgagee, payment of damages to the owner for the death of the stock by the railroad company did not prevent the assignee from recovering on the policy (*Algase v. Horse Owners' Mut. Indemnity Ass'n*, 77 Hun, 472, 29 N. Y. Supp. 101).

(b) Guaranty insurance.

A contract insuring against loss from breach of fidelity of an employé is one of indemnity (*Fidelity & Casualty Co. v. Eickhoff*, 63

Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464). So, too, contracts insuring against loss from the insolvency of debtors are regarded as contracts of indemnity.

Rice v. National Credit Ins. Co., 164 Mass. 285, 41 N. E. 276; *State v. Phelan*, 66 Mo. App. 548; *In re Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

A contract of title insurance has been regarded as a contract of strict indemnity in several cases.

Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 17 O. C. A. 56; *Wheeler v. Real Estate Title Ins. & Trust Co.*, 160 Pa. 408, 20 Atl. 849; *German Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682; *Trenton Potteries Co. v. Title Guaranty & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116.

The doctrine has been applied to sustain a holding that the insured cannot recover for an amount he was obliged to pay to cure a defect in title from both the insurance company and the person liable for such defect (*Alexander v. Greacen*, 36 Misc. Rep. 133, 72 N. Y. Supp. 1085).

(c) Employer's Liability—Carrier's Liability.

Contracts insuring employers against loss due to their liability for injuries to employes are contracts of indemnity.

Embler v. Hartford Steam Boiler Inspection & Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; *Chicago Sugar Refining Co. v. American Steam Boiler Co. (C. C.)* 48 Fed. 198, affirmed in 57 Fed. 294, 6 O. C. A. 336, 21 L. R. A. 572; *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503.

Such contracts are not contracts of indemnity merely against loss or damage, but of indemnity against liability. This distinction is well stated in the leading case of *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. The policy provided for an insurance against all liabilities on account of fatal or non-fatal injuries suffered by an employé. The company was authorized to take on itself the settlement of any loss, and, if any legal proceedings were brought against the employer to enforce the claim for injuries, the company at its own cost should have absolute conduct and control of the defense. It was further provided that the employer should not settle any claim or incur any expense without the consent of the company. The court regards the instrument, not merely as an agreement

to indemnify against damage, but to indemnify against liability for loss or damage.

By a similar course of reasoning the courts in *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41, 38 Atl. 22; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; *Pickett v. Fidelity & Casualty Co.*, 38 S. E. 160, 60 S. C. 477; *Beacon Lamp Co. v. Travelers' Ins. Co.*, 61 N. J. Eq. 59, 47 Atl. 579; *Frye v. Bath, Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; and *Stephens v. Pennsylvania Casualty Co. (Mich.)* 97 N. W. 686—arrived at the same conclusion that these policies are contracts of indemnity against liability, and not merely against loss or damage.

In *Beacon Lamp Co. v. Travelers' Ins. Co.*, 61 N. J. Eq. 59, 47 Atl. 579, the court regards the relation created between the various parties as similar to the relation existing between a principal and a surety, comparing it to the relation created where a mortgagor conveys the mortgaged land, the grantee assuming payment of the mortgage debt, and holding that the employer has the right, as surety, to bring an action to enforce the liability of the company as principal debtor.¹

Contracts insuring carriers against loss due to injuries to passengers are also regarded as contracts of indemnity.

Boston & Albany R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 539, 34 Atl. 778, 38 L. R. A. 97; *Trenton Passenger Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. Law, 246, 87 Atl. 609, 44 L. R. A. 213.

(d) Life and accident insurance.

Policies of life and accident insurance have long been regarded as exceptions to the general rule that contracts of insurance are contracts of indemnity. Accident insurance, in so far as it insures against injury only, is indeed recognized as a contract of indemnity in *Healey v. Mutual Acc. Ass'n*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637. The case also contains a statement which might be regarded as holding such a contract one of indemnity as to death

¹A bill in equity by a surety will lie to compel a creditor to have recourse to the principal debtor and to compel the latter to perform his contract. *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Klapworth v. Dressler*, 13 N. J. Eq. 62,

78 Am. Dec. 69; *Irick v. Black*, 17 N. J. Eq. 195; *Wise v. Shepherd*, 13 Ill. 41; *Ritenour v. Mathews*, 42 Ind. 7; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Norton v. Reid*, 11 S. C. 593; *Bishop v. Day*, 18 Vt. 81, 37 Am. Dec. 582.

by accidental cause. But Mr. Joyce regards the statement as a general one and as made incidentally in connection with the general question of construction.² However that may be, the great majority of the courts regard contracts of life insurance and contracts of accident insurance insuring against death as in no sense contracts of indemnity.

Though the courts have seized upon this interpretation of the contract as a principle to conjure with, they have applied it to uphold such contradictory decisions that it is doubtful if there is any real ground for the distinction attempted to be made between life and other forms of insurance in this respect. While the question is not, perhaps, very important in itself, a proper determination of the rights of parties, and especially of creditors and assignees, under the contract, depends, to a large extent, on the character of the contract. It is therefore advisable to discuss the question at some length, and to discover, if possible, the reason for the exception.

(e) Same—Amount payable is predetermined

The fundamental principle on which the doctrine is based is that a policy of life insurance, unlike insurance of property, is an absolute contract to pay a certain sum on the happening of an event certain to occur, and this was stated as the reason for the doctrine that such policies are not contracts of indemnity in the English case on which the American courts have based their decisions.³ There can be on human life no such pecuniary estimate of value as is included in the idea of indemnity.

These are the principles deduced from *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200; *Olmsted v. Keyes*, 85 N. Y. 593; *Holmes v. Davenport* (Sup.) 18 N. Y. Supp. 56; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 357; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *De Ronge v. Elliott*, 23 N. J. Eq. 486; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372 (dissenting opinion); *McKenty v. Universal Life Ins. Co.*, 16 Fed. Cas. 196; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463.

² See Joyce on Insurance, vol. 1, § 27.

Ins. Co., 15 Com. B. 365; and 2 Big-

³ See *Dalby v. India & London Life*

elow, Insurance Cases, 371.

This view of a contract is vigorously opposed by Mr. May,⁴ who regards the distinction as superficial. A life policy he regards as, in effect, a valued policy, similar to valued policies in fire or marine insurance, in which the indemnity to be paid in case of loss is simply fixed at the inception of the contract, and not left for determination after actual loss has occurred. Mr. Porter, too, remarks⁵ that to say the contract is not one of indemnity, because the sum is certain and all will be payable, is begging the question, as the real point to be determined is whether the whole amount should be paid, or only so much as will compensate for the loss actually sustained.

Mr. May's position is supported by *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *St. John v. American Mut. Life Ins. Co.*, 2 Duer (N. Y.) 419.

It is to be noted that the *St. John Case* was decided before the English case laid down the principle of nonindemnity. It was subsequently affirmed in 13 N. Y. 31, 64 Am. Dec. 529, but in the meantime the English case referred to had been decided, and the court, though affirming the judgment, apparently regarded the contract as not one of indemnity. So in *Bevin v. Connecticut Mut. Life Ins. Co.*, 28 Conn. 244, the policy was regarded as a valued one, but as a contract of indemnity, and in *Central National Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, though the policy is described as a contract, so far as the company is concerned, to pay a certain sum on the occurrence of an event sure to happen, it is also regarded as one of indemnity. In *Hoyt v. New York Life Ins. Co.*, 16 N. Y. Super. Ct. 440, the court regarded a life policy as a valued one, though expressly disclaiming any intention of passing on the question whether it was a contract of indemnity. In *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74, the policy was held to be a valued one, but was nevertheless regarded as not a contract of indemnity.

As applying to the general question, see *State ex rel. Clapp v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028, and *Commonwealth v. People's Mut. Life & Relief Ass'n*, 6 Pa. Dist. R. 561, where policies are apparently regarded as contracts of indemnity, though it is doubtful if the point is necessarily involved. See, also, the definition of insurance in *Deering's Ann. Civ. Code Cal.* § 2527, which, the annotator says, plainly makes insurance on life, as well as other kinds of insurance, contracts of indemnity. In this connection see, also, *Oyster v. Burlington Relief Dept.*, 65 Neb. 789, 91 N. W. 699,

⁴ See *May on Insurance*, vol. 1, § 7.

⁵ *Porter on Insurance*, p. 15.

59 L. R. A. 291, where recovery under a benefit certificate of a railway relief association was denied, on the ground that the widow had already recovered for the death of her husband against the railroad company. There was, however, a special provision in the certificate covering such case.

(f) Same—Necessity of insurable interest.

The necessity of an interest in the subject-matter in property insurance is apparently based on the principle that a contract insuring property is strictly a contract of indemnity. If a contract of life insurance is not one of indemnity, there would seem to be no reason for requiring an insurable interest in the life insured to support the policy in the absence of statutory provisions.

Such is, indeed, the holding in *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *De Ronge v. Elliott*, 23 N. J. Eq. 486; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Chisholm v. National Capital Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414.

So, too, the majority of the decisions upholding the principle of non-indemnity on the alleged ground that the value of human life cannot be estimated in dollars and cents nevertheless hold that some interest is necessary, though that interest may be only such as is supplied by natural affection, accompanying ties of consanguinity or affinity.

This is the principle underlying *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.) 396; *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74; *Chisholm v. National Capital Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; and *Croswell v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200.

In view of the facts that in every action for death by wrongful act an estimate is actually put on the value of human life, and that every life insurance company, in passing on an application, takes into account the amount of the insurance as related to the circumstances of the risk, the reasoning that a contract cannot be one of indemnity, because no value can be set on human life, would seem to be faulty. In this connection, attention may be called to those cases which hold that mere relationship, unaccompanied by any reasonable expectation of advantage, is not sufficient to supply any insurable interest. But it is also said that the advantage need not be a direct and pecuniary one. It is sufficient if some loss will result from the death of the life insured.

This is the principle underlying *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268, and *Bevin v. Mutual Life Ins. Co.*, 23 Conn.

244, where the contract is held to be one of indemnity. The Bevin Case was followed in *Hoyt v. New York Life Ins. Co.*, 16 N. Y. Super. Ct. 440, though the court did not pass on the question of indemnity.

The question is well discussed in *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, where it was held that, because the contract is one of indemnity, there must be an insurable interest to support the policy, and that the mere relationship of mother-in-law and son-in-law did not supply such an interest. As said in *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429, though the indemnity feature in life insurance is not always apparent, the difficulty in estimating it ought not to be decisive of the question.

(g) Same—Assignment of policy.

The principle that a contract is not one of indemnity has been held in several cases as the basis for decisions upholding assignments of policies where the assignee was alleged to be without interest, but it is to be noted that in these cases the application of the principle was not necessary. Thus in *Olmsted v. Keyes*, 85 N. Y. 593, the policy was taken out by the insured, payable to plaintiff as trustee for the wife of the insured. The wife having died, the insured married again, and plaintiff assigned his interest as trustee to the second wife. The court regards the contract of insurance as a mere chose in action, assignable like other choses in action. So in *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, regarded as the leading case in Massachusetts, the policy, which was issued for the benefit of the wife of the insured, was assigned by the insured and the beneficiary to a creditor in consideration of a certain sum of money and the discharge of certain debts. The court said that, conceding that the assignee had no insurable interest, except as creditor, he was, nevertheless, an assignee for a valuable consideration. Moreover, the policy was supported by the interest of the wife in the life insured. In *Emerick v. Coakley*, 35 Md. 188, where it was contended that a policy of life insurance is a contract of indemnity, and therefore not assignable until loss has occurred, which contention was denied by the court on the authority of the English decisions, it is difficult to see what application the doctrine had to the case; the assignment being by the insured and his wife, who was beneficiary, to secure payment of certain debts of the husband. On the other hand, in *St. John v. American Mut. Life Ins. Co.*, 2 Duer (N. Y.) 419, where the contract was held to be one of indemnity, the principle underlying the decision seems to be that the

policy was supported by an original interest. *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, which also seems to support the principle of indemnity, was decided on different grounds. The policy was assigned to one who paid the premiums, and the court held that, as the assignment was apparently only a cover for a wager policy, the assignee was entitled to reimbursement only for the premiums he had paid.

(h) Same—Creditors' policies.

Perhaps the most important phase of the question has arisen in connection with creditors' policies, and especially where the debt has been paid before the death of the debtor insured. The rule of property insurance that the extinguishment of interest bars a recovery on the policy was applied to early contracts of life insurance. In its application to creditors' policies it was found in some cases to work an injustice. This led to the abandonment of the rule of indemnity so far as life policies are concerned, and the establishment of the principle that life policies are not contracts of indemnity. The strict application of this rule has also worked great injustice, and it remains for the courts to readjust the principle, a step which has already been taken in some jurisdictions.

A leading case is *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 357, affirmed in 27 N. Y. 282, 84 Am. Dec. 280, where the court apparently based its opinion that the creditor's policy is not a contract of indemnity, on the ground that the debt is not insured. There is not an agreement to make compensation for loss of the debt, but the contract is an absolute one to pay in the amount of loss or damage arising from the death, or a specified sum of money on the termination of the life insured. *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, has also been regarded as a leading authority on the question. In this case the policy was taken out by the surety on an official bond of the person whose life was insured. The liability of the surety having been extinguished before the death of the person insured, it was contended that he had no insurable interest at the time the policy matured. The court held that, as the contract was not one of indemnity, the continuance of insurable interest was not necessary; that, if the policy fell with the extinguishment of interest, it might lead to the result that the creditor, who had paid the premiums on a policy on the life of his debtor, would in reality suffer loss to the extent of the premiums, though his debt was paid in full. In view of the later Pennsylvania cases, however, the case loses much of its weight, and the somewhat positive rule there stated must be modified. In *Appeal of Corson*, 113

Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, the court said that while the amount of insurance placed on the life of the debtor cannot be grossly disproportionate to the debt, yet, in considering the amount, the age of the debtor and the probable amount of premiums to be paid must be taken into consideration. In *Grant v. Kline*, 115 Pa. 618, 9 Atl. 150, Justice Paxson, speaking for himself, stated that he regarded it as an equitable rule that a policy taken out by the creditor on the life of his debtor should be limited to the amount of the debt, with interest, and the amount of the premiums, with interest, during the expectancy of life, as shown by the tables.

This rule was approved in *Ulrich v. Rejnoehl*, 143 Pa. 243, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; *Schaffer v. Spangler*, 144 Pa. 223, 22 Atl. 865; and *Cooper v. Shaefer* (Pa.) 11 Atl. 549.

In the *Cooper Case*, where a policy for \$3,000 was taken out to secure a debt of \$100, the court held that the disproportion was so great as to warrant them in saying that the transaction was, as a matter of law, a wager policy. In all of these cases it was stated as a basic principle that life insurance is not indemnity; but in every one of them it is insisted that the creditor must be fully indemnified for his debt and expenses.

Such, too, is the principle underlying the decisions in *Sides v. Knickerbocker Life Ins. Co.* (C. C.) 16 Fed. 650; *Ferguson v. Massachusetts Life Ins. Co.*, 32 Hun (N. Y.) 308, affirmed without opinion in 102 N. Y. 647; and *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844—all of which lay great stress on the rule that the policies are not contracts of indemnity.

That this is the proper construction to be placed on these decisions is sustained by *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, where the court said that though the contract, so far as the company is concerned, is merely one to pay a certain sum of money on the occurrence of an event sure to happen, the contract is one of indemnity, though it cannot be considered as strictly one of indemnity as is the case with fire and marine insurance. If the creditor insures the life of his debtor, he is thereby indemnified against loss by the death of his debtor before payment. If the creditor keeps up the premiums, and his debt is paid before the death, he may still recover on the contract; but if the debtor obtains the insurance on an insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the maturity of the policy, then the proceeds go, not to the creditor, but to the estate of the debtor. Even in

Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, often cited as upholding the doctrine of nonindemnity, the holding is, in fact, merely that the contract is not strictly one of indemnity. In the later case of *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, the court upholds the principle that a creditor's policy is a contract of indemnity, and apparently approves the doctrine that a creditor's claim on the proceeds of insurance should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor or his estate. Mr. May discusses the question very fully in connection with creditors' policies,⁶ and points out that it is on the principle of indemnity that the creditor is allowed to recover at all. He compares a creditor's policy on the life of his debtor with a policy covering a mortgagee's interest on the property of the mortgagor. In each case he says the contract is a separate and distinct collateral contract, which the insured has a right to make for his own benefit, and there seems to be no doubt that the mortgagee may recover the full amount insured without prejudice to his mortgage debt, which, whether it be paid or unpaid, is of no concern to the insurer, and that, even where a mortgagee insures mortgaged property to secure a mortgage note, if there is a total loss within the period of the insurance, he recovers the amount and still holds his note.⁷

In a late case the Supreme Court of Georgia has repudiated the principle of nonindemnity, regarding it as wholly erroneous. In *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, where the policy was taken out by a creditor on the life of his debtor, the court says that effecting insurance for the purpose of securing a debt is a contract of indemnity and nothing else. Indemnity is the only legal end to be attained by a transaction of this kind. The only possible right that a creditor has to be the beneficiary of a policy of life insurance is to protect himself against loss, and such protection is indemnity. Whenever it is admitted that a contract of life insurance has not indemnity for its object, it is necessarily stamped as a wagering contract, and though there is reason for holding that even ordinary contracts of life insurance, whereby a man insures his own life for the benefit of those depending on him, are contracts for indemnity merely, the court does not enter upon the discussion on that point, but confines itself to the consideration of a policy effected to secure a debt. The

⁶ See May on Insurance, vol. 1, §§ 115-117; vol. 2, § 459a.

proceeds of an insurance policy, see Century Digest, vol. 28, "Insurance," § 1445, and vol. 35, "Mortgages," § 536.

⁷ As to the right of a mortgagee to the

interest of the creditor holding as security a life insurance policy can be as readily computed in dollars and cents as the interest of a creditor secured by a policy on property, and it is no more public policy not to allow a creditor to speculate on chances of property being destroyed than to allow him to speculate on the life of his debtor. If a creditor protected by a life policy lawfully stipulate for anything more than indemnity, the transaction is a speculation pure and simple. The reasoning employed by the majority of the court was dissented from by Justice Little, though he concurred in the result. He adhered to the principle that life insurance policies cannot be contracts of indemnity, apparently on the ground that a life is not and cannot be the subject of valuation, and consequently cannot be valued, so as to afford indemnity.

(i) Same—General principles of construction.

It is a general rule of construction of insurance policies that the contract should, if possible, be sustained in favor of the insured. The reason of the rule is that the predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view in putting a construction on a policy. (Supreme Lodge Order of Mutual Protection v. Meister, 105 Ill. App. 471.) As will appear when we come to discuss the rules of construction of insurance contracts, this rule is applied to life insurance contracts, as well as contracts of insurance on property. The principle that life insurance contracts are not contracts of indemnity is in this connection tacitly ignored, indicating that it has been appealed to rather to fit special cases than because it has a philosophical foundation.

(j) Conclusion.

While contracts of insurance generally are regarded as contracts of indemnity, the prevailing doctrine is that life insurance contracts are not contracts of indemnity. The reasons on which this doctrine is based are, however, regarded by some courts as utterly inadequate and inconsistent with the fundamental principles on which the validity of the contract depends and in accordance with which it is construed. Certainly this is true so far as creditors' policies are concerned, and these, at least, must be looked upon as contracts of indemnity.

9. LIFE INSURANCE POLICY AS AN ENTIRE CONTRACT OR CONTRACT FROM YEAR TO YEAR.

- (a) Early doctrine.
- (b) Doctrine of *Manhattan Life Ins. Co. v. Warwick*.
- (c) Doctrine of *New York Life Ins. Co. v. Statham*.
- (d) Doctrine in other states.
- (e) Effect of form of policy.
- (f) Mutual benefit and fraternal insurance.

(a) Early doctrine.

In determining the rights of the parties under a contract of life insurance, it is sometimes necessary to determine first whether the contract is a continuing one, entire for the period of life, or merely a contract from year to year, or such other period as may have been selected for the payment of premiums. Especially does this question become important when forfeiture for nonpayment of premiums occurs, and the issue is as to the rights and remedies of the insured. As early as 1850 the question was raised in *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 534, and the contract was held to be a contract from year to year. In Ohio the superior court of Cincinnati in *Robert v. New England Life Ins. Co.*, 1 Disn. 355, decided in 1857 that a contract of life insurance was a contract running from year to year only. The decision was subsequently affirmed by the superior court in general term (2 Disn. 106). The same policy as that involved in the Georgia case was considered by the Supreme Court of New York in 1858, but with a result diametrically opposite. The court held in *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. 556, that a policy insuring for the term of life is not a contract from year to year, but an entire contract. In *Howell v. Knickerbocker Life Ins. Co.*, 26 N. Y. Super. Ct. 232, decided in 1865, the court apparently regarded the contract as one from year to year, but the decision was probably based on the form of the policy. On the other hand, in *O'Reilly v. Mutual Life Ins. Co.*, 2 Abb. Prac. (N. S.) 167, decided a year later, the court for the purpose of the argument assumed, though without deciding, that the contract was an entire contract.

(b) Doctrine of *Manhattan Life Ins. Co. v. Warwick*.

The tendency towards more liberal construction of insurance contracts, in order to protect the rights of the insured, was prob-

ably given an impetus by the desire on the part of many courts to protect the interests of the insured and beneficiaries in those policies which had, technically at least, become forfeited for nonpayment of premiums, where payment had been rendered impossible by the suspension of commercial intercourse during the civil war. The Supreme Court of Georgia, it is true, in *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 167, adhered to the doctrine it had already announced in 1850 in the *Ruse Case*. The Court of Appeals of Kentucky, however, in 1870, in *New York Life Ins. Co. v. Clopton*, 70 Ky. 179, 3 Am. Rep. 290; where the question involved was the effect of war as suspending the policy, regarded the contract as an entire one, and not as a contract from year to year. Similarly in *Cohen v. New York Mut. Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522, and *Sands v. New York Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535, the court approved the principles laid down in *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. (N. Y.) 556, and the *Clopton Case*. But the case that probably had the most influence, at this particular time, in determining the status of contracts suspended by the civil war, is *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218.

The policy in this case, in consideration of a certain sum in hand paid and an annual premium paid on or before July 23d in each year, granted insurance for the term of the natural life of the person insured. The court, following the decision in 26 Barb. 556, held that the policy was an entire contract for the whole term of the life of the insured, on condition that, if the annual premium was not paid on the date mentioned, the policy should cease and become void, and not a contract from year to year as the premiums should be paid. They regarded the contract as partly executory and partly executed. It was altogether executory on the part of the company, in the sense that they had done nothing towards performance on their part, but it had been largely executed on the part of the assured, who was a creditor of the person insured, whereby he had become invested with the right to the policy, which could be defeated only by his default. This right became vested when the advance premium was paid, and was a right to the insurance, not merely for one year, but for the life of the person insured. A new contract every year was not necessary to give the right, but only the annual payment of the premium was necessary to prevent the divesting of the right. The annual payments and giving receipts therefor were not new contracts, but only the performance of

a subsisting contract. Judge Christian dissented from the decision in this case, and, it would seem, took the view that the policy was a contract from year to year. He regarded the annual premium as the consideration for the risk, and that the risk assumed by the company on the one hand and the premiums paid by the assured on the other were correlative obligations. The obligation of the assured was to pay the annual premiums on the day specified, and that of the company was to assume the risk on the day of payment for 12 months from that day.

The decision in this case was quoted with approval and followed in *Hamilton v. Mutual Life Ins. Co.*, 11 Fed. Cas. 351, and in *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741. The court in this case held that the contract became a complete one on the payment of the first premium, covering the whole life, and not a mere contract from year to year. The chancellor, however, dissented from the opinion of the court, and held that the contract was one from year to year merely. In *Tait v. New York Life Ins. Co.*, 23 Fed. Cas. 620, where the issue was the same as in the *Hamilton Case*, the court took the opposite view, and apparently regarded the contract as a contract from year to year, quoting with approval the reasoning in the *Dillard Case* and in the dissenting opinion of Judge Christian in the *Warwick Case*.

(c) Doctrine of New York Life Ins. Co. v. Statham.

The question came before the Supreme Court of the United States in 1876 in *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, a case which may be regarded as the leading case on the point under consideration. Mr. Justice Bradley, speaking for the court, said that the contract of insurance is not for a year, with the privilege of renewal from year to year by paying annual premiums, but it is an entire contract of insurance for life, subject to discontinuance and forfeiture for nonpayment of a stipulated premium. It was contended that the payment of each premium is the consideration for insurance during the next following year, as in the case of fire policies; but this is regarded as untenable. Each installment of a premium is in fact part of the entire insurance. The value of the insurance for the earlier years is manifestly not the same as when the insured is older, but the payments are equal. There is, therefore, no relation between the premium and the risk for the year in which it is paid. Mr. Justice Strong dissented from the opinion of the court, holding that the contract was not entire,

but was a contract from year to year. In his opinion the true meaning of the contract is that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life on the payment of the same annual premium, if paid in advance.

Another case which has been regarded as an important one on this point is *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400, where the question was discussed at some length. It was held that a policy of life insurance, which stipulates for the payment of an annual premium by the insured, with a condition to be void on non-payment, is not an insurance from year to year, like a common fire policy, but the premium constitutes an annuity, the whole of which is the consideration for the entire insurance for life. The court criticises the views of Mr. Justice Strong in the *Statham Case* as unsound, though the opinion of Mr. Justice Bradley is also criticised as an unsatisfactory answer to Mr. Justice Strong's arguments.

This view of the contract of life insurance has been approved in *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Coffey v. Universal Life Ins. Co. (C. C.)* 7 Fed. 301; *McMaster v. New York Life Ins. Co. (C. C.)* 78 Fed. 33, reaffirmed in the hearing on the merits in 90 Fed. 40; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; *Drake v. Stone*, 58 Ala. 133; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Whitehead v. New York Life Ins. Co.*, 102 N. Y. 152, 6 N. E. 267, 55 Am. Rep. 787; *McGlynn v. Curry (Sup.)* 81 N. Y. Supp. 855; *Knickerbocker Life Ins. Co. v. Heidel*, 76 Tenn. (8 Lea) 488; *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435; *Foster v. Gile*, 50 Wis. 603, 8 N. W. 217 (separate opinion of Judge Cassoday); *Ewald v. Northwestern Mut. Life Ins. Co.*, 60 Wis. 443, 19 N. W. 513; and *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537. In *People v. Security Life Ins. & Annuity Co.* the opinions expressed by Justices Bradley and Strong in the *Statham Case* were referred to, but no intimation given as to which the court regarded as the true doctrine.

In *Fearn v. Ward*, 80 Ala. 555, 2 South. 114, the question arose on an issue as to the subjection of the proceeds of a life policy to the claims of creditors. It was contended that a contract of life insurance is an insurance for one year, with the privilege of continuing it by successive periodical payments, and that each payment was a renewal of the contract, or in a limited sense the making of a new contract. The court, however, regarded the contention as

untenable, and, following the *Statham Case*, said that the contract has its inception in the issue of the policy, and is a complete and entire contract for the life of the insured, continuing during life. The annual premium is not paid in consideration of insurance for a single year. Each premium constitutes a part of the contract as one and entire, the whole premiums being balanced against the whole insurance.

(d) The doctrine in other states.

The Supreme Court of Illinois, in *Mutual Ben. Life Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8, held that a policy issued to insure the life of a person for the term of life, in consideration of premiums to be paid annually, was an entire contract. The receipt given for the annual premium, which recites that the policy is thereby continued in force for another year, does not constitute a new contract, but is merely a continuance of the old one. The Supreme Court of Ohio, in 1876, in *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443, repudiated the doctrine laid down in the *Robert Case*, and, apparently basing its decision on the *Hill-yard Case*, held that the contract of life insurance is a continuing one, and not merely a contract from year to year. This doctrine was subsequently approved in *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

On the other hand, the Supreme Court of Pennsylvania, in *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, 100 Pa. 172, held that a contract of life insurance is really a contract for an insurance for one year in consideration of an advanced premium, with the right to the assured to continue it in force from year to year on payment of the premium stipulated. In view of the decision in *American Life Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256, it is perhaps doubtful if the Supreme Court of Pennsylvania would adhere to this doctrine. In the *McAden Case* it was held that on a wrongful forfeiture of the policy the insured was entitled to recover money paid in as premiums; the ground of the decision being that though rights had attached under the policy, and the beneficiary had in a sense enjoyed the protection which the policy afforded in the event of the death of the insured, yet in fact no actual benefit had accrued under the contract. It is evident that if, as held in the case under discussion, the premium paid is a premium for a single year, the insured must have received full consideration for the premium paid, and consequently would have no right to recover any portion back.

In *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495, where the policy was issued on an annual premium, to be paid on or before a certain date in every year, and to be void on failure of payment, it was held that the applicant, on the payment of the first premium, effected an insurance on his life for one year, and purchased the right to continue the insurance from year to year at the same rate. The court regards the extra amount paid above the actual cost of insurance for any year as consideration paid for the right to continue the insurance.

Reference has already been made to *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 34 Am. Rep. 522; *Id.*, 7 Abb. N. C. (N. Y.) 198, where the court declined to express any opinion on the relative merits of the principles laid down by Justices Bradley and Strong in the *Statham Case*. In some other states the courts have declined to commit themselves on the doctrine. In *Dungan v. Mutual Benefit Life Ins. Co.*, 46 Md. 469, after quoting the views expressed in *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495, and those expressed in *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, the court declined to decide between them as not necessary to the decision of the case. So, too, in *Thompson v. New York Life Ins. Co.*, 21 Or. 466, 28 Pac. 628, where the issue was as to the right of the insured after a wrongful forfeiture to recover premiums paid, reference was made to the conflict of opinion in the *Statham Case*, and, though leaning towards the doctrine announced by Mr. Justice Bradley, yet the court does not fairly decide the question.

(e) Effect of form of policy.

In nearly all the cases holding the contract to be entire, wherein the form of the policy is shown, the contract was expressly stated to be for the term of life, or, as in *Coffey v. Universal Life Ins. Co.* (C. C.) 7 Fed. 301, for a term of years. In *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 534, where the contract was regarded as one from year to year, the contract was also for the term of life, and in *Robert v. New England Life Ins. Co.*, 1 Disn. (Ohio) 355, the contract was for a term of seven years. On the other hand, in *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 167, the contract on its face required that it should be renewed from year to year by a payment of premiums. In *Howell v. Knickerbocker Life Ins. Co.*, 26 N. Y. Super. Ct. 232, where the court apparently regarded the contract as one from year to year, the policy was by its

terms for a term of one year, with the privilege of being continued in force from time to time on the payment of the stipulated premium. It would seem, therefore, that the general rule laid down in the **Warwick and Statham Cases** must yield to the form and provisions of the contract. This is well illustrated by *McDougall v. Provident Savings Life Assur. Soc.*, 135 N. Y. 551, 32 N. E. 251, reversing 64 Hun, 515, 19 N. Y. Supp. 481. The Supreme Court had followed the general rule that an insurance contract is entire, and held that the contract of the defendant company was an entire contract, not an insurance from year to year. The contract, which was dated July 23, 1884, purported to insure the person named therein until 12 o'clock noon of the 23d day of July, 1885, and the society agreed to renew and extend the insurance during each successive year on condition that the insured pay the premium stipulated on or before July 23d in each successive year. The Supreme Court regarded the particular form of the policy as unimportant, as it was clearly the intention of the contracting parties that the insurance should be continued until the death of the insured. The Court of Appeals, however, reversed the decision, holding that, because of the particular form of the contract, it must be regarded as a contract for term insurance merely, and not as a continuing contract. This view was subsequently approved by the federal court in *Rosenplaenter v. Provident Savings Life Assur. Soc.* (C. C.) 91 Fed. 728, affirmed in 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473; the policy involved being similar to that in the *McDougall Case*. The court indorsed the general rule that a contract of life insurance is a complete and entire contract for the life of the assured, and not merely an insurance from year to year, but held that the contract in this case is an insurance from year to year, with a privilege of renewal at the expiration of each year.

(2) Mutual benefit and fraternal insurance.

In the very nature of things mutual benefit and fraternal insurance cannot be an entire contract. The assessments paid carry the insurance only for a limited period, and purport to do nothing else. This was the holding in *Modern Woodmen v. Tevis*, 117 Fed. 369, 54 C. C. A. 293.

Such, too, is the inference to be drawn from the decisions in *McMahon v. Supreme Tent Knights of the Maccabees*, 151 Mo. 522, 52 S. W. 384, and *Carlson v. Supreme Council American Legion of Honor*, 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643.

It is to be noted, however, that in *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435, where the contract involved was that of a Masonic benefit association, Judge Black, in a dissenting opinion, held that according to the better authority an ordinary contract of life insurance is an entire insurance for life, subject to forfeiture for nonpayment of premium. There is nothing in the context to indicate whether by the term "ordinary contract" he meant what is commonly known as "straight life insurance," or merely the usual contracts of life insurance.

10. WHAT MAY BE THE SUBJECT OF INSURANCE.

- (a) Fundamental principles.
- (b) Property and its incidents.
- (c) Same—Rents, use, and occupancy.
- (d) Same—Marine insurance.
- (e) Existence and condition of property.
- (f) Same—Retrospective policies.
- (g) Subjects of life or accident insurance.
- (h) Subjects of guaranty and indemnity insurance.

(a) Fundamental principles.

In view of the general definition of insurance as a contract by which one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event (*Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457), what may properly be a subject of insurance? To determine this question it is obviously necessary to decide first what is, in the abstract, the subject of an insurance. In popular language we speak of a policy of fire insurance as "insuring" a certain building, or a policy of life or accident insurance as "insuring" the certain person for whose death or injury payment is to be made. While these expressions are perhaps sufficiently definite for all practical purposes, they are not accurate. It is not, in fact, the building or person that is insured, but it is the "interest" which the person procuring the policy has in the continued existence of the building or life that is insured. (*Wilson v. Hill*, 3 Metc. [Mass.] 66.) In other words, in a strict technical sense it is not the specific, corporate thing for the loss of which indemnity is promised, but the interest of the person procuring the policy in the thing that is the subject of the insurance (*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495).

That this is the true theory on which all rules as to what may be the subject of insurance must be based is the more easily understood when the principles of insurable interest are considered. For example, it is a fundamental rule that if the person procuring the policy parts with his interest before the loss he can recover nothing. As to him the insurance ceased when his interest terminated, though the thing in which he had an interest still exists. Again, it is a settled principle that an absolute or even a qualified property in the thing is not necessary to support the insurance, but any reasonable expectation of legitimate profit or advantage to spring therefrom is sufficient. From these principles we may deduce the further principle that any interest which furnishes a reasonable expectation of pecuniary benefit is a proper subject of insurance (*International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516). This interest may or may not be directly connected with a specific thing or person. It rests upon an expectation of advantage to be derived directly from the person or thing, or it may rest upon an incorporeal right growing out of some duty or obligation imposed by law or contract on one or several third persons.

As a basis for a discussion of the question propounded above, we may, therefore, deduce the general rule that **whenever the destruction or injury of any thing or person, or the impairment or breach of any right, duty, or obligation, would result in a diminution of estate, an interest in such thing, person, right, duty, or obligation is a proper subject of insurance.** For the purposes of the following discussion the concrete thing will be spoken of as the subject of the insurance; but it must be borne in mind that it is the interest in the concrete subject that is the real subject of the insurance.

(b) Property and its incidents.

In view of the general principles laid down in the preceding paragraphs it is evident that anything in which a property right may exist is a proper subject of insurance. It is not essential that the thing to which the insurance relates should have what is properly called a value or price. (*Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. [La.] 423, 39 Am. Dec. 542.) It may partake of the nature of personal property or real estate. As illustrative of the principle that it is the interest in the thing, rather than the thing itself, that is the subject of the insurance, it is said in *Mutual Assur. Soc. v. Holt*, 29 Grat. (Va.) 612, that, while interests in real estate on which there are buildings may be covered by insurance, land in itself is not a proper subject of fire insurance; the insurance of land against fire involving an absurdity. But it is

conceivable that an interest in the land itself might properly be insured against other causes of loss or damage. The whole thing need not be the subject of the insurance, as insurance may be written on part of a building (*Roots v. Cincinnati Ins. Co.*, 12 Ohio Dec. 535).

Though a policy insuring land as such against loss by fire or storm would perhaps be an anomaly, growing crops are recognized as a proper subject of insurance (*Mutual Fire Ins. Co. v. Dehaven* [Pa.] 5 Atl. 65). So, in view of statutes giving railroad companies an insurable interest in property in the vicinity of their tracks exposed to the risk of fire, it has been held in several cases that growing trees, shrubs, and flowers are, so far as their nature is concerned, proper subjects of insurance, though it may be that insurance companies would not write policies covering that class of property.

Pratt v. Atlantic & St. Lawrence R. Co., 42 Me. 579; *Mathews v. St. Louis & S. F. Ry. Co.*, 24 S. W. 591, 121 Mo. 298, 25 L. R. A. 161; *Campbell v. Missouri Pac. Ry. Co.*, 25 S. W. 936, 121 Mo. 340, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Dean v. Charleston & W. C. Ry. Co.*, 55 S. C. 504, 33 S. E. 579.

It is, of course, obvious that certain classes of property may by the charter or rules of the insurer be declared uninsurable.

Ingrams v. Mutual Assur. Soc., 1 Rob. (Va.) 661; *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217.

So, too, it may be that insurance on specific kinds of property, or property used for certain purposes, may be declared invalid, because the use is illegal. But it is clear that such specific exceptions do not affect the general rule.

(e) Same—Rents, use, and occupancy.

That rent may be a proper subject of insurance may, perhaps, be implied from *Carey v. London Provincial Insurance Co.*, 33 Hun (N. Y.) 315; but, however that may be, it may be regarded as settled, in Pennsylvania at least, that loss of rent by a landlord, or loss to the tenant by reason of his liability to pay rent while the building is untenanted, may be indemnified by insurance.

Royal Ins. Co. v. Heller, 133 Pa. 152, 19 Atl. 349, 7 L. R. A. 411; *Heller v. Royal Ins. Co.*, 177 Pa. 262, 35 Atl. 726, 34 L. R. A. 600.

So, in *German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682, ground rents were insured against loss by reason of noncompletion of buildings.

The use and occupancy of real property has also been regarded as a proper subject of insurance. While comparable with rent and profits, it is distinguished from them. Use and occupancy, as a subject of insurance, relates to the business use of which the property is capable. An insurance on use and occupancy is intended to indemnify the owner, if the property should not continue in the same condition of availability.

Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810; **Buffalo Elevating Co. v. Prussian Nat. Ins. Co.**, 71 N. Y. Supp. 918, 64 App. Div. 182; **Tanenbaum v. Freundlich**, 81 N. Y. Supp. 292, 39 Misc. Rep. 819; **Tanenbaum v. Simon**, 81 N. Y. Supp. 655, 40 Misc. Rep. 174, affirmed without opinion 82 N. Y. Supp. 1116, 84 App. Div. 642.

Profits of the trade or business have been regarded as a proper subject of insurance against fire (**Niblo v. North American Fire Ins. Co.**, 3 N. Y. Super. Ct. 551). In a North Dakota case (**In re Hogan**, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759) a landowner was insured against loss of revenue from his lands.

(d) Same—Marine insurance.

Vessels and their cargoes are obviously proper subjects of marine insurance, and it has been held that a raft, though not in the ordinary contemplation of maritime law a vessel, may be the subject of a cargo policy (**Moores v. Louisville Underwriters [C. C.]** 14 Fed. 226). But it is not merely vessels and their cargoes that may be the subject of marine policies. Interests connected therewith, though future and contingent, may also be made subjects of insurance. (**Bell v. Western Marine & Fire Ins. Co.**, 5 Rob. [La.] 423, 39 Am. Dec. 542.) Thus advances, freight, passage money, and profits may be made subjects of insurance.

As to advances, see **Providence Washington Ins. Co. v. Bowring**, 50 Fed. 613, 1 C. C. A. 583, 1 U. S. App. 183; **Burnham v. Boston Marine Ins. Co.**, 139 Mass. 399, 1 N. E. 837; **Phoenix Ins. Co. v. Parsons**, 129 N. Y. 86, 29 N. E. 87; **International Marine Ins. Co. v. Winsmore**, 124 Pa. 61, 16 Atl. 516.

As to freight, see **Riley v. Hartford Ins. Co.**, 2 Conn. 368; **Cole v. Louisiana Ins. Co. (La.)** 2 Mart. (N. S.) 167; **Hodgson v. Mississippi Ins. Co.**, 2 La. 341; **Katheman v. General Mut. Ins. Co.**, 12 La. Ann. 35; **McGaw v. Ocean Ins. Co.**, 23 Pick. (Mass.) 405; **Robinson v. Manufacturers' Ins. Co.**, 1 Metc. (Mass.) 143; **Stilwell v. Commercial Ins. Co.**, 2 Mo. App. 22; **United Ins. Co. v. Lenox**,

- 1 Johns. Cas. (N. Y.) 377; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 89, 2 Am. Dec. 139; *Livingston v. Columbian Ins. Co.*, 3 Johns. (N. Y.) 49; *Robbins v. New York Ins. Co.*, 1 N. Y. Super. Ct. 363; *Mellen v. National Ins. Co.*, 1 N. Y. Super. Ct. 500; *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.) 458.
- As to passage money, see *Marks v. Nashville Co.*, 6 La. Ann. 127; *Ogden v. New York Mut. Ins. Co.*, 35 N. Y. 418.
- As to profits, see *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659; *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Tom v. Smith*, 3 Caines (N. Y.) 245; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139; *Mumford v. Hallett*, 1 Johns. (N. Y.) 433; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516.
- By the custom of Philadelphia, insurance to cover premiums cannot be written in the same policy with that to cover the value of the property (*Barton v. Anthony*, 2 Fed. Cas. 984).

(e) Existence and condition of property.

A contract of insurance implies that the subject of the insurance is in existence at the date of the contract (*Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush [Ky.] 81, 3 Am. Rep. 301). This does not mean that insurance cannot be written on a future interest, but that, unless there is an expressed intent to cover an antecedent risk, a valid contract of insurance cannot be written if the subject thereof has ceased to exist.

This rule is fundamental, and it is deemed sufficient to refer only to *Kerr v. Milwaukee Mechanics' Ins. Co.*, 117 Fed. 442, 54 C. C. A. 616; *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 611, 58 Pac. 177; *Clark v. Insurance Co. of North America*, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; *Wilson v. New Hampshire Fire Ins. Co.*, 140 Mass. 210, 5 N. E. 818; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Bentley v. Columbia Ins. Co.*, 19 Barb. (N. Y.) 595; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683.

The rule applies to policies of reinsurance (*Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140), and, of course, in the case of a renewal of an existing policy (*Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. 191).

In the practical application of the rule the important question for determination is usually whether the contract was complete before the loss. If it was, the policy is valid, though it was not delivered or the premium paid until after the loss. On the other hand, if the contract was not complete, or if delivery of the policy and payment of pre-

mium were necessary to the completion of the contract, the destruction of the subject of insurance prevents the policy from attaching.

These principles are illustrated by the following cases: *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636; *Insurance Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423; *Schultz v. Phenix Ins. Co. of Brooklyn (C. O.)* 77 Fed. 375; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *City of Davenport v. Peoria Fire & Marine Ins. Co.*, 17 Iowa, 276; *Blanchard v. Waite*, 28 Me. 51, 38 Am. Dec. 474; *Kelm v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671; *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, 89 N. W. 997; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Henshaw v. Insurance Co.*, 73 N. Y. Supp. 1, 36 Misc. Rep. 405.

Not only must the subject of the insurance be in existence at the date of the policy, but it must continue to exist substantially as it is insured. A common condition of modern policies is that the insurance shall cease if the building fall, except as the result of the risk insured against (*Nave v. Home Mut. Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394). So it has been held that a policy on a "steamboat" terminates if the vessel is dismantled, so that it is no longer a steamboat, capable of being used as such (*Baker v. Central Ins. Co.*, 3 Ohio Dec. 478). The question as to the existence and condition of the subject of the insurance was also raised in *McMyler v. Union Casualty & Surety Co.* (Sup.) 84 N. Y. Supp. 170, where a policy of plate glass insurance was involved, and it was held that the existence of a hole near the center of the plate of glass did not indicate that the glass was not in existence at the date of the policy, or that it was in such condition as to be uninsurable.

(f) Same—Retrospective policies.

It is, however, recognized that there are circumstances under which a contract completed after the destruction of the subject of the insurance will bind the insurer (*New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. [N. Y.] 468). It is a familiar principle of marine insurance that a policy on a vessel which had been previously totally lost, but of which loss the owner had no knowledge at the time of procuring the insurance, is valid.

General Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674, affirming 20 Fed. Cas. 1321; *Kohne v. Insurance Co. of North America*, 14

Fed. Cas. 835; *Arkansas Ins. Co. v. Bostick*, 27 Ark. 539; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

Usually these policies contain the express stipulation that the risk attaches, whether the subject of the insurance is "lost or not lost." This is, in effect, a stipulation for indemnity against past, as well as future, losses, and, if made in good faith, will be upheld (*Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219). But it is held, so far as voyage policies are concerned, that such a stipulation is not necessary to render the policy retrospective, if the insured acts in good faith.

Insurance Co. v. Folsom, 18 Wall. 237, 21 L. Ed. 827, affirming 9 Fed. Cas. 349; *Hammond v. Allen*, 11 Fed. Cas. 382; *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Prac. (N. Y.) 351.

Mr. Justice Story, in *Hammond v. Allen*, 11 Fed. Cas. 382, was of the opinion that a time policy would not cover an antecedent loss, in the absence of a stipulation; but it was held, in *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827, affirming 9 Fed. Cas. 349, that a time policy antedated would cover a loss accruing between such date and the issuance of the policy. But the whole question is one of good faith (*Andrews v. Maine Ins. Co.*, 9 Johns. [N. Y.] 32), and, if the insured knew of the loss before taking out the insurance, even the stipulation "lost or not lost" will not avail to render the policy valid.

McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98; *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246; *Merchants' Ins. Co. v. Paige*, 60 Ill. 448; *Gauntlett v. Sea Ins. Co.*, 127 Mich. 504, 86 N. W. 1047.

Moreover, the insured, if he learns of the loss after making his application and before the contract is completed, is bound to communicate the fact to the insurer as soon as possible.

Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; *Watson v. Delafield*, 2 Caines (N. Y.) 224, affirmed in 1 Johns. (N. Y.) 150; *Snow v. Mercantile Ins. Co.*, 61 N. Y. 160; *Byrnes v. Alexander*, 1 Brev. (S. C.) 213.

The insured is not affected by the negligence of the master to inform him of the loss, though the master delays the communication so that insurance may be made (*Ruggles v. General Interest Ins. Co.*, 20 Fed. Cas. 1321, affirmed in 12 Wheat. 408, 6 L. Ed. 674).

It is, of course, obvious that the policy will not be retrospective, if by an express condition antecedent losses, known or unknown, are excepted (*Mark v. Ætna Ins. Co.*, 29 Ind. 390).

The principles just discussed have also been applied in fire insurance. That insurers may contract for antecedent risks, and by stipulation make their contracts retrospective, where by reason of the remoteness of the property it is not known, at the time the contract is entered into, whether or not it is destroyed, is recognized in several well-considered cases.

Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322; *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Prac. (N. Y.) 351; *Henshaw v. Insurance Co.*, 36 Misc. Rep. 405, 73 N. Y. Supp. 1.

It has, indeed, been held in some cases that, where the subject of insurance is at a distance and its condition unknown to either party, it would, in the absence of fraud, concealment, or misrepresentation, be implied that the contract was intended to be retrospective, though there was no clause therein equivalent to the words "lost or not lost."

Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379, affirming 26 N. J. Law, 268.

However that may be, it is well settled that, if the nonexistence of the subject of the insurance is known to either party, there is no contract.

German Ins. Co. v. Downman, 115 Fed. 481, 53 C. C. A. 213; *Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322; *Mead v. Phenix Ins. Co.*, 158 Mass. 124, 32 N. E. 945; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

Insurance on property known by the insurer to be nonexistent is, indeed, *ultra vires* (*Henshaw v. Insurance Co.*, 36 Misc. Rep. 405, 73 N. Y. Supp. 1).

(g) Subjects of life or accident insurance.

The subject of insurance in the case of a life or accident policy is the life insured (*Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365). That life may be a proper subject of insurance was asserted in the earliest life insurance case reported in this country (*Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38), and has never been questioned. As in the case of property insurance, the companies may and do restrict insurance to certain classes of lives, and the policy of the law may still further restrict the writing of life insurance on certain classes of persons. Thus, though such a point was not directly in-

volved in the case, it was practically decided in *Burt v. Union Central Life Ins. Co.*, 105 Fed. 419, 44 C. C. A. 548, affirmed in 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, that one convicted of a capital crime would not be a proper subject of insurance. Indeed, in the early case of *Lord v. Dall*, already referred to, it was said that, while the mere fact that the person who is the subject of the insurance is about to engage in an illegal act will not render the policy void, yet a policy issued to enable one to commit a crime without financial loss to a third person dependent on him would be void.

It is, of course, elementary that there can be no valid insurance on the life of one already dead at the time when the contract became complete.

Paine v. Pacific Mut. Life Ins. Co., 51 Fed. 689, 2 C. C. A. 459; *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, 26 C. C. A. 491; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 534; *Jacobs v. New York Life Ins. Co.*, 71 Miss. 658, 15 South. 639; *Le Favour v. Insurance Co.*, 1 Phila. (Pa.) 558, 2 Bldg. Ins. Cas. 158.

The time of completion of the contract and the condition of the life insured at that time thus become important elements and will be fully discussed elsewhere.¹

It would seem that, as in marine and fire insurance, life policies might be made retroactive. The only case from which such a doctrine can be inferred is *Philadelphia Life Ins. Co. v. American Life & Health Ins. Co.*, 23 Pa. 65. The defendant company insured the life of N. for one year from February 24, 1851, with the privilege of insurance for another year. On May 31, 1851, they reinsured a portion of the risk in the plaintiff company for the term of one year, but the time when the year was to begin or end was not stated. Unknown to either of the parties, N. was then dead, having been killed early in May. The court regarded the policy of reinsurance as intended to cover the same risk as the original policy, and as running one year from the date of the original policy, and not from the date of issuance, and that it was, therefore, retroactive in its operation. It is, however, possible that the principle may also be inferred from *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700, where the plaintiff was insured against accident as a leather merchant. He was in fact also a leather cutter, and while in that occupation received an injury. On applying for relief, he was informed that his policy did not cover such accident; but the company, to correct the mistake, issued

¹ See post, p. 451.

him a new policy, of the same date as the old one, covering both occupations, and consequently the former accident. The policy was held to be valid.

(h) Subjects of guaranty and indemnity insurance.

On the principle, stated in paragraph (a), that an interest in any right, duty, or obligation, the impairment or breach of which would tend to a diminution of estate, is a proper subject of insurance, it is evident that the commoner forms of guaranty insurance may be justified. In view of this principle, we may regard as proper subjects of insurance any right of property the continued existence of which depends on the solvency of debtors (*Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920), the fidelity of persons in places of trust (*People ex rel. Kasson v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124), the performance of contracts generally (*Union Trust Co. v. Citizens' Trust & Surety Co.*, 185 Pa. 217, 39 Atl. 886), compliance with the conditions of judicial bonds (*Industrial & General Trust v. Tod*, 67 N. Y. Supp. 362, 56 App. Div. 39), and the validity of titles to real estate (*Gauler v. Solicitors' Loan & Trust Co.*, 9 Pa. Co. Ct. R. 634). On the same principle, the liability of an employer for injuries to his employes (*Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689), or to third persons (*Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 429), may be regarded as proper subjects of insurance.

The liability of a carrier for injuries to passengers by reason of the negligence of its servants has been recognized as a proper subject of indemnity insurance.

Boston & A. R. Co. v. Mercantile Trust & Dep. Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; *Trenton Passenger Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213.

The liability of a carrier for loss of goods has also been regarded as a proper subject of marine insurance (*Ursula Bright S. S. Co. v. Amsinck* [D. C.] 115 Fed. 242) and of fire insurance (*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132).

11. GENERAL RIGHTS AND LIABILITIES INCIDENT TO THE CONTRACT.

- (a) Rights of policy holders in general.
- (b) Right to possession of policy.
- (c) Right to loan on policy.
- (d) Rights under endowment, participating, and tontine policies.
- (e) Matters peculiar to mutual companies.
- (f) Matters peculiar to mutual benefit associations.
- (g) Same—Expulsion of members.
- (h) Same—Remedies of members.

(a) Rights of policy holders in general.

As has been already pointed out, the relation between the insured and the insurer, when the latter is a stock company, is purely one of contract. The basis of all the rights which the insured possesses is this contract relation. If, for instance, a life company is absorbed by a second company, the insured may stand on his rights under the original contract. (*Davitt v. National Life Ass'n*, 36 App. Div. 632, 56 N. Y. Supp. 839.)

In the case of mutual companies, the relation of the policy holder is a dual one. Each policy holder of a mutual company is at the same time insurer and insured. In one aspect he is a mere holder of a policy, containing a contract of indemnity against loss by fire, with a specific and limited fund out of which that indemnity is to be made good. In another aspect, he is a member of the corporation, and, as such, his rights and liabilities are defined partly by the contract contained in the policy, partly by the statutes, and partly by the by-laws of the corporation. (*Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116.) He does not stand in the relation of a corporator in his own act of insurance, but as to this he is a stranger (*Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31), and the stipulations of his contract of insurance are no less binding than upon a stranger (*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300).

The basis of the rights and liabilities of the policy or certificate holders of mutual benefit associations is very similar to that of the insured in ordinary mutual companies. Especially is this true as to the rights of members of co-operative assessment companies. But in all mutual benefit associations, whether ordinary co-operative associations or fraternal benefit societies, the insured is a member of the association, though as to the insurance the relation between

the member and the association must be construed as a contractual one. (*Logsdon v. Supreme Lodge Fraternal Union*, 34 Wash. 666, 76 Pac. 292.)

On the insolvency or dissolution of an insurance company or mutual benefit association, the rights of policy or certificate holders are determined either by the general rules applicable to insolvent and dissolved corporations or by special statutes relating to insurance corporations. It is deemed sufficient for the present purpose to merely refer to the place where the decisions relating to this phase of the subject may be found.¹

(b) Right to possession of policy.

It has been said that a policy, as soon as signed, becomes the property of the insured, and is held by the insurer for his use (*Hall v. Commercial Ins. Co.*, 26 N. J. Law, 268). Even if this be regarded as a somewhat too general statement, it is held in several cases that acceptance of the premium and delivery of the policy to the insured or his agent vests the title and right of possession in the insured.

De Camp v. New Jersey Mutual Life Ins. Co., 7 Fed. Cas. 313; *Robinson v. Peterson*, 40 Ill. App. 132; *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537.

The principle laid down by the New Jersey court is, however, supported by the Supreme Court of the United States, which has held that if an agent, duly authorized to fill up and issue blank policies furnished him for that purpose, fills up such policy after a loss has occurred, the policy becomes the property of the assured, and, upon a refusal of the company to surrender it, the assured may proceed by action to recover the possession of the policy (*Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423).

Possession of the policy is *prima facie* evidence of title, but is not conclusive. *Ellicott v. United States Ins. Co.*, 8 Gill & J. (Md.) 166; *Wood v. Phoenix Ins. Co.*, 22 La. Ann. 617.

As a general rule the right to the possession of a life insurance policy during the term of insurance is in the person who effects the insurance and pays the premiums (*Bowers v. Parker*, 58 N. H. 565).

¹ See *Century Digest*, vol. 28, "Insurance," §§ 50-63, 85, 86, 1847. See, also, *American Digest Annuals 1897 to 1904*, inclusive, "Insurance," subdivision II.

As against persons other than the insured the right of possession is in the person for whose benefit the policy is taken out.

Sheets v. Sheets, 4 Colo. App. 450, 36 Pac. 310; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666. See, also, *Massachusetts Mut. Life Ins. Co. v. Hayes*, 16 Ill. App. 233; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94.

The owner of a life insurance policy may maintain an action for damages for the conversion thereof (*Wheeler v. Pereles*, 40 Wis. 424). The measure of damages for the conversion of a life insurance policy is the market value of the policy, with interest. If it has no market value, the face value thereof at the time of conversion may be shown. (*Woodworth v. Hascall*, 59 Neb. 124, 80 N. W. 483.) So the measure of damages for the conversion of a matured policy of life insurance is prima facie the face value thereof (*Staford v. Lang* [R. I.] 56 Atl. 684). In *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079, 16 Am. St. Rep. 476, it was held that the measure of damages for conversion, if the insured is still in good health and his life is insurable, is the present value of the sum named in the policy as benefit, less the present value of the amount of premiums necessary to procure another policy, similar in kind and value, on the same life, the life expectancy tables being taken into consideration in making such estimates; but, if the insured is not in good health and is not insurable, the number of years he was likely to live should be first ascertained from his general condition of health, the testimony of experts, and the life expectancy tables, the present value of the amount of the benefit named in the policy and of all the premiums to be paid thereon during his life being then computed, and, if the present value of the benefit exceeded that of the premiums to be paid, the measure of damages would be the difference between such values. In trover for a policy of fire insurance, the measure of damages is the amount that could have been recovered on the policy at the date of the commencement of the action (*Allemania Ins. Co. v. McHugh*, 1 Lack. Leg. Rec. [Pa.] 411).

(c) Right to loan on policy.

Policies of insurance often contain an agreement on the part of the insurer to make a loan to the insured, under certain circumstances, to an amount equal to a specified proportion of the surrender value of the policy. It has been held in Iowa that such an

agreement is not repugnant to Laws 23d Gen. Assem. c. 33, § 1, prohibiting life insurance companies from discriminating between individuals of the same class and expectancy of life, and from making any contract not expressed in the policy, or giving any special inducement for insurance not specified in the policy (*Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68). When the statute prohibited domestic insurance companies from loaning more than the reserve value of a policy on the policy itself as collateral security, a loan to a policy holder of \$250, the policy being taken as collateral, at a time when the policy was of the value of \$75.44 only, was absolutely void, and could not avail the company as a defense in an action on the policy (*Hoover v. Union Central Life Ins. Co.*, 6 Ohio Dec. 432).

Even under the agreement the insured is not entitled to a loan if he is in default in the payment of premiums, when such default works a forfeiture of the policy (*Union Cent. Life Ins. Co. v. Buxer*, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737). While the loss of a policy of life insurance does not entitle the insurer to treat any of the obligations of the policy at an end, yet the fact that the insurer refuses, on account of such loss, to make the insured a loan as agreed does not entitle the insured to recover damages, in the absence of a showing that he was unable to procure the money from other sources at the same rate of interest at which the insurer agreed to furnish it (*New York Life Ins. Co. v. Pope*, 68 S. W. 851, 24 Ky. Law Rep. 485), and the measure of damages for breach of the contract to make the loan is the difference between the rate of interest at which the company agreed to furnish the money and the rate, not exceeding the legal rate, which the insured was required to pay elsewhere. Where the divorced wife of the insured claimed the policy by virtue of an assignment executed during the continuance of the marriage relation, and had, subsequent to the assignment, paid all the premiums, the insured could not compel the company to make the loan, unless the wife's claim arising from the payment of premiums was satisfied, or unless she consented to the loan as stipulated in the policy (*Hatch v. Hatch* [Tex. Civ. App.] 80 S. W. 411).

Where life insurance policies were assigned to the insurer as security for a loan to the insured, it is not necessary for the latter's administrator to have possession or to make tender of the amount due before suing for the balance on the policies (*Steele v. Connecticut General Life Ins. Co.*, 31 App. Div. 389, 52 N. Y. Supp. 373).

(d) Rights under endowment, participating, and tontine policies.

A certain class of life insurance policies provides for the payment of premiums annually for a stated period of years, known as the endowment period. If the insured dies during that period, the amount of the policy is paid to the beneficiary, as in an ordinary life policy. If, however, the insured survives the endowment period, the policy matures, and he is entitled to the face of the policy, with the addition of a certain percentage of the surplus earned on his payments. These contracts are endowment policies.

Briggs v. McCullough, 36 Cal. 542; *State ex rel. Clapp v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028.

Some forms of endowment policies are payable when the beneficiary attains a specified age. Such policies do not mature until the beneficiaries reach that age, though, before then, all dues and assessments that can be required have been paid. (*Gray v. Merri-man*, 56 Minn. 171, 57 N. W. 463.) The contracts may state the form of an agreement to pay at the end of the endowment period a "share of the endowment fund not exceeding" a specified amount (*Congower v. Equitable Mutual Life & Endowment Ass'n*, 94 Iowa, 499, 63 N. W. 192). Such contracts are, of course, promises to pay, not an absolute amount, but merely such share as may be determined to be due, and in an action on such an agreement the plaintiff must allege the amount of his share. Generally, in an action on endowment policies, the insured must set out all the terms of the contract on which his rights depend (*Rebut v. Legion of the West*, 96 Cal. 661, 31 Pac. 1118).

A statute of Massachusetts (St. 1861, c. 186) provided that, on the nonpayment of a premium, the surplus earned by the policy should be applied to purchase extended temporary insurance. This statute was made applicable to the conditions of an endowment policy. As death within the extended period would give a right of recovery, it was held that the expiration of the endowment period would have the same effect in bringing the policy to maturity, and consequently the insured could recover, though the last premium had not been paid when the endowment period expired, subject, however, to the deduction of the amount of the premium. (*Carter v. John Hancock Mut. Life Ins. Co.*, 127 Mass. 153.)

Though, in an action on an endowment policy, an assessment levied after the action was brought cannot be set off against plaintiff's claim (*Hendel v. Reverting Fund Assur. Ass'n*, 2 Pa. Dist. R. 110),

the company may set off against an endowment policy assessments for the purpose of meeting claims on similar policies which fell due before the date when that policy became payable (*Wagner v. Keystone Mut. Ben. Ass'n*, 8 Pa. Dist. R. 231).

A common form of life policy is that known as a "participating policy," by virtue of the provisions of which the insured is entitled to share in the surplus earnings of the company in proportion to the premiums paid or the amount of his policy. This share in the surplus may be payable to him, at the option of the company, at a certain fixed period or as dividends. In the absence of a statutory provision, the time of distribution of a surplus to policy holders depends on the discretion of the directors of the company, except so far as it may be determined by the charter of the company or valid by-laws (*Rothschild v. New York Life Ins. Co.*, 97 Ill. App. 547). Under a policy entitling the insured to participate in the distribution of the surplus according to such principles as might be adopted by the company, the insured has no title to any such surplus until a distribution is made by the officers of the company, and under such provision the company is not required to distribute the entire surplus (*Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, reversing 57 N. Y. Supp. 871, 40 App. Div. 180). If the right of a policy holder to share in a surplus fund is contingent on his continuing a policy holder until the expiration of a certain period, he has no right to sue for his share of such fund until the expiration of the period limited (*Fry v. Provident Savings Life Assur. Soc.* [Tenn. Ch. App.] 38 S. W. 116). And generally such policies do not create a trust relation, so that a suit for accounting will be justified (*Taylor v. Charter Oak Life Ins. Co.*, 9 Daly [N. Y.] 489).

The right to participate may be enforced by the administrator of the insured after his death (*Vogler v. World Mut. Life Ins. Co.*, 51 How. Prac. [N. Y.] 301).

Where the statute provides several methods by which surplus may be distributed, the right of electing which method shall be adopted belongs to the company, and not the insured (*Eastman v. New York Life Ins. Co.*, 62 N. H. 1).

A provision that the policy holder shall be entitled to dividends does not contemplate that the insured may dictate the amount of dividend that shall be declared, or question the result after the discretion of the managers has been exercised in this behalf. The

contract is that the insured shall have the benefit of such dividends as the company shall appropriate, and not such as the policy holder or the court may think might have been appropriated. (*Fuller v. Knapp* [C. C.] 24 Fed. 100.) If the time of declaring a dividend is committed to the discretion of the directors of the company, the policy holder cannot demand a discovery and decree for a dividend, unless an abuse of discretion is shown (*Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167). A life policy issued on the reserve dividend plan provided that the dividend surplus in which all policies issued in any one year should be entitled to share should be apportioned and paid to the surviving and persistent policy holders at the end of 10 years. It was held that the company was not bound to credit annually the usual dividends and reserves of lapsed policies, but was entitled to use such funds for the payment of losses or expenses, and it was the surplus left at the end of the 10 years that was to be divided among the survivors. (*Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4.) In declaring dividends on policies, the directors must follow the established rules of the company (*Heusser v. Continental Life Ins. Co.* [C. C.] 20 Fed. 222); and the directors cannot limit it to such policies as may be continued in force by the payment of the next premium (*Mutual Ben. Life Ins. Co. v. Davis*, 73 S. W. 1020, 24 Ky. Law Rep. 2291).

The dividends are in some instances to be applied to the payment of premiums. If the policy so provides, any indebtedness due the company may be deducted from the accumulated profits before they shall be applied to the extension of the policy (*Tate v. Mutual Benefit Life Ins. Co.*, 131 N. C. 389, 42 S. E. 892). Where the constitution of an assessment company secures to the member the right to have his assessments paid out of a surplus or guaranty fund, this right cannot be affected by the conditions of a bond issued to the member representing his interest in the fund (*Knights Templars' & Masons' Life Indemnity Co. v. Vail*, 68 N. E. 1103, 206 Ill. 404, affirming 105 Ill. App. 331).

Policies of life insurance sometimes provide for the establishment of a reserve fund, to be used in emergencies for the payment of death claims, the surplus of which may be divided among the policy holders at the end of a stated period. Such a fund is for the benefit of the members living at the end of the period, and cannot be diverted from the purpose for which it was established. (*Farmers' Loan & Trust Co. v. Aberle*, 18 Misc. Rep. 257, 41 N. Y. Supp.

638.) A co-operative life insurance company issued "life reserve" and "life" certificates. A reserve fund was created on all holders of reserve certificates only, and a death fund by equal assessments on all members. The constitution provided that no person holding a life certificate should in any manner derive benefit from the reserve fund. It was held, therefore, that no portion of the reserve fund could be used for the payment of losses arising from the death of members holding life certificates. (*People v. Life & Reserve Ass'n*, 150 N. Y. 94, 45 N. E. 8, reversing 36 N. Y. Supp. 1059, 92 Hun, 592.) The only persons entitled to share in the distribution of a safety fund established by a co-operative assessment company are the persistent living policy holders, such fund being available for death claims only in case of an actual transfer to the mortuary fund (*People v. Family Fund Society*, 31 App. Div. 166, 52 N. Y. Supp. 867).

By the constitution, by-laws, and certificates of membership of an association, only members persisting for a year after the completion of the reserve fund were entitled to its benefits. Under legislative enactments, the association was compelled to cease issuing new certificates in that department, but continued to collect assessments from one member, who had no knowledge of the change. It was held that the member became entitled to a benefit in the reserve fund, as a persistent member, and that the rights of his beneficiary were the same, but that such rights could not be secured in an action at law on the contract, but must be sought in equity. (*Bird v. Mutual Union Ass'n*, 52 N. Y. Supp. 1044, 30 App. Div. 346.)

A policy holder in a co-operative assessment company, who is not a judgment creditor of the corporation, cannot sue in his individual capacity to compel the specific performance of a provision of the policy that a reserve fund would be created and, when exceeding a certain sum, should be divided among the policy holders (*Swan v. Mutual Reserve Fund Life Ass'n*, 20 App. Div. 255, 46 N. Y. Supp. 841, reversing 41 N. Y. Supp. 444, 17 Misc. Rep. 722).

Somewhat similar to the ordinary participating policies, but possessing features generally regarded as objectionable, are the tontine policies, so called, which were at one time very popular. Under the tontine system the surplus, which in an ordinary policy is usually returned to the policy holder as an annual dividend, instead of being divided and paid to the policy holder annually, goes into a fund, called the "tontine fund," the amount of which is credited to the particular class to which the policy belongs. When a policy lapses the reserved value becomes profits, and such profits go into

the tontine fund. At the end of the tontine period the fund is divided among the surviving holders of the class; that is to say, the persistent policy holders. This tontine plan does not affect the instrument as a policy of insurance on life, but merely engrafts thereon an endowment or profit-sharing feature.

Romer v. Equitable Life Assur. Co., 102 Ill. App. 621; *Simons v. N. Y. Life Ins. Co.*, 88 Hun (N. Y.) 309.

The tontine plan does not require an insurance company to keep the funds in each class separately invested, and it is no breach of its contract with assured that it neglected to do so; and, even if an obligation to do so could be implied from the provisions of the policy, it furnishes no excuse for nonperformance by the insured, by omitting to pay premiums (*Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522).

Under a tontine policy the insured acquires no right to share in the fund until the expiration of the tontine period.

Romer v. Equitable Life Assur. Co., 102 Ill. App. 621; *Simons v. N. Y. Life Ins. Co.*, 88 Hun (N. Y.) 309; *Columbia Bank v. Equitable Life Assur. Soc.*, 79 App. Div. 601, 80 N. Y. Supp. 428.

The tontine period includes the last day of the period, and consequently the right to share in the fund does not become effective until the day following.

Columbia Bank v. Equitable Life Assur. Soc., 79 App. Div. 601, 80 N. Y. Supp. 428; *Ellison v. Straw*, 97 N. W. 168, 119 Wis. 502.

So, where the insured died a short time before the expiration of the period, his beneficiary was entitled to no share in the tontine fund (*New York Life Ins. Co. v. Miller* [Ky.] 56 S. W. 975). The relation between the company and the policy holder under a tontine contract is not that of trustee and cestui que trust, but one of contract merely (*Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363). Until the expiration of the tontine period the liability of the company is contingent (*Avery v. Equitable Life Assur. Soc.*, 117 N. Y. 459, 23 N. E. 3). On the expiration of the period the relation of debtor and creditor arises.

Pierce v. Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; *Ellison v. Straw*, 97 N. W. 168, 119 Wis. 502.

It was held in *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433, that the policy holder is entitled to

an accounting on the expiration of the period; but the principle laid down in New York and the federal courts is that no accounting can be had.

Hunton v. Equitable Life Assur. Soc. (C. C.) 45 Fed. 661; *Everson v. Equitable Life Assur. Soc.*, 71 Fed. 570, 18 C. C. A. 251, affirming (C. C.) 68 Fed. 258; *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363; *Hackett v. Equitable Life Assur. Soc.*, 63 N. Y. Supp. 847, 30 Misc. Rep. 523, affirmed in 63 N. Y. Supp. 1092, 50 App. Div. 268.

The action of the company in making an apportionment of the tontine fund cannot be reviewed by the courts, unless fraud or irregularity in its procedure is shown (*Gadd v. Equitable Life Assur. Soc. [C. C.]* 97 Fed. 834).

A tontine dividend, becoming by the terms of a policy a part thereof, does not bear interest (*Stevens v. Germania Life Ins. Co.*, 62 S. W. 824, 26 Tex. Civ. App. 156).

(e) Matters peculiar to mutual companies.

As already stated, the policy holder in a mutual company not only sustains a contract relation to the company as the insured, but he is also a member of the company.

Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 68; *Mutual Fire Ins. Co. v. Miller Lodge*, 58 Md. 463; *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402; *Kochler v. Beeber*, 122 Pa. 291, 16 Atl. 354.* Merely signing an application is not sufficient, but the applicant must actually become insured (*Blue Grass Ins. Co. v. Cobb*, 58 S. W. 981, 22 Ky. Law Rep. 857; *Id.*, 72 S. W. 1099, 24 Ky. Law Rep. 2132). In the absence of any provision in the statute requiring one becoming insured to sign the constitution of the association, such a signature is not necessary to constitute him a member and an insured (*Richards v. Louis Lipp Co.*, 69 Ohio St. 359, 69 N. E. 616, 100 Am. St. Rep. 679), though, of course, the taking out of a policy would not be sufficient, if the law requires such signature (*Richards v. Swalm*, 7 Ohio N. P. 68).

The rule that one insured in a mutual company becomes a member thereof applies, though the insured is a municipal corporation (*French v. City of Millville*, 66 N. J. Law, 392, 49 Atl. 465). So, where a policy in a mutual company is transferred with the consent of the company to a purchaser of the property, such purchaser and

* See Century Digest, vol. 28, "Insurance," § 67.

assignee becomes a member of the company to the same effect as if he had been an original insured (*Cumings v. Hildreth*, 117 Mass. 309).

One insured on the cash premium plan does not become a member of the company (*Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149; *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921). So, also, one to whom a standard policy in the ordinary form was issued was not a member, in the absence of anything to show that it was issued on the mutual plan or subject to the rules and regulations incident to mutual companies (*Osius v. O'Dwyer*, 127 Mich. 244, 86 N. W. 831).

Since mutual companies are composed wholly of policy holders, an admission that one is a member of the company is an admission that a valid policy was issued to him (*Spencer v. Farmers' Mut. Ins. Co.*, 79 Mo. App. 213).

Though the insured in a mutual company by virtue of his membership is entitled to share in the profits (*Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371), the members do not bear to each other the relation of ordinary partners (*Cohen v. New York Mut. Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522). The contract of insurance is strictly between the corporation and the insured (*Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741). Nor are they partners as to third persons, though the officers and directors may be liable to persons not members (*Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149). In a general way it may be said that persons insuring in a mutual insurance company are associated in the nature of limited or special partners (*Krugh v. Lycoming Fire Ins. Co.*, 77 Pa. 15).

The members of a mutual company are bound by the acts of the majority of the associates, unless there be some restriction in the articles of association (*Dean v. Tucker*, 7 Fed. Cas. 306); and, as the directors elected by the members are their representatives, the acts of such officers are binding (*Koehler v. Beeber*, 122 Pa. 291, 16 Atl. 354). It is, too, a fundamental principle that the members of a mutual company are presumed to know and are bound by the charter and by-laws of the company (*Douville v. Farmers' Mut. Fire Ins. Co.*, 113 Mich. 158, 71 N. W. 517).^a

Where the parties to an insurance policy agree on the terms on which a dissolution of the membership may be had, the assured cannot withdraw from membership, except with the company's

^a See post, p. 602.

consent, without compliance with such terms (*Hyatt v. Wait*, 37 Barb. [N. Y.] 29). Generally membership in a mutual company ceases with the expiration of the policy and the payment of all liabilities incurred while the contract was in force (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545). Within the term of the policy the membership can, as a rule, be terminated only by a surrender of the policy (*Schroeder v. Farmers' Mut. Fire Ins. Co.*, 87 Mich. 310, 49 N. W. 536), and this may be so though the property insured is alienated (*Cumings v. Sawyer*, 117 Mass. 30). Notwithstanding the rule that one does not become a member of a mutual company until the policy is issued, and the further rule that he ceases to be a member on surrender of his policy, one who receives a policy in such a company, which he returns to be changed, so as to include more property, continues a member of the company, if he continues the payment of assessments, though he claims that the policy was never returned to him (*Rockland & Hardenburgh Town Fire Ins. Co. v. Bussey*, 48 App. Div. 359, 63 N. Y. Supp. 86).

The termination of one's contract with a mutual insurance company cannot defeat his right to participate in the profits already accrued (*Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371).

(f) Matters peculiar to mutual benefit associations.

It has been held in Maryland that the courts will extend to members of mutual benefit fraternal societies incorporated under the laws of Massachusetts, but residing in other states, the benefits accruing by reason of the statutes of Massachusetts to members residing in the latter state, since the ideas of mutuality and fraternity which form the basis of such societies require that all its members should be treated alike (*Supreme Council of Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244).

The laws of fraternal societies usually provide that the rights of members are secured to them only while they are in good standing in the society (*McMahon v. Supreme Council, Order of Chosen Friends*, 54 Mo. App. 468). Good standing in the order implies a compliance with the laws and regulations of the society (*McMurry v. Supreme Lodge Knights of Honor* [C. C.] 20 Fed. 107), whether such laws relate to the payment of dues and assessments (*Millard v. Supreme Council American Legion of Honor*, 81 Cal. 340, 22 Pac. 864), or to the conduct and habits of the member (*Supreme Council Royal Templars of Temperance v. Curd*, 111 Ill.

284). The good standing of members must be left to the determination of the societies themselves, and their determinations are conclusive in courts of justice, when they have proceeded to determine the question in accordance with the rules and regulations of the order (*High Court Independent Order of Foresters v. Zak*, 35 Ill. App. 613, affirmed in 136 Ill. 185, 26 N. E. 593).

The constitution of a fraternal benefit society having three classes of memberships was amended by creating a fourth class; the amendment providing that members of the other classes might be admitted to the fourth class, irrespective of any age limit. It was held that an application for transfer to the fourth class could not be arbitrarily rejected by the medical examiner on account of the applicant's age. (*Sourwine v. Supreme Lodge Knights of Pythias*, 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532.) But it cannot be said as a matter of law that the chief medical examiner of a fraternal order acted arbitrarily in rejecting an applicant 62 years of age on the ground that his pulse rate—76 when sitting, and 80 when standing—was excessive (*Supreme Lodge K. P. v. Andrews*, 31 Ind. App. 422, 67 N. E. 1009).

A member of a fraternal benefit society may, at any time, with or without cause, terminate his membership therein (*Chaloupka v. Bohemian Roman Catholic First Cent. Union*, 111 Ill. App. 585). His right to withdraw is not dependent on the consent of the association (*Borgraefe v. Supreme Lodge Knights and Ladies of Honor*, 26 Mo. App. 218). Nor is the association estopped from asserting that a member has withdrawn from membership, although it has denied his right to voluntarily withdraw, unless, in so doing, it has led the member to believe, to his prejudice, that he is still a member. It may, however, be required that there can be no withdrawal except on surrender of the benefit certificate. (*Patrons' Mut. Aid Soc. v. Hall*, 19 Ind. App. 118, 49 N. E. 279.) Where a membership terminates in any manner, the rights and liabilities of the member are the same as if the termination were by resignation (*Gray v. Daly*, 57 N. Y. Supp. 527, 40 App. Div. 41); but the presumption is that the membership continues until the contrary is made to appear (*Cornfield v. Order of Brith Abraham*, 64 Minn. 261, 66 N. W. 970).

In this connection reference may be made to *Conselyea v. Supreme Council American Legion of Honor*, 3 App. Div. 464, 38 N. Y. Supp. 248, affirmed without opinion 157 N. Y. 719, 53 N. E. 1124. The rules of the association required a member desiring to withdraw

to pay all charges against him and surrender his certificate, with a written release of all claims against the order. A member delivered to his wife his certificate, in which she was the beneficiary, under an agreement that she should pay assessments and he would not change the beneficiary. Thereafter she retained the certificate in her possession, paid the assessments to the association, who had knowledge of the facts, till the association, on tender, refused to accept the payments; the husband having resigned from the order without surrendering his certificate. The court held that, the certificate having passed into the possession of the wife, and the title thereto having vested in her for value, and she having thereafter paid the assessments to the defendant, who, through its subordinate council, had knowledge of these facts, it could not, in violation of its own laws, permit the husband, by his withdrawal through spite and malice, fraudulently to deprive her of the rights in and to the certificate which she had thus secured.

(g) Same—Expulsion of members.

A member of a fraternal benefit society may be expelled therefrom for a breach of the laws of the society, and thereby forfeit all rights possessed by virtue of his membership (*Moore v. National Council Knights and Ladies of Security*, 65 Kan. 452, 70 Pac. 352). If there is no claim that the member lacked mental capacity to enter into the contract which made him a member, his subsequent mental incapacity will not prevent his expulsion for failure to comply with its regulations (*Noel v. Modern Woodmen of America*, 61 Ill. App. 597). The proceedings for expulsion must, however, follow the formalities prescribed by the laws of the society, in order that the member shall be deprived of his rights.

Byram v. Sovereign Camp of Woodmen of the World, 108 Iowa, 430, 79 N. W. 144, 75 Am. St. Rep. 265; *State v. Fraternal Mystic Circle*, 9 Ohio Cir. Ct. R. 364; *Foxhever v. Order of Red Cross*, 24 Ohio Cir. Ct. R. 56; *District Grand Lodge No. 4, O. K. S. B. v. Menken*, 67 Ill. App. 576.

In the absence of a prescribed mode of procedure, the society may adopt any method of trial it chooses, provided it is fair (*Spilman v. Supreme Council Home Circle*, 157 Mass. 128, 31 N. E. 776). It is, of course, elementary that a member of a fraternal society cannot be expelled without due notice and an opportunity to be heard in defense.

Supreme Lodge A. O. U. W. v. Zuhlke, 30 Ill. App. 98, affirmed 129 Ill. 298, 21 N. E. 789; *Fritz v. Muck*, 62 How. Prac. (N. Y.) 69; *State v. Temperance Benevolent Ass'n*, 42 Mo. App. 485; *Women's Catholic Order of Foresters v. Haley*, 86 Ill. App. 330; *Supreme*

Lodge Knights of Pythias v. Eskholme, 35 Atl. 1055, 59 N. J. Law, 255, 59 Am. St. Rep. 609. But, if he puts himself in such position that notice cannot be given or could not benefit him, notice is excused (*Berkhout v. Supreme Council Royal Arcanum*, 43 Atl. 1, 62 N. J. Law, 103).

And generally, if the rules of the association provide for expulsion of a member on charges after the hearing of evidence, the member must be expelled only after he has had a fair trial upon legal evidence, such as would be admissible under the rules of the common law (*Modern Woodmen v. Deters*, 65 Ill. App. 368). The objection that notice was not given in time (*Slater v. Supreme Lodge Knights and Ladies of Honor*, 88 Mo. App. 177), or that the formalities prescribed were not followed (*Miller v. Grand Lodge Order Brith-Abraham*, 72 Mo. App. 499), may, however, be waived.

Termination of membership in a Masonic lodge, which is in substance and effect an expulsion, though not so in form, forfeits membership in a Masonic mutual benefit association, where it is provided in the certificate that expulsion from the lodge will work a forfeiture, and it is also a requisite of membership in the association that the member shall be a Mason in good standing (*Ellerbe v. Faust*, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149); but an illegal expulsion or suspension of the member from the lodge would not work a forfeiture of his rights, though the suspension is not set aside by the superior officers until after the death of the member (*Connelly v. Masonic Mut. Benefit Ass'n*, 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428).

(h) Same—Remedies of members.

Though there is some apparent contradiction between the decisions of the various courts as to the remedies to be pursued by a member of a benefit society who is aggrieved by the action of the society, it may be stated as a general rule that his rights depend in the first instance on laws of the society. A member of a mutual benefit association, for the purpose of preserving his rights as a member, must pursue the remedies granted to him by the rules of the association, before he can call in the aid of a court. (*Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012.) If the laws of the order do not prescribe such a method of procedure the member is not required to exhaust his remedies by appeal within the order before resorting to a court of law for redress (*Supreme Lodge K. P. v. Andrews*, 31 Ind. App. 422, 67 N. E. 1009). Thus, though a

member is by the laws of the society required to appeal to the supreme executive officer, he cannot, in the absence of a law so providing, be required to appeal from the decision of such executive to the supreme body itself (*Byram v. Sovereign Camp of Woodmen of the World*, 108 Iowa, 430, 79 N. W. 144, 75 Am. St. Rep. 265).

In several jurisdictions the general rule has been adopted that a member of a benefit society who has been expelled cannot resort to the courts for reinstatement without first exhausting the remedies provided by the constitution and by-laws of the society, and this, though the order of expulsion is void.

People v. Women's Catholic Order of Foresters, 162 Ill. 78, 44 N. E. 401; *Jeane v. Grand Lodge A. O. U. W.*, 86 Me. 434, 30 Atl. 70; *State v. Knights of the Golden Rule*, 10 Wkly. Law Bul. (Ohio) 2.

It is obvious, however, that where an appeal to the supreme executive is required an affirmance of the action of the lodge does not render the expulsion effectual by way of ratification or estoppel (*Byram v. Sovereign Camp of Woodmen of the World*, 108 Iowa, 430, 79 N. W. 144, 75 Am. St. Rep. 265). Where the laws of the order provide a method of taking and perfecting appeals, the superior body may nevertheless entertain an appeal not regularly taken and prosecuted, in the absence of any provision forbidding it so to do (*Vivar v. Supreme Lodge K. P.*, 52 N. J. Law, 455, 20 Atl. 36).

On the other hand, it has been held in Wisconsin (*Wuerfler v. Grand Grove Order of Druids*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940), that a by-law providing that, in case of any difference between a member and the lodge, the member shall apply to the grand lodge before commencing action, does not apply where the society denies the membership of a person. Similarly it was held in *Schrempp v. Grand Lodge A. O. U. W.*, 70 Mo. App. 456, that a member of a mutual benefit association who has been illegally expelled is not obliged to exhaust all of his remedies in the judicatories of the order before he can resort to the civil courts for a remedy, if to do so would be useless. But he must make known his dissent from such sentence of expulsion, and unless he takes some steps to secure his reinstatement he will be deemed to have acquiesced therein (*Glardon v. Supreme Lodge Knights of Pythias*, 50 Mo. App. 45).

Thus, where a member did not for nine years exercise his right to appeal to the supreme body or to the civil courts, the society was

justified in assuming that he acquiesced in the action of the society (Supreme Lodge K. P. v. Andrews, 31 Ind. App. 422, 67 N. E. 1009).

In view of the general rule that where a member of a mutual benefit society resorts, for the correction of an alleged wrong done to him, to the tribunals of the society, the judgment of such tribunals, when resulting fairly from the application of the rules of the society, is final (*McAlees v. Supreme Sitting Order of the Iron Hall* [Pa.] 13 Atl. 755), it has been held that proceedings of an association to expel members are quasi judicial, and where the local body, which, under the by-laws of the association, constitutes the court, acquires jurisdiction, its judgment pronounced in good faith will be binding (*Noel v. Modern Woodmen of America*, 61 Ill. App. 597), and will not be inquired into collaterally, in an action at law on the member's benefit certificate, where the procedure was not mala fide, or repugnant to natural justice (*Croak v. High Court I. O. F.*, 162 Ill. 298, 44 N. E. 525, affirming 62 Ill. App. 47). Though equity will not interfere by injunction to reinstate members of a mutual benefit association, unless there is a plain violation by the society of its own law (*Bauer v. Seegar*, 2 Wkly. Notes Cas. [Pa.] 242), if a member of a beneficiary association has been wrongfully expelled therefrom, he may compel his reinstatement by mandamus.

State v. Fraternal Mystic Circle, 9 Ohio Cir. Ct. R. 364, 3 Ohio Dec. 9;
Lavalle v. Societe St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392.

If, however, the member admits guilt of the offense for which he was expelled, mere informality or lack of notice will not justify reinstatement by mandamus (*State v. Temperance Ben. Ass'n*, 42 Mo. App. 485).

II. INSURABLE INTEREST—INSURANCE OTHER THAN LIFE.

1. Necessity of insurable interest in property.
 - (a) The common-law doctrine.
 - (b) Necessity of insurable interest at inception of policy.
 - (c) Necessity of insurable interest based on the principle of indemnity.
 - (d) Necessity of insurable interest at time of loss.
 - (e) Modification of rule requiring insurable interest at inception of risk.
 - (f) Necessity of insurable interest of appointee or assignee.
 - (g) Insurance without interest void as wagering contract.
 - (h) Invalidity of wager policies based on considerations of public policy.
 - (i) Severable contracts.
2. Nature and essentials of insurable interest in property.
 - (a) Scope of inquiry.
 - (b) Nature of title or ownership in general.
 - (c) Insurable interest does not imply property.
 - (d) Limited, qualified, contingent, or expectant interests.
 - (e) Equitable rights and rights of possession or occupancy.
 - (f) Enforceable rights or interests.
 - (g) Interest need not be personal.
 - (h) Expectation of profit or advantage.
 - (i) Interest in preservation of property.
 - (j) Extent of interest.
3. Persons having insurable interest in general.
 - (a) In general.
 - (b) Building on land of another.
 - (c) Interests dependent on relation to legal proceedings.
 - (d) Receivers and assignees.
 - (e) Executors and administrators.
 - (f) Trustees and cestuis que trustent.
 - (g) Interest in homestead.
 - (h) Husband and wife.
 - (i) Same—Wife's right of dower.
 - (j) Life tenants and remaindermen.
 - (k) Insurable interest of railroad in property along its route.
4. Insurable interest based on contract relations in general.
 - (a) Persons contracting to procure insurance.
 - (b) Interest of insurer.
 - (c) Buildings in process of erection.
 - ✓ (d) Interest in profits or future compensation.
 - (e) Lessor and lessee.
 - (f) Same—Buildings erected by lessee.
 - (g) Partners.
 - (h) Stockholders.

5. Insurable interest of agents, carriers, factors, and other bailees.
 - (a) Agents in general.
 - (b) Consignees and persons holding property in trust or on commission.
 - (c) Bailees—Warehousemen.
 - (d) Carriers.
6. Insurable interest of creditors and lienors in general.
 - (a) Creditors in general.
 - (b) Persons making advances.
 - (c) Lienors in general.
 - (d) Creditors having liens.
 - (e) Liens of mechanics and materialmen.
7. Insurable interest of mortgagor and mortgagee.
 - (a) Mortgagee.
 - (b) Mortgagor.
 - (c) Other persons interested in mortgage.
8. Insurable interest of vendor and vendee.
 - (a) Vendor.
 - (b) Vendee in general.
 - (c) Vendee holding under defective or fraudulent title.
 - (d) Vendee in executory contract.
 - (e) Vendee of personal property.
9. Insurable interest in subjects of marine insurance.
 - (a) Insurable interest in vessel.
 - (b) Same—Mortgagor and mortgagee.
 - (c) Same—Vendor and vendee.
 - (d) Same—Vessel under bottomry.
 - (e) Same—Liens and advances.
 - (f) Insurable interest in cargo.
 - (g) Insurable interest in profits and commissions.
 - (h) Insurable interest in freight.
 - (i) Reinsurance.
10. Termination of or change in insurable interest.
 - (a) Effect of termination of interest.
 - (b) What constitutes termination of interest in general.
 - (c) Transfer of subject of insurance.
 - (d) Same—Executory contract.
 - (e) Same—Reserving lien or mortgage.
 - (f) Same—Transfer to secure debt or by way of mortgage.
 - (g) Effect of judicial sale.
 - (h) Adjudication in bankruptcy or assignment for benefit of creditors.
 - (i) Interest of vendee.
 - (j) Interest of mortgagor and mortgagee.
 - (k) Effect on rights of third persons.
 - (l) Temporary suspension of interest.
 - (m) Change of interest.
11. Pleading and practice as to insurable interest in property.
 - (a) Pleading insurable interest—Necessity.
 - (b) Same—Insurable interest of assignees, appointees, etc.
 - (c) Same—Sufficiency of allegations.

11. Pleading and practice as to insurable interest in property—(Cont'd).
 - (d) Same—Defects, objections, and *aider by verdict*.
 - (e) Right to raise defense of want of *insurable interest*.
 - (f) Same—*Estoppel to deny interest*.
 - (g) Pleading lack of *insurable interest*.
 - (h) Reply.
 - (i) Issues, proof, and *variance*.
 - (j) Evidence—Presumptions and burden of proof.
 - (k) Same—*Admissibility*.
 - (l) Same—*Weight and sufficiency*.
 - (m) Trial and review.
12. Insurable interest—*Guaranty and indemnity insurance*.
 - (a) General principles.
 - (b) *Fidelity insurance*.
 - (c) *Credit insurance*.
 - (d) *Contract insurance*.
 - (e) *Judicial insurance bonds*.
 - (f) *Title insurance*.
 - (g) *Liability insurance*.
 - (h) *Conclusion*.

1. NECESSITY OF INSURABLE INTEREST IN PROPERTY.

- (a) The common-law doctrine.
- (b) Necessity of insurable interest at inception of policy.
- (c) Necessity of insurable interest based on the principle of *indemnity*.
- (d) Necessity of insurable interest at time of loss.
- (e) Modification of rule requiring insurable interest at inception of risk.
- (f) Necessity of insurable interest of appointee or assignee.
- (g) Insurance without interest void as *wagering contract*.
- (h) Invalidity of *wager policies* based on considerations of public policy.
- (i) Severable contracts.

(a) The common-law doctrine.

So far as marine insurance is concerned, it is undoubtedly true, as said in *Amory v. Gilman*, 2 Mass. 1, that, under the common law, it was not regarded as necessary in England that the insured should have an insurable interest in the property to render the policy valid, and prior to the adoption of any statute on the subject policies without interest were in this country regarded as valid contracts (*Williams v. Insurance Company of North America*, 9 How. Prac. [N. Y.] 365). In *Russell v. Union Insurance Co.*, 21 Fed. Cas. 28, decided in 1806, it was held that there was no law in this country prohibiting insurance without interest. This must be considered, however, as having reference only to marine insurance,

though there was at this time no law prohibiting policies without interest in any kind of insurance.

Such policies were also held valid under the common law in *Clendinning v. Church*, 3 Caines (N. Y.) 141, *Juhel v. Church*, 2 Johns. Cas. (N. Y.) 333, *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318, and *Shepherd v. Sawyer*, 6 N. C. 26, 5 Am. Dec. 517; but, as said in *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, the manifest evils attending such contracts led to the enactment, in England, of St. 19 Geo. II, c. 37, prohibiting insurance without interest, and similar statutes have been enacted in this country.¹ The theory that policies without interest were valid at common law is, however, denied in *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247, 14 Abb. Prac. 398.²

(b) Necessity of insurable interest at inception of policy.

Though it has been qualified in some cases, and especially in respect to marine insurance, it is now a well-settled principle in the law of insurance that the existence of an insurable interest in the property insured at the inception of the policy is essential to the validity of the contract.

This is the rule laid down in *Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524; *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409; *Seamans v. Loring*, 21 Fed. Cas. 921; *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 708; *Earnmoor v. California Ins. Co.* (D. C.) 40 Fed. 847; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Copeland v. Phoenix Ins. Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134; *Bibend v. Liverpool & London Fire & Life Ins. Co.*, 30 Cal. 78; *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587; *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Honore v. La Mar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Vernon Ins. & Trust Co. v. Bank of Toronto*, 29 Ind. App. 678, 65 N. E. 23; *Frierson v. Brenham*, 5 La. Ann. 540, 52 Am. Dec. 603; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Adams v. Rockingham Mut. Fire Ins. Co.*, 20 Me. 292; *Sawyer v. Mayhew*, 51 Me. 398; *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Strong v. Manufacturers' Ins. Co.*, 27 Mass. 40, 20 Am. Dec. 507; *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep.

¹ See post, p. 142.

² As to the validity of policies without interest at common law, see 3 Kent,

Com. (11th Ed.) p. 364; Arnould, *Marine Ins.* (Perkins' Ed.) vol. 1, p. 281.

325; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 826; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.) 301; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 42, 35 Am. Dec. 543; *Fowler v. New York Indemnity Co.*, 23 Barb. (N. Y.) 143 (dissenting opinion); *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, affirming (Super. Ct.) 5 N. Y. Supp. 183; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Bryan v. Farmers' Mutual Indemnity Ass'n*, 81 N. Y. Supp. 145, 81 App. Div. 542; *Graham v. Firemen's Ins. Co.*, 2 Disn. (Ohio) 255; *Vairin v. Oanal Ins. Co.*, 10 Ohio, 223; *Insurance Co. v. Butler*, 38 Ohio St. 128; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Wilson v. Trumbull Mut. Fire Ins. Co.*, 19 Pa. 372; *Sweeny v. Franklin Fire Ins. Co.*, 20 Pa. 337; *Commonwealth v. Globe Mut. Ins. Co.*, 35 Pa. 475; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 28 S. W. 628; *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125; *Dickerman v. Vermont Mut. Fire Ins. Co.*, 67 Vt. 99, 30 Atl. 808; *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Sun Ins. Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693 (but this decision was reversed by the Court of Errors and Appeals in 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330).³

(c) Necessity of insurable interest based on the principle of indemnity.

The nature of contracts of insurance as contracts of indemnity has been discussed elsewhere.⁴ As was said in *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, the doctrine that a marine or fire insurance policy is a contract of indemnity means that, in order to support it, the insured must have an interest in the property covered.

That the doctrine of insurable interest is based on the principle that the contract is one of indemnity is supported by *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 707; *Hidden v. Slater Mut. Fire Ins. Co.*, 12 Fed. Cas. 121; *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Honore v. La Mar Fire Ins. Co.*, 51 Ill. 400; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep.

³ As to the necessity of insurable interest at the inception of the contract, see *Arnould, Marine Ins.* (Perkins' Ed.) vol. 1, p. 235; 3 Kent, Com. (11th Ed.) p. 349; *Greenhood, Public Policy*, p. 238. See, also, *Code Ga. 1895*, vol. 2,

§ 2090; *Rev. Codes N. D. 1899*, §§ 4442, 4456; *Ann. St. S. D. 1901*, §§ 5284, 5298; *Code Mont. 1895*, §§ 3380, 3408.

⁴ Contracts of insurance as contracts of indemnity, see *ante*, p. 85.

499; *Strong v. Manufacturers' Ins. Co.*, 27 Mass. 40, 20 Am. Dec. 507; *Wilson v. Hill*, 44 Mass. 66; *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325; *Franklin v. National Ins. Co.*, 48 Mo. 491; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 34 Hun (N. Y.) 556; *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Wyman v. Wyman*, 26 N. Y. 253; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, affirming 51 Barb. 647; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 890; *Insurance Co. v. Butler*, 88 Ohio St. 128; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.) 458; *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.⁵

The contract of insurance is essentially a personal contract (*Traders' Ins. Co. v. Newman*, 120 Ind. 544, 22 N. E. 428). It is not the property that is insured, but the interest of the person who is indemnified against loss, and consequently the existence of such an interest as will afford a basis for indemnity lies at the very foundation of the contract.

The principle is also upheld in *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835, *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719, and *Lee v. Adsit*, 37 N. Y. 78.

(d) Necessity of insurable interest at time of loss. 1

From the principles announced in the preceding paragraph, it will readily be deduced that it is not sufficient that there should be an existing insurable interest at the inception of the policy only. If the contract is strictly one of indemnity, there must also be an existing insurable interest at the time the loss occurs.

This rule is supported by *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Bibend v. Liverpool & London Fire Ins. Co.*, 30 Cal. 78; *Birdsey v. City Fire Ins. Co.*, 26 Conn. 165; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; *Traders' Ins. Co. v. Pacaud*, 51 Ill. App. 252; *Hanover Fire Ins. Co. v. Orr*, 56 Ill. App. 621; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Orr v.*

⁵ See, also, Rev. Codes N. D. 1899, § 4455; Ann. St. S. D. 1901, § 5297; Code Mont. 1895, § 3405.

Hanover Fire Ins. Co., 158 Ill. 149, 41 N. E. 854, 49 Am. St. Rep. 146; Home Insurance Co. v. Duke, 75 Ind. 535; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Indiana Live Stock Co. v. Bogeman*, 4 Ind. App. 237, 80 N. E. 7; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Western Assur. Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265; *Phoenix Ins. Co. v. Moffitt* (Ind. App.) 51 N. E. 948; *Vernon Ins. & Trust Co. v. Bank of Toronto*, 65 N. E. 23, 29 Ind. App. 678; *Insurance Co. of North America v. Hegewald*, 66 N. E. 902, 161 Ind. 631; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Royal Ins. Co. v. Horton*, 14 Ins. Law J. 871; *Bell v. Firemen's Ins. Co.*, 3 Rob. (La.) 423; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292; *Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *White v. Robbins*, 21 Minn. 370; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *Clevinger v. Northwestern Mut. Ins. Co.*, 71 Mo. App. 73; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.) 301; *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. (N. Y.) 143 (dissenting opinion); *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, affirming 51 Barb. 647; *Graham v. Firemen's Ins. Co.*, 2 Disn. (Ohio) 255; *Highlands v. Lurgan Mut. Fire Ins. Co.*, 177 Pa. 566, 35 Atl. 728, 55 Am. St. Rep. 739; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418; 26 S. W. 628; *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125; *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185; *Dickerman v. Vermont Mut. Fire Ins. Co.*, 67 Vt. 99, 30 Atl. 808; *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534, 38 Pac. 186; *Jerde v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636.*

(c) Modification of rule requiring insurable interest at inception of risk.

Though it was held in the early case of *Seamans v. Loring*, 21 Fed. Cas. 920, that the insured must have a subsisting interest at the time when the policy would attach, and that an interest subse-

* See, also, *Greenhood*, Public Policy, Ann. St. S. D. 1901, § 5298; Code p. 238; Rev. Codes N. D. 1899, § 4456; Mont. 1895, § 3406.

quently acquired would not be sufficient, the rule has been modified in some cases. As was said in *Henshaw v. Mutual Safety Ins. Co.*, 11 Fed. Cas. 1189, though it is a settled rule, in the construction of policies of insurance, that, if the insured had no insurable interest at the date it was intended the contract should commence, the policy would be invalid, though he may have possessed such an interest at the time of loss, yet it is competent for the parties to contract with a view to such a condition of things. There are, moreover, strong reasons for the doctrine that the insured will be protected if he had an interest at the time of the loss, without any express stipulation to that effect, though he had no interest at the commencement of the risk. So, too, in the leading case of *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219, decided 30 years later, the court said that an insurable interest subsisting during the risk and at the time of loss is sufficient, though there was no existing interest at the time of effecting the policy. The same principle was applied to fire policies in the interesting case of *Sun Ins. Co. v. Merz*, 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330, reversing 63 N. J. Law, 365, 43 Atl. 693. In this case it was said that, though the early rule was that there must be an existing interest at the inception of the risk, reflection has led to the conclusion that contracts of insurance on property in which the insured had no interest at the time of the issuance of the policy are not invalid, if he acquires an interest during the life of the policy and retains it at the time when the loss occurs.

A similar rule seems to have governed *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400, *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 89 Atl. 1095, *Boston Ins. Co. v. Globe Fire Ins. Co.*, 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303, and *Sawyer v. Dodge County Mut. Ins. Co.*, 87 Wis. 503.

These decisions seem to be based to some extent on the analogy between those cases in which there is an acquisition of an interest during the risk and the cases of insurance on stocks of merchandise, where the general rule is that the policy will cover after-acquired goods which take the place of those sold.⁷

(f) Necessity of insurable interest of appointee or assignee.

Where the policy is issued to one having an interest, the loss payable to another, the policy is supported by the interest of the

⁷ See, also, *Arnould, Marine Ins.* (Perkins' Ed.) vol. 1, p. 238. As to shifting risk, see post, p. 757.

person taking the policy, and it is not necessary that the person to whom the loss is payable should also have an interest. 3

This is the doctrine announced in *Baughman v. Camden Mfg. Co.* (N. J. Ch.) 56 Atl. 376, *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 81 Mich. 348, *Guiterman v. German Am. Ins. Co.*, 111 Mich. 626, 70 N. W. 135, *Parks v. American Fire Ins. Co.*, 26 Mo. App. 511, *Marts v. Cumberland Ins. Co.*, 44 N. J. Law, 478, and *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384, 1 Abb. Prac. (N. S.) 345, 31 How. Prac. 30.

In *Tallman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Prac. (N. Y.) 71, it appeared that B. sold certain machinery to S., retaining title until the purchase price was paid. S. insured the property on B.'s account for one or two years, and, having failed to renew, the policy was renewed at the instance of B. The court, regarding this as an insurance by S., who had parted with his interest, held that, as S. had no interest, the policy was void, though by its terms it was payable to B., who had an interest. The case was, however, subsequently reversed by the Court of Appeals in *42 N. Y. 87, 33 How. Prac. 400, 4 Abb. Dec. 345; the court regarding the policy as an insurance by B. of his interest.

Freeman v. Fulton Fire Ins. Co., 38 Barb. (N. Y.) 247, has been cited as announcing a contrary rule; but, as pointed out in the *Frink Case*, it is to be distinguished, as the policy in the *Freeman Case* was taken out by persons having no interest and payable to them, though it was attempted to base a recovery on the interest of another for whom plaintiffs claimed to be acting, while in the *Frink Case* the insurance was taken out by one who actually had an interest, and a third person was appointed to receive the money. In accord with the general doctrine as to insurable interest are *Henshaw v. Mutual Safety Ins. Co.*, 11 Fed. Cas. 1189, where it was held that if a policy is taken out by A., payable to B., for the benefit of whom it may concern, and B. has an interest at the time of the loss, the policy is valid, though he had no interest at the inception of the policy, and *Traders' Ins. Co. v. Pacaud*, 51 Ill. App. 252, where it was held that, if a policy provides that the loss shall be paid to a certain person as his interest may appear, he cannot recover if, at the time of loss, he had no interest.

Where there is an absolute assignment of the policy, the assignee must have an insurable interest to support a recovery.

† *Merrill v. Colonial Mut. Fire Ins. Co.*, 169 Mass. 10, 47 N. E. 439, and *Perry v. Mechanics' Mut. Ins. Co.* (C. C.) 11 Fed. 478.

In the last case it is also held that, if the policy is payable to a third person, it must be supported by an insurable interest in the assignor. It has also been held that an assignment of the policy as collateral security will not enable the assignee to maintain an action thereon, if he did not have, at the time of the loss, any interest in the property insured.

Peabody v. Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339,
and *Bayles v. Hillsborough Ins. Co.*, 27 N. J. Law, 163.

So, too, it was held in *Birdsey v. City Fire Ins. Co.*, 26 Conn. 165, that if the original holder of a policy of insurance has no interest in the property at the time of the loss, no recovery can be had in his name for the benefit of one to whom it had been assigned as security. A different rule seems to have governed in *Merrill v. Colonial Mut. Fire Ins. Co.*, 169 Mass. 10, 47 N. E. 439, where it was held that, if the insured assigned the policy to a creditor as collateral, and the insurer consented to the assignment, the assignor did not thereby part with his interest in the policy, but remained the person insured. Consequently the fact that the assignee had no insurable interest was not a defense to the policy. It is possible, however, that the consent of the insurer was the determining factor in this case. Thus in *Blackburn v. St. Paul Fire & Marine Ins. Co.*, 116 N. C. 821, 21 S. E. 922, it was held that, while it is true that the rule is that a policy of insurance against fire is not valid if taken out by, or if assigned to, one who has no interest in the property insured, yet, if such an assignment is made with the consent of the insurer, without false representation or suppression of facts, it is nevertheless valid. In *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, it was said that if the insured has, with the consent of the insurers, assigned his interest to another, action may be brought in the name of the insured for the use of the person to whom he has so assigned his interest, and the fact that the insured has no interest at the time of loss does not affect the rights of the assignee.

(g) Insurance without interest void as wagering contract.

As said in *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.) 458, since insurance is a contract of indemnity, and its object is to avert a business loss, and not to allow the insured to make a positive gain, a policy made without interest is a wager, and not really insurance, except in name and form. While such

contracts were regarded as valid at common law, the cases in which wager policies were upheld involve contracts of marine, and not fire, insurance. Attention to this distinction was called in *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247, 14 Abb. Prac. 398. The modern rule as to such policies is stated in *Williams v. Insurance Co. of North America*, 9 How. Prac. (N. Y.) 365, where it was held that, in view of the New York statute (1 Rev. St. p. 662, §§ 8-10) prohibiting wagers, a policy of marine insurance not founded on interest is void as a wagering contract; and, as said in *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149, there is no doubt that an insurance against fire without any interest in the subject-matter is a wagering contract, which the law does not sanction.

In addition to the cases already cited in paragraph (b), (c), and (d), the rule that insurance without interest is void as a wagering contract is supported by *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64; *French v. Vix*, 2 Misc. Rep. 312, 21 N. Y. Supp. 1018; *Blackburn v. St. Paul Fire & Marine Ins. Co.*, 116 N. O. 821, 21 S. R. 922; *Pennsylvania Central Ins. Co. v. Gayman*, 7 Leg. Gaz. 234; *Morrison v. Tennessee Mar. & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772; *Talman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Prac. (N. Y.) 71; *Ætna Ins. Co. v. Miers*, 37 Tenn. 139; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247, 14 Abb. Prac. 398; *McCluskey v. Providence Washington Ins. Co.*, 8 Ins. Law J. 413; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; and *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160.*

Where the policy is supported by a substantial interest, it does not become a wager because the interest is overvalued.

Amory v. Gilman, 2 Mass. 1; *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564; *Huth v. New York Mut. Ins. Co.*, 21 N. Y. Super. Ct. 538; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, affirming 38 N. Y. Super. Ct. 281; *Coolidge v. Gloucester Mut. Ins. Co.*, 15 Mass. 341. But, as said in *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.) 458, if there is a gross overvaluation or bad faith on the part of the insured, the policy will be held void as a wager.

The rule that insurance without interest is void is not affected by the good faith of the persons obtaining the policy, according to

* See *Arnould, Marine Ins. (Perkins' (11th Ed.) pp. 362, 468; Greenwood, Ed.) vol. 1, p. 281; Parsons, Marine Public Policy, pp. 238, 240. Ins. vol. 1, pp. 155, 156; 3 Kent, Com.*

Agricultural Ins. Co. v. Montague, 38 Mich. 548, 31 Am. Rep. 326, though a different view would seem to have been taken in *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341, and *Monroe County Mut. Ins. Co. v. Robinson*, 5 Wkly. Notes Cas. (Pa.) 389. In this case it was said that the want of title of the insured is no defense to an action on the policy, if the insured entered on the land and took out the insurance in good faith, under a reasonable and honest belief that he had title. In *Alsop v. Commercial Ins. Co.*, 1 Fed. Cas. 564, it was held that there cannot, strictly speaking, be a wager policy unless both parties so intend. *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386, holding that there must be good faith, cannot be regarded as intending to say that good faith may be a substitute for insurable interest.⁹

As was said in *Wheeler v. Factors' & Trustees' Ins. Co.*, 29 Fed. Cas. 896, though a policy taken out by one having no insurable interest in the property is void, and the insured cannot recover, it does not follow that some one else who has an insurable interest, but for whom the insurance was not taken out, can be substituted in the place of the original insured; the company having no contract with such person. According to *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.) 301, if the insured owns the property when the insurance is effected, the contract does not become a wager policy by a transfer of the property before the happening of the loss, though the insured can no longer recover on it.¹⁰

(h) Invalidity of wager policies based on considerations of public policy.

Wager policies are held void, not because without consideration or unequal between the parties, but because they are contrary to public policy.

King v. State Mut. Fire Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683, and *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160. The general doctrine that public policy condemns insurance without interest is also approved in *Stetson v. Massachusetts Mut.*

⁹ See, also, 1 Rev. St. N. Y. p. 662, §§ 8-10, declaring wager contracts void, but providing (section 10) that the preceding sections should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law."

¹⁰ See *Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206, where the principle that a person having no interest in freight cannot insure it, was applied to the effect that, where a shipper took out insurance on freight, it was simply evidence that the bill of lading contained a special agreement that it should be at the shipper's risk.

Fire Ins. Co., 4 Mass. 330, 3 Am. Dec. 217, *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134, *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554, and *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

The court in *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683, said that, independent of considerations of public policy, if an insurance is made on property in which the insured has no pecuniary interest, though in other respects he may be deeply concerned in it, and on that ground willing to pay a fair premium, there is no reason why it cannot be valid as between parties; but, on strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy the property, such policies without interest are justly held void. In the leading case of *Insurance Co. v. Butler*, 38 Ohio St. 128, it was said that the reason upon which the principle that wager policies are contrary to public policy is based is the prevention of fraud and crime by removing all inducement and temptation to commit them which would naturally arise from the great disparity between the consideration paid and the indemnity received by the insured in such contracts.

This reasoning has been approved by *Bibend v. Liverpool & London Fire & Life Ins. Co.*, 30 Cal. 78; *Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 708; *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160; *American Basket Co. v. Farmville Ins. Co.*, 1 Fed. Cas. 618.

In *Riggs v. Connecticut Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, affirming (Super. Ct.) 5 N. Y. Supp. 183, attention was called to the fact that, though contracts of insurance without interest were permitted at common law, the manifest evils attending such contracts and the temptation which they afforded to fraud and crime led to the enactment in England of St. 19 Geo. II, c. 37, prohibiting wager policies, and the New York statute (1 Rev. St. p. 662, §§ 8-10) prohibiting wagers. Similar statutes have been passed in some other states.¹¹

(4) Severable contracts.

Where a policy covering property in which the insured has an interest also covers property in which he has no interest, the pol-

¹¹ See Rev. Codes N. D. 1899, § 4463; Mont. 1895, § 3412; Code Ga. 1895, Ann. St. S. D. 1901, § 5304; Code vol. 2, § 2090.

icy, though void as to the latter class of property, is valid as to the property in which an insurable interest exists.

Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828, and *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759.

In *Perry v. Mechanics' Mut. Ins. Co. (C. C.)* 11 Fed. 478, it was held that when two persons take out a policy jointly, and it transpires that one has no interest, the policy is not void as to the other person having an interest.

These principles also underlie the decisions in *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575, and *Oastner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554.

But in *Sun Ins. Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693, it was said that, if the contract was on a single consideration, it was entire and inseparable, and consequently entirely void.

2. NATURE AND ESSENTIALS OF INSURABLE INTEREST IN PROPERTY.

- (a) Scope of inquiry.
- (b) Nature of title or ownership in general.
- (c) Insurable interest does not imply property.
- (d) Limited, qualified, contingent, or expectant interests.
- (e) Equitable rights and rights of possession or occupancy.
- (f) Enforceable rights or interests.
- (g) Interest need not be personal.
- (h) Expectation of profit or advantage.
- (i) Interest in preservation of property.
- (j) Extent of interest.

(a) Scope of inquiry.

What constitutes an insurable interest in property has been the subject of much discussion. It is difficult to give a comprehensive and at the same time accurate definition. In the early history of insurance there was apparently a tendency to require title and ownership, or, at least, a substantial vested pecuniary interest, as a basis of insurable interest. But, as pointed out in *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, affirming (Super. Ct.) 5 N. Y. Supp. 183, the tendency of recent decisions has been in the direction of a more liberal doctrine than formerly prevailed. It is no longer required

that there should be an absolute right of property in the subject of the insurance. Yet there must be a real interest, existing or expectant, to serve as a basis for an insurable interest, though, as said in *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554, the nature of that interest is immaterial. The discussion in the following paragraphs is an attempt to define in general terms what are the essential elements of an insurable interest in property.

(b) Nature of title or ownership in general.

That absolute ownership of property gives an insurable interest may so fairly be regarded as axiomatic that it is scarcely necessary to cite authorities.

The principle is, however, asserted in *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *Miltenerberger v. Beacom*, 9 Pa. 198; *Providence Washington Ins. Co. v. The Sidney* (D. C.) 23 Fed. 88; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150.

In *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473, it was said that it is sufficient generally if the insured has an insurable interest under any status of ownership or possession. Even if the title comes through a fictitious person, it is sufficient (*David v. Williamsburg Mut. Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418, reversing 7 Abb. N. C. 47). When the laws of a mutual insurance company provide that the insured must have a fee-simple title, as in *Mutual Ins. Soc. v. Holt*, 29 Grat. (Va.) 612, no other title will support an insurable interest.

A similar principle appears to have governed *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 305, and *Eminence Mut. Ins. Co. v. Jesse*, 1 Metc. (Ky.) 523.

The fact that the title of the insured is defective, or even invalid, will not deprive him of his insurable interest, if he is in possession and use under a bona fide claim of title.

Travis v. Continental Ins. Co., 32 Mo. App. 198; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *Wolfe v. Security Fire Ins. Co.*, 89 N. Y. 49; *Bell v. Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542.

In *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358, it was said that one holding under a deed improperly acknowledged nevertheless has an insurable interest. A title claimed under a deed fraudulent as to creditors of the grantor

is sufficient to support an insurable interest; such conveyances being good between the parties.

Home Ins. Co. v. Allen, 19 S. W. 743, 14 Ky. Law Rep. 161, reversing 13 Ky. Law Rep. 95; *Lerow v. Wilmarth*, 9 Allen (Mass.) 382.

In the last case, where the grantor was not at the time insolvent, it was said that, as it was only in a contingency that he might at some future day become insolvent that the grantee was liable to be disturbed in his possession, such a contingency did not affect his insurable interest.

Where the conveyance was obtained by a fraud practiced on the grantor, as in *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43, the grantee had, nevertheless, an insurable interest, as the conveyance was voidable only, and not void. This principle was applied, also, in *Parks v. Hartford Fire Ins. Co.*, 100 Mo. 373, 12 S. W. 1058, to uphold the insurable interest of one having a lien on a homestead situated in Texas; it being held that, though the Constitution of Texas (article 16, §§ 50, 51) provided that a lien on a homestead, except for purchase money or improvements, shall be invalid, such a lien is voidable only at the instance of a person interested, and not necessarily void. Similarly, it was held in *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292, that a mere contingency that the title to the insured property may be affected by subsequent events does not affect the insurable interest. But a title claimed under a conveyance absolutely void ab initio will not support an insurable interest (*Perry v. Mechanics' Mut. Ins. Co.* [C. C.] 11 Fed. 478). So, in *Sweeny v. Franklin Fire Ins. Co.*, 20 Pa. 337, it was held that one who erected a house on land without license or color of title had no insurable interest in the house.¹

(c) Insurable interest does not imply property.

The principle laid down in *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281, affirmed in 63 N. Y. 77, that an absolute right of property does not necessarily constitute an element in determining the question of insurable interest, may be regarded as settled law. As was said in *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341, it is not essential to an insurable interest that

¹ As to what constitutes insurable interest in general, see 8 Kent, Com. (11th Ed.) p. 349; *Greenhood*, Public Policy, p. 241; Rev. Codes N. D. 1899, § 4551; Ann. St. S. D. 1901, § 5293; Code Mont. 1895, § 3401.

one should have a property in the thing insured, or an estate, legal or equitable, in it. The term "insurable interest" is more extensive than "property" or "estate." By that term is meant any benefit or advantage arising out of or depending on the thing.

These principles find support in *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409; *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 18 Fed. 250; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; *Copeland v. Phoenix Ins. Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374, affirming 64 Ill. App. 30; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Bartlet v. Walter*, 13 Mass. 267, 7 Am. Dec. 143; *Michael v. St. L. Mut. Fire Ins. Co.*, 17 Mo. App. 23; *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Goodall v. N. E. Mut. Fire Ins. Co.*, 25 N. H. 169; *Harvey v. Cherry*, 76 N. Y. 436, affirming 12 Hun, 354; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Grabbs v. Farmers' Mutual Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516; *Farmers' & Mechanics' Mut. Ins. Co. v. Meckes*, 10 Wkly. Notes Cas. (Pa.) 306; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.) 139; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

(d) Limited, qualified, contingent, or expectant interests

From the principles stated above it readily follows that legal title is unnecessary, and that any qualified or limited interest in the subject of the insurance is sufficient to give an insurable interest.

Such is the doctrine of *Home Protection v. Caldwell*, 85 Ala. 607, 5 South. 338; *Bartlet v. Walter*, 13 Mass. 267, 7 Am. Dec. 143; *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 113 Iowa, 653, 85 N. W. 985; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401; *Sussex County Mutual Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Miltenberger v. Beacom*, 9 Pa. 198; *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Westchester Fire Ins. Co. v. Weaver* (Md.) 17 Atl. 401, 5 L. R. A. 478; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Goodall*

v. New England Mut. Fire Ins. Co., 25 N. H. 169; **International Marine Ins. Co. v. Winsmore**, 124 Pa. 61, 16 Atl. 516.²

The interest one must have in the property insured, in order to give him an insurable interest, need be only slight and contingent.

This is the principle announced in **Fenn v. New Orleans Mut. Ins. Co.**, 53 Ga. 578; **Agricultural Ins. Co. v. Clancey**, 9 Ill. App. 137; **Tilley v. Connecticut Fire Ins. Co.**, 86 Va. 813, 11 S. E. 120; **Lazarus v. Commonwealth Ins. Co.**, 19 Pick. (Mass.) 81; **Bishop v. Olay Fire & Marine Ins. Co.**, 49 Conn. 167 (dissenting opinion); **Hume v. Providence Washington Ins. Co.**, 23 S. C. 190; **Southern Ins. & Trust Co. v. Lewis**, 42 Ga. 587; **Michael v. St. Louis Mut. Fire Ins. Co.**, 17 Mo. App. 23.³

It may properly be deduced as a corollary to the principles already discussed that if the title is merely one of expectancy, which will in time ripen into an absolute title, it is sufficient.

This is the doctrine laid down in **Home Ins. Co. v. Mendenhall**, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374, affirming 64 Ill. App. 30. It is also supported by **Traders' Ins. Co. v. Newman**, 120 Ind. 544, 22 N. E. 428; **Gaylord v. Laman Ins. Co.**, 40 Mo. 13, 93 Am. Dec. 289; **Miotke v. Milwaukee Mechanics' Ins. Co.**, 113 Mich. 166, 71 N. W. 463; **Clawson v. Citizens' Mut. Fire Ins. Co.**, 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538; **Carter v. Humboldt Fire Ins. Co.**, 12 Iowa, 287.⁴

Although it was said in **Hancox v. Fishing Ins. Co.**, 11 Fed. Cas. 409, that a contingent or expectant interest would support an insurable interest, though there was not, at the moment, anything corporeal or tangible to which it would attach, the better doctrine seems to be that of **Macarty v. Commercial Ins. Co.**, 17 La. 365, where it was said that a bare possibility that a right to property might afterwards arise is insufficient to give an insurable interest. The expectancy must be founded on some substantial basis. A mere hope, as was said in **Riggs v. Commercial Mut. Ins. Co.**, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, is not sufficient.⁵

² See **Arnould, Marine Ins. (Perkins' Ed.)** vol. 1, p. 235.

³ See 3 **Kent, Com.** (11th Ed.) p. 349; **Code Ga.** 1895, vol. 2, § 2090. But see **Rev. Codes N. D. 1899**, § 4453; **Ann. St. S. D. 1901**, § 5295; **Code Mont.** 1895, § 3403.

⁴ See **Rev. Codes N. D. 1899**, § 4451; **Ann. St. S. D. 1901**, § 5293; **Code Mont.** 1895, § 3401.

⁵ See **Parsons on Marine Insurance**, vol. 1, p. 163; **Code Ga.** 1895, vol. 2, § 2090; **Rev. Codes N. D. 1899**, § 4453; **Ann. St. S. D. 1901**, § 5295; **Code Mont.** 1895, § 3403.

(e) Equitable rights and rights of possession or occupancy.

As was said in *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 305, where the act of incorporation provides that the company may write insurance only when the insured has title in fee simple, an equitable estate in fee simple will support an insurable interest, as well as an absolute legal estate; and it may be stated as a well-settled rule that an equitable interest is sufficient to support an insurable interest.

This rule is supported by *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335; *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473; *Rumsey v. Phoenix Ins. Co.* (C. C.) 1 Fed. 396; s. c. (C. C.) 2 Fed. 429; *North British & Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429, 17 C. O. A. 175; *International Trust Co. v. Norwich Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608; *Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616; *Home Protection v. Caldwell*, 85 Ala. 607, 5 South. 338; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *American Cent. Ins. Co. v. Donlon* (Colo. App.) 66 Pac. 249; *Hough v. State Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759 (dissenting opinion); *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587; *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga. 578; *Danvers Mut. Fire Ins. Co. v. Schertz*, 95 Ill. App. 656; *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292; *Strong v. Manufacturers' Ins. Co.*, 27 Mass. 40, 20 Am. Dec. 507; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41; *Walsh v. Fire Association*, 127 Mass. 383; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *French v. Rogers*, 16 N. H. 177; *Goodall v. N. E. Mut. Fire Ins. Co.*, 25 N. H. 169; *Franklin Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Morts v. Cumberland Ins. Co.*, 44 N. J. Law, 478; *Williams v. Smith*, 2 Caines (N. Y.) 13; *McKechnie v. Sterling*, 48 Barb. (N. Y.) 330; *Allen v. Franklin Fire Ins. Co.*, 9 How. Prac. (N. Y.) 501; *Lasher v. N. W. National Ins. Co.*, 57 How. Prac. (N. Y.) 222, 18 Hun, 98, 55 How. Prac. 324; *Foster v. Van Reid*, 5 Hun (N. Y.) 321; *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.) 397; *Pelton v. West Chester Fire Ins. Co.*, 13 Hun (N. Y.) 23; *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247; *Cone v. Niagara Fire Ins. Co.*, 3 Thomp. & C. (N. Y.) 33, affirmed in 60 N. Y. 619; *McColdin v. Greenwich Ins. Co.*, 10 N. Y. St. Rep. 390; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Tallman v. Atlantic Fire & Marine Ins. Co.*, *42 N. Y. 87, 33 How. Prac. 400, 4 Abb. Dec. 345, reversing 29 How. Prac. 71; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Excelsior Fire Ins. Co. v. Royal Fire Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271, affirming 7 Lans. 138; *Redfield v. Holland Pur-*

chase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424; *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. 568; *Lebanon Mutual Ins. Co. v. Erb (Pa.)* 4 Atl. 8; *Tuckerman v. Home Ins. Co.*, 9 R. I. 414; *Hume v. Providence Washington Ins. Co.*, 23 S. C. 190; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.) 139; *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665.

It was held in *People v. Liverpool, London & Globe Ins. Co.*, 2 Thomp. & C. (N. Y.) 268, that possession, though without title, is sufficient to give the possessor an insurable interest. And where the possession is coupled with a beneficial use the possessor has an insurable interest.

Jacobs v. Mutual Ins. Co., 52 S. C. 110, 29 S. E. 533, and *Horsch v. Dwelling House Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806; or a claim of ownership as in *Travis v. Continental Ins. Co.*, 32 Mo. App. 198, and *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745. The rule is also applied in *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Brugger v. State Investment Ins. Co.*, 4 Fed. Cas. 472; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469.

Similarly, in *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242, where the insured was in possession claiming ownership and his right was disputed, it was held that he had, nevertheless, an insurable interest as long as he was in possession and his title had not been declared invalid.

A right of occupancy based on relationship to the true owner, as the right of a husband to occupy his wife's lands, is sufficient to support an insurable interest.

Reynolds v. Iowa & Nebraska Ins. Co., 80 Iowa, 563, 46 N. W. 659; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

(2) Enforceable rights or interests.

In some cases the broad rule has apparently been modified to some extent by the qualification that the right or interest must be one which the courts will protect or enforce. Thus, in *Farmers'*

Mut. Ins. Co. v. New Holland Turnpike Road Co., 122 Pa. 37, 15 Atl. 563, it was said that all definitions of insurable interest import an interest in the property insured which can be enforced at law or in equity. A mere general interest, not susceptible of enforcement, is not insurable. A similar doctrine seems to have been announced in Hubbard v. North British & Mercantile Ins. Co., 57 Mo. App. 1. On the other hand, according to Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, an insurable interest in property need not be necessarily a right in it which can be legally enforced. The true doctrine seems to be, not that insurable interests are restricted to rights or interests which may be enforced in law or equity, but that any right or interest which is enforceable is an insurable interest. In Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451, it was said that the result of a comparison of the definitions of the phrase "insurable interest" is that there need not be a legal or equitable title to the property insured, but, if there be a right in or against the property which some court will enforce, it will support an insurable interest.

Such, too, seems to be the doctrine in Tuckerman v. Home Ins. Co., 9 R. I. 414, Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587, McColdin v. Greenwich Ins. Co., 10 N. Y. St. Rep. 390, and Rohrbach v. Aetna Ins. Co., 62 N. Y. 613.

In view of these cases, it may be justifiable to interpret the Turnpike Company Case and the Hubbard Case not as restrictive, but as simply affirming that any enforceable right or interest is an insurable interest.

(g) Interest need not be personal.

As said in Graham v. Firemen's Ins. Co., 2 Disn. (Ohio) 255, while it is essential to a recovery on a policy of insurance that the person insured should have an interest in the property, such interest need not be personal. Similarly, in Peck v. New London County Mut. Ins. Co., 22 Conn. 575, it was said that, while want of interest will render a policy void, there is no rule that requires that the interest should be in the person's own right.

The same principle may be deduced from Insurance Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524, and Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499. It is on this principle that the insurable interest of an agent or trustee is based.

(h) Expectation of profit or advantage.

It has already been shown that any contingent or expectant interest in property is an insurable interest. It is also the rule, announced in many cases, that any reasonable expectation of legitimate profit or advantage to spring from property is sufficient to give an insurable interest.

This principle is supported by *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 113 Iowa, 652, 85 N. W. 985; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516.

It is on this principle that insurable interest in profits, commissions, etc., is based. It would seem, however, that such an expectation of profit or advantage must be founded on some substantial interest in the property.

Bishop v. Clay Fire & Marine Ins. Co., 49 Conn. 167 (dissenting opinion); *Miltnerberger v. Beacom*, 9 Pa. 198.

(i) Interest in preservation of property.

In the preceding paragraphs it has been shown, not only that a right of property is not an essential ingredient of insurable interest, but also that any limited or qualified interest, equitable right, or expectancy of advantage may support an insurable interest. From the preceding discussion it may be deduced, as expressed in *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516, that, as a general rule, **whatever furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of insurance is a valid insurable interest.** In *Agricultural Ins. Co. v. Clancey*, 9 Ill. App. 137, indeed, the court said that, though in early days the courts showed a disposition to restrict insurable interest to a clear, substantial, vested pecuniary interest, and to deny it to a mere expectancy without any vested right, the modern tendency is to relax the stringency of the earlier rule and admit to the protection of the contract wherever there is a reasonable degree of probability that the insured will suffer loss. But probably the better statement of the rule is that of *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 708, and *Herkimer v. Rice*, 27 N. Y. 163, where it is said that **whenever the insured has a direct pe-**

cuniary interest in the preservation of the subject-matter, so that he will suffer loss by its destruction, he has an insurable interest. Such an interest must be direct and immediate, and not based on a bare possibility, according to *MacCarty v. Commercial Ins. Co.*, 17 La. 365; nor, as said in *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11, can it be remote and consequential.

These principles are supported by *Sansom v. Ball*, 4 Dall. (Pa.) 459, 1 L. Ed. 908; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; *Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.)* 18 Fed. 250; *Providence Washington Ins. Co. v. The Sidney (D. C.)* 23 Fed. 88; *Nussbaum v. Northern Ins. Co. (C. C.)* 37 Fed. 524, 1 L. R. A. 704; *North British & Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429, 17 C. C. A. 175; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *American Cent. Ins. Co. v. Donlon*, 66 Pac. 249, 16 Colo. App. 416; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167; *Home Insurance Co. v. Mendenhall*, 64 Ill. App. 30; *Farmers' Mutual Fire & Lightning Ins. Co. v. Le Croy*, 91 Ill. App. 41; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Phoenix Ins. Co. v. Adams*, 8 Ky. Law Rep. 532; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 1 Am. Rep. 591; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; *Hayes v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754; *Guterman v. German-American Ins. Co.*, 111 Mich. 626, 70 N. W. 135; *Michael v. St. Louis Mut. Fire Ins. Co.*, 17 Mo. App. 23; *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Farmers' & Merchants' Ins. Co. v. Mickel* (Neb.) 100 N. W. 130; *Franklin Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. (N. Y.) 507; *MacLaren v. Hartford Fire Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 210; *Lawrence v. St. Mark's Fire Ins. Co.*, 43 Barb. (N. Y.) 479; *Colburn v. Lansing*, 46 Barb. (N. Y.) 37; *Kline v. Queen Ins. Co.*, 7 Hun (N. Y.) 267; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 34 Hun (N. Y.) 556; *Foley v. Farragut Fire Ins. Co.*, 71 Hun, 369, 24 N. Y. Supp. 1131; *McColdin v. Greenwich Ins. Co.*, 10 N. Y. St. Rep. 390;

Berry v. American Central Ins. Co., 55 Hun, 612, 8 N. Y. Supp. 762; *Waring v. Loder*, 53 N. Y. 581; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Same v. Aetna Ins. Co.*, 62 N. Y. 613; *Harvey v. Cherry*, 76 N. Y. 436, affirming 12 Hun, 354; *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716, affirming (Super. Ct.) 5 N. Y. Supp. 183; *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548, affirming 55 Hun, 612, 8 N. Y. Supp. 762; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503; *Vairin v. Canal Ins. Co.*, 10 Ohio, 223; *Insurance Co. v. Sampson*, 38 Ohio St. 672; *Farmers' & Mechanics' Mut. Ins. Co. v. Meckes*, 10 Wkly. Notes Cas. (Pa.) 306; *Caley v. Hoopes*, 86 Pa. 492; *Roberts v. Firemen's Ins. Co.*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642; *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707; *Ulmer v. Phoenix Fire Ins. Co.*, 61 S. C. 459, 39 S. E. 712; *Wagner v. Westchester Fire Ins. Co.*, 92 Tex. 549, 50 S. W. 569; *McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343; *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 813, 11 S. E. 120; *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Oushing v. Williamsburg City Fire Ins. Co.*, 4 Wash. 538, 30 Pac. 736; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Horsch v. Dwelling House Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806.*

(J) Extent of interest.

In some cases it has been held that, where one has only a qualified or contingent interest, his insurable interest is measured by the extent of that interest only.

Such seems to be the doctrine of *Michael v. St. Louis Mut. Fire Ins. Co.*, 17 Mo. App. 23, *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247, and *Phenix Ins. Co. v. Adams*, 8 Ky. Law Rep. 532.

So it was held, in *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475, that in a contract of reinsurance the interest of the insured extends no further than the risks he has taken. On the other hand, it was said, in *Insurance Co. v. Sampson*, 38 Ohio St. 672, that the quantity of the interest is not material, if it is substantial and valuable.

This rule is supported in *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292, *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 813, 11 S. E.

* See *Arnould, Marine Ins. (Perkins' Codes, N. D. 1899, § 4450; Ann. St. S. Ed.) vol. 1, p. 235; Parsons, Marine D. 1901, § 5292; Code Mont. 1895, § Ins. vol. 1, pp. 161, 162. See, also, Rev. 8400.*

120, *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081, and *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473.

In the last case it was said that the owner of property has an insurable interest to the extent of its value, notwithstanding the existence of a mortgage thereon sufficient in amount to absorb it. So, too, a lienor has an insurable interest, limited only by the value of the property and the amount of his lien. In *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421, it was said that, though one may have an especial insurable interest as a vendor holding an equitable lien, yet, if he also has the legal title, it is competent for him to insure, not only his beneficial interest, but the property itself. In *Millaudon v. Western Marine & Fire Ins. Co.*, 9 La. 27, 29 Am. Dec. 433, it was held that one who has an insurable interest to the full extent of the value of the property, but has insured only to one-half its value, still has an insurable interest to the extent of the other half, which he may protect by another policy.[†]

3. PERSONS HAVING INSURABLE INTEREST IN GENERAL.

- (a) In general.
- (b) Building on land of another.
- (c) Interests dependent on relation to legal proceedings.
- (d) Receivers and assignees.
- (e) Executors and administrators.
- (f) Trustees and cestuis que trustent.
- (g) Interest in homestead.
- (h) Husband and wife.
- (i) Same—Wife's right of dower.
- (j) Life tenants and remaindermen.
- (k) Insurable interest of railroad in property along its route.

(a) In general.

As was pointed out in the preceding brief, not only persons holding title to property by absolute ownership, but also those who have a limited, contingent interest therein, legal or equitable, or who have a reasonable expectation of benefit to be derived from its preservation, or would suffer loss from its destruction, have an

[†] See *Greenhood*, Public Policy, p. Ann. St. S. D. 1901, § 5296; Code 241; Rev. Codes N. D. 1899, § 4454; Mont. 1895, § 3404.

insurable interest in such property. The object of this and the succeeding briefs is to show the application to special cases of the general principles heretofore established.

In *Macarty v. Commercial Ins. Co.*, 17 La. 365, it was held that the mere possibility that a donation might be revoked on account of ingratitude on the part of the donee or birth of children to the donor was not such a contingent right or interest as would give the donor an insurable interest. It was held in *Farmers' Mut. Ins. Co. v. New Holland Turnpike Road Co.*, 122 Pa. 37, 15 Atl. 563, that a turnpike company which has voluntarily contributed to the construction of a public bridge, over which those using its road as well as the general public pass, has not an insurable interest in the bridge, since it has no right of property of any kind, nor of possession, nor of custody. The mere right to use was not a right belonging to the company in its corporate capacity, but a right belonging to all citizens in common.¹

But under the general rule that possession, coupled with the right of beneficial use, will support an insurable interest, it was held, in *People v. Liverpool & London & Globe Ins. Co.*, 2 Thomp. & C. (N. Y.) 268, that where the trustees of an asylum, in pursuance of an act of the Legislature, conveyed such asylum to the people, the state, being in possession, though without title, had an insurable interest. So, in *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229, where a corporation engaged in cultivating a farm had in its possession certain mules belonging to another, and used in the cultivation of the farm, such corporation had an insurable interest in the mules.

The principle that one who will suffer loss from the destruction of property has an insurable interest seems to be the governing principle in *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E.

¹ See, also, *New Holland Turnpike Road Co. v. Farmers' Mut. Ins. Co.*, 144 Pa. 541, 22 Atl. 923. This case grew out of the case cited in the text. It was an action to recover from the insurance company the premiums paid. It was held that the statute of limitations began to run against the right to recover premiums paid for insurance on property in which the insured had no

insurable interest as soon as the loss occurred and the insurance company refused to repay the premiums, if, indeed, the statute did not begin to run when the premiums were paid. The fact that the insured did not know that he had no insurable interest until a decision of the Supreme Court, rendered some years afterwards, in an action by him on the policy, did not affect the question.

1078, 36 L. R. A. 374, affirming 64 Ill. App. 30, where a father purchased at a chancery sale certain lands, placing his son in possession thereof, with the intention that the son should eventually inherit the property. It was held that the son, being in possession as heir expectant, with a reasonable expectancy of becoming the owner in fee, had an insurable interest. Where one went into possession of premises owned by his son under an agreement that he might occupy the premises as a home for life, as in *Berry v. American Central Ins. Co.*, 8 N. Y. Supp. 762, 55 Hun, 612, such person had an insurable interest. In *North British & Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429, 17 C. C. A. 175, one who had a legal title to and derived his support from the property had an insurable interest. In *Caley v. Hoopes*, 86 Pa. 493, the vendor of a farm, who for a portion of the consideration entered up a judgment, which he subsequently assigned, agreeing to become security for its payment, had an insurable interest in the buildings on the farm by reason of his liability on the transferred judgment. The owner of unused internal revenue stamps has an insurable interest therein, according to *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081, though he may be able to reimburse himself from the government in case of their loss before being used. In *Insurance Co. v. Thompson*, 95 U. S. 547, 24 L. Ed. 487, sureties on the bond of a distiller, who, under their bond, were liable for the government tax on the whisky stored in the distiller's warehouse, had an insurable interest in the whisky by reason of their liability for the government tax.

Where the pastor and ex-officio trustee of a church bought in the building with his own money on the foreclosure of a mortgage, as in *Caraher v. Royal Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858, he had an insurable interest, notwithstanding the general rule that a trustee cannot purchase for his own benefit. In *Whitehouse v. Cargill*, 88 Me. 479, 34 Atl. 276, certain real estate was devised, with a direction to the devisee to pay plaintiff \$500 when she became 21 years of age. Defendant was appointed guardian of plaintiff. Subsequently the devisee conveyed the real estate to defendant by warranty deed. It was held that defendant had an insurable interest. It was, however, held, in *Baldwin v. State Ins. Co.*, 60 Iowa, 497, 15 N. W. 300, that a son has no insurable interest in his father's property by reason of the relationship.

(b) Building on land of another.

One who has built a house on the land of another has an insurable interest in such house.

Fireman's Fund Ins. Co. v. Gatewood, 10 Ky. Law Rep. 117; *Abbott v. Hampden Mutual Fire Ins. Co.*, 30 Me. 414. But he will have no insurable interest, according to *Sweeny v. Franklin Fire Ins. Co.*, 20 Pa. 337, if he is a mere trespasser.

In *Greenwich Ins. Co. v. Louisville & N. Ry. Co.*, 66 S. W. 411, 112 Ky. 598, 56 L. R. A. 477, 99 Am. St. Rep. 313, it was held that one who was permitted by a railroad company to construct a building on its right of way had an insurable interest, notwithstanding the condition that the company should not be liable for loss or damage to the building by fire. Where B. entered into an agreement with L. to grant him the land on which a building was to be erected, on the condition that L. should erect a building on the adjacent lot for B., and L. entered upon the property, erected his own building, and nearly completed the building to be erected for B., it was held, in *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587, that L. had an insurable interest in the building he had erected for himself.

Reference may also be made to *Batcheller v. Commercial Union Assur. Co.*, 143 Mass. 495, 10 N. E. 321, where A. built a schoolhouse under a written contract and subsequently bought the land on which the house was built. The question whether A. had an insurable interest in the schoolhouse, by reason of possession or otherwise, was ruled on in the trial court, but was not passed on in the appellate court, not being raised by exceptions.

(c) Interests dependent on relation to legal proceedings.

A sheriff, by seizure on attachment, acquires a special property in the goods seized, which gives him an insurable interest therein, according to *White v. Madison*, 26 N. Y. 117, 26 How. Prac. 481. In *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.) 139, the interest which one acquires in property purchased at execution sale is insurable, though no money has been paid and no deed received. And where land was purchased at a chancery sale in partition, but the 20 days provided to intervene between the filing of the master's report and the confirmation of the sale had not elapsed, and no deed had issued, it was held, in *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45

N. E. 1078, 36 L. R. A. 374, affirming 64 Ill. App. 30, that the presumption was that the purchaser had complied with the usual decree entered in such cases, and had paid part, if not all, of the purchase money, and was entitled to his deed at the expiration of the 20 days, so as to give one who claimed under such purchaser an insurable interest. Even where the bidder at sheriff's sale agreed to sell the property bid in to another, who paid the consideration and bought for his own benefit, the fact that through some mistake the deed was made by the sheriff to a third person did not affect the insurable interest of the beneficial owner (*Lebanon Mut. Ins. Co. v. Erb*, 4 Atl. 8, 112 Pa. 149).

A debtor, whose property has been sold at execution or other judicial sale, has an insurable interest, if a right of redemption remains.

Chamberlain v. Insurance Co. of North America, 3 N. Y. Supp. 701, 51 Hun, 636; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619, affirming 3 Thomp. & C. 33; *McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343; *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 5 Am. Rep. 297.

And in the *Cone Case* it was held that, though the right of the debtor to redeem had ceased, he might still have an insurable interest, if the right of his judgment creditors to redeem remained. The attorneys of a mortgagee have, as such, an insurable interest in the mortgaged property, where it has been sold under foreclosure, but part of the purchase money has not been paid, and they have obtained an order of court for a resale at the risk of the purchaser (*Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499).

(d) Receivers and assignees.

A receiver holds such relation to and is under such personal responsibility for the safety of property in his hands that he has an insurable interest.

Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343.

It was held, too, in *In re Hamilton* (D. C.) 102 Fed. 683, that a receiver in bankruptcy has an insurable interest in property so held by him. An assignee for the benefit of creditors has an in-

surable interest in the property, though he has not yet qualified or executed his bond.

Phoenix Ins. Co. v. Adams' Trustee, 8 Ky. Law Rep. 532; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473.

(e) Executors and administrators.

The question whether executors and administrators as such have an insurable interest in the property of the decedent is an interesting and important one. It was held, in *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404, that executors to whom real property is devised have an insurable interest therein by virtue of the trust. So, in *Globe Ins. Co. v. Boyle*, 1 Cin. Super. Ct. Rep'r (Ohio) 444, it was held that an executrix, in her capacity as trustee for creditors and devisees, has an insurable interest. And it is not necessary that she should be described as executrix or trustee in the policy (*Security Ins. Co. v. Kuhn*, 108 Ill. App. 1). And in *Clarke v. Firemen's Ins. Co.*, 18 La. 431, it was said that an administrator has an insurable interest. The rule, however, adopted by the New York courts, seems to be that an administrator has no such beneficial interest in the estate as will support an insurable interest.

Wyman v. Wyman, 28 N. Y. 253; *Beach v. Bowery Fire Ins. Co.*, 8 Abb. Prac. (N. Y.) 261, note.

The leading case is *Herkimer v. Rice*, 27 N. Y. 163, where the question involved was whether the administrator of an insolvent estate had an insurable interest in buildings situated on land belonging to the estate. The court regarded the administrator as representing, not merely the decedent, but to a certain extent the creditors of the estate, and, on the general ground that a creditor of one who has died intestate leaving no personal property has an insurable interest, it was held that an executor or administrator of an insolvent estate, where the payment of debts is dependent on the real estate, has an insurable interest in buildings which constitute the principal value of such real estate. Subsequently, in *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, affirming 51 Barb. 647, the Court of Appeals reaffirmed the doctrine in the *Herkimer Case*, but distinguished the present case, in that the estate was not insolvent, and held, therefore, that an administrator of a solvent estate has no

B.B.INS.—11

such interest in the real estate as will support a contract of insurance.

The doctrine of these cases has been approved in *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, and *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

In *Colburn v. Lansing*, 46 Barb. (N. Y.) 37, it appeared that the testator gave an annuity to M. for her support, and provided that she should be furnished with comfortable house room to keep house in by herself. In certain proceedings instituted a house was designated, of which M. took possession. It was held that as the estate was charged with the expense of providing a residence for M., and was directly interested that she should occupy the premises indicated, the estate had an insurable interest in the designated property.

(f) Trustees and cestuis que trustent.

It was said in *Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524, that a trustee, though having no personal interest in property, yet has an insurable interest therein.

This principle has been approved in *Lane v. Maine Mut. Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Washington Fire Ins. Co. v. Kelly*, 82 Md. 421, 3 Am. Rep. 149; *Rhode Island Underwriters' Ass'n v. Monarch*, 98 Ky. 305, 32 S. W. 959; *Babson v. Thomaston Mut. Fire Ins. Co.*, 2 Fed. Cas. 306; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; *Graham v. Firemen's Ins. Co.*, 2 Disn. (Ohio) 255; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169.

Where real property is held in trust for the benefit of other persons, the cestuis que trustent have an insurable interest.

Lerow v. Wilmarth, 9 Allen (Mass.) 382; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. (Mass.) 81.

(g) Interest in homestead.

The head of a family, out of whose property a homestead has been set apart, has an insurable interest therein, according to *German-American Ins. Co. v. Davidson*, 67 Ga. 11; and where a husband occupies, with his wife and family, as a homestead, property belonging to the wife, the right so to occupy is of a pecuniary value to him, giving him an insurable interest.

This is the rule in *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658; *Farmers'*

Mut. Fire & Lightning Ins. Co. v. Lecroy, 91 Ill. App. 41; *American Central Ins. Co. v. McLanathan*, 11 Kan. 533; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 68 N. W. 920; *Reynolds v. Iowa & Nebraska Ins. Co.*, 80 Iowa, 563, 46 N. W. 659; *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 113 Iowa, 652, 85 N. W. 985.

Where property had been occupied as a homestead by husband and wife, and after desertion by the husband the wife continued so to occupy, and erected buildings thereon, it was held, in *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, that she had an insurable interest, as she was the owner of the right of homestead to the extent of \$1,000.

(h) Husband and wife.

In those states where tenancy by the curtesy survives, it has generally been held that the husband has an insurable interest in the property of the wife.

Such is the rule in *Harris v. York Mutual Ins. Co.*, 50 Pa. 341; *Mutual Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673; *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Franklin Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792.

But the rule must give way where the charter of a mutual company gives the company a lien for assessments, as in *Eminence Mut. Ins. Co. v. Jesse*, 1 Metc. (Ky.) 523, as the husband in such case could not create a lien on the land. On the other hand, it has been held that where, by statute, the wife is separate in property, the husband, having no control over her property, has no insurable interest therein.

Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N. E. 428; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326; *Clarke v. Dwelling House Ins. Co.*, 81 Me. 373, 17 Atl. 303; *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 362, 22 Atl. 245; *German-American Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442; *Planters' Mut. Ins. Co. v. Loyd*, 71 Ark. 292, 75 S. W. 725; *Tyree v. Virginia Fire & Marine Ins. Co.* (W. Va.) 40 S. E. 706, 68 L. R. A. 657. The point was also raised, but not decided, in *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136.

This is, however, probably too broad a statement of the rule. It was held in *Cohn v. Virginia Fire & Marine Ins. Co.*, 6 Fed. Cas.

33, that a husband has in the separate property of his wife a right of user which is insurable, though he cannot insure the property as such. The better doctrine seems to be, as stated in *American Central Ins. Co. v. McLanathan*, 11 Kan. 533, that where a husband and wife are in joint occupancy of the wife's property, he has an insurable interest therein, though under the statute husband and wife are separate in property.

This seems to be the governing principle in *Jacobs v. Mutual Ins. Co.*, 52 S. C. 110, 29 S. E. 533; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Reynolds v. Iowa & Nebraska Ins. Co.*, 80 Iowa, 563, 46 N. W. 659; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658; *Horsch v. Dwelling House Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806; *German Ins. Co. v. Davis*, 6 Kan. App. 268, 51 Pac. 60; *Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302; *Continental Fire Ass'n v. Wingfield* (Tex. Civ. App.) 78 S. W. 847. The principle was applied to the insurance of the wife's personalty in *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543, 46 Am. Rep. 792.

It has also been held that, where the husband and wife are tenants by the entirety, the husband has an insurable interest in the whole premises, since his estate, though not an absolute estate in fee, may ripen into one.

Mlotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463; *Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538.

In *Merchants' Ins. Co. v. Dwyer*, 1 Posey, Unrep. Cas. (Tex.) 441, it was held that a surviving husband, who has possession of the community property, with the right of disposition for the payment of debts, has an insurable interest therein. And in *Clarke v. Firemen's Ins. Co.*, 18 La. 431, it was said that a husband, as administrator of his wife's property, has an insurable interest therein. In *Marts v. Cumberland Ins. Co.*, 44 N. J. Law, 478, where a wife's property was insured, and by the terms of the policy it was made payable to the husband, it was held that the fact that he had no insurable interest did not affect the validity of the policy, as it was supported by the insurable interest of the wife in her own property. Where one purchased property with his own funds, but as a

matter of convenience had the title made to his wife (*Danvers Mut. Fire Ins. Co. v. Schertz*, 95 Ill. App. 656), he had, nevertheless, an insurable interest in the premises. But where, as in *Travis v. Continental Ins. Co.*, 32 Mo. App. 198, a wife made a verbal gift of property to her husband, which was void by statute, it was held that the husband had, notwithstanding that, an insurable interest.

It was held, in *Breard v. Mechanics' & Traders' Ins. Co.*, 29 La. Ann. 764, that a wife holding property in her own name, donated to her by her father during the marriage, has an insurable interest therein. In *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.) 397, it was held that a bond and mortgage executed by a husband to his wife for a valid consideration gave the wife an insurable interest in the property. Where property was donated by the husband to his wife (*German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401), the fact that the gift was in fraud of the husband's creditors did not affect the wife's insurable interest. So, in *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49, it was held that, though the conveyance by a husband to his wife was void in a legal sense, yet the wife had an insurable interest in the property.

(1) Same—Wife's right of dower.

In *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428, the court said that it does not follow, from the rule giving a husband holding an inchoate right of curtesy an insurable interest, that a wife holding an inchoate right of dower has an insurable interest. Until there is an actual admeasurement of dower, her interest is merely potential, amounting to a mere chose in action. She has no interest or estate in the lands. On the other hand, it was held in *Louden v. Waddle*, 98 Pa. 242, and *Estate of Zehring*, 4 Pa. Super. Ct. 243, that a widow's dower is not merely a lien, but an estate in the lands, which gives her an insurable interest. In *Quarles v. Clayton*, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170, the husband by an antenuptial contract agreed that on his death the wife should have a comfortable home, to consist of certain lands, the dwelling, and other buildings. It was held that on the death of the husband, even though the lands had not been set out to her by survey, yet, as they were to include the house and other buildings, she had a vested interest therein for life, which gave her an insurable interest.

(j) Life tenants and remaindermen.

A life tenant has an insurable interest in property held by him.

This is the decision in *Jacobs v. Mutual Ins. Co.*, 52 S. O. 110, 29 S. E. 533; *Harrison v. Pepper*, 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404; *Hubbard v. Austin*, 8 Ohio Dec. 111; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414; *Redfield v. Holland Purchase Ins. Co.*, 58 N. Y. 354, 15 Am. Rep. 424; *Farmers' Mutual Fire & Lightning Ins. Co. v. Le Croy*, 91 Ill. App. 41; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906; *Convis v. Citizens' Mut. Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555.

In the last case, where plaintiff and her husband were owners in common of a life estate, it was held that plaintiff as life tenant had an insurable interest either in the undivided half of the property or in the whole of it, under the rule that, whenever insured will suffer loss by destruction of the property, he has an insurable interest.

So, too, the reversioner of a life estate has an insurable interest.

Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150; *Convis v. Citizens' Mut. Fire Ins. Co.*, 127 Mich. 616, 86 N. W. 994.

(k) Insurable interest of railroad in property along its route.

In many states statutes have been passed making railroad companies liable for injury to or destruction of property by fire caused by their engines, and giving the company an insurable interest in property along its route.² The theory of these statutes seems to be, as said in *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, 105 Mass. 570, that the railroad companies under the statute become practically insurers of property, so as to give them an insurable interest, which they may reinsure. The constitutionality of these statutes has been upheld in numerous cases, though the precise question involved was the validity of the provisions relating to the liability of the railroad company, rather than the provisions relating to insurable interest.

Reference may be made to *McCandless v. Richmond & D. R. Co.*, 38 S. O. 103, 16 S. E. 429, 18 L. R. A. 440; *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Missouri Pac. Ry. Co. v. Simmons*, 165 U. S. 27, 17 Sup. Ct. 996, 41 L. Ed.

² See Rev. St. Me. c. 51, § 64; Pub. St. Mass. c. 112, § 214 (Rev. Laws, 1902, vol. 2, c. 111, § 270); Gen. St. S. C. § 1511 (Rev. St. S. C. 1893, §

1688); Rev. St. Mo. 1899, § 2615; Rev. St. N. H. c. 142, §§ 8, 9 (Pub. St. 1901, c. 159, §§ 29-31); Vt. St. 1894, § 3926.

621 (Mem.); *Mathews v. St. Louis & S. F. Ry. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; *Campbell v. Missouri Pac. Ry. Co.*, 25 S. W. 936, 121 Mo. 340, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Lumbermen's Mut. Ins. Co. v. Kansas City, F. S. & M. Ry. Co.*, 149 Mo. 165, 50 S. W. 281.

Such statutes are remedial in their nature, and should be liberally construed.

Wall v. Platt, 169 Mass. 398, 48 N. E. 270; *Lumbermen's Mut. Ins. Co. v. Kansas City, F. S. & M. Ry. Co.*, 149 Mo. 165, 50 S. W. 281.

As the liability under such statutes is coextensive with the right to insure, it has been necessary to decide in what kinds of property the railroad had an insurable interest, so as to be within the purview of the statute. It has been held that the statute does not apply to property temporarily placed near the track and liable to be moved away at any time, but only to such property as is permanently located on or near the right of way.

This rule is announced in *Chapman v. Atlantic & St. L. R. R.*, 87 Me. 92; *Lowney v. New Brunswick Ry. Co.*, 78 Me. 479, 7 Atl. 381; *Thatcher v. Maine Cent. R. Co.*, 27 Atl. 519, 85 Me. 502; *Pierce v. Bangor & A. R. Co.*, 94 Me. 171, 47 Atl. 144; *Boston Excelsior Co. v. Bangor & A. R. Co.*, 98 Me. 52, 44 Atl. 138, 47 L. R. A. 82; *Leavitt v. Canadian Pac. Ry. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

On the other hand, in *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87, the court says that the statute was not intended to confine the right of indemnity to a property of a fixed or immovable nature. Such contention assumes that no insurance can be obtained except on such property regarding which they have previous notice or knowledge. There is no reason for such a limitation, nor is there any reason why the railroad company cannot protect itself by policies in an amount to cover all possible risks. So it was held, in *Grissell v. Housatonic R. Co.*, 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138, that the provision as to insurable interest does not limit the right to recover only to cases where the property injured is such as is usually regarded as insurable.

The same doctrine was laid down in *Dean v. Charleston & W. O. R. Co.*, 55 S. C. 504, 33 S. E. 579, and *Haseltine v. Concord R. R.*, 64 N. H. 545, 15 Atl. 143.

It was said in *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579, that the liability, and consequently the insurable interest, is not confined to either real estate or personal property; and in *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87, it was held that, as the right to insure covers personal property, the liability extended to such property, though the corporation had no knowledge or cause to believe that such property was situated where it might be injured. In *Thatcher v. Maine Cent. R. Co.*, 85 Me. 502, 27 Atl. 519, it was held that lumber piled for seasoning and as stock in a permanent lumber yard is within the purview of the statute, as the railroad had an insurable interest therein. So, in *Trask v. Hartford, etc., R. Co.*, 16 Gray (Mass.) 71, the statute was held to extend to machinery, tools, patterns, and lumber in a building near the track and to a fence by the side of the track. In *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72, cars of another road in the possession of the railroad company were regarded as within the purview of the statute giving the company an insurable interest. In *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579, and in *Dean v. Charleston & W. C. Ry. Co.*, 55 S. C. 504, 33 S. E. 579, growing trees or underbrush were regarded as being within the purview of the statute. The question was extensively discussed in *Mathews v. St. Louis & S. F. Ry. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and the court held that the fact that growing timber and ornamental shrubs have not been made a common subject of insurance does not affect the question. The act is an enabling act, and gives the company the right to insure such property, if an insurer is willing to write the policy. In *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530, it was said that the purpose of the law was to give the corporation the same right and opportunity of protection as the owner of the property had, and whether the property is subject to insurance is to be determined by the insurance companies. The court seems to intimate that growing trees and shrubs are not insurable, contrary to the views expressed in the *Mathews Case*.

As to the location of the property it has been held that the liability, and consequently the insurable interest, is in property so near the track as to be exposed to fire from the engines, irrespective of the actual distance.

Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Me. 579; *Martin v. Grand Trunk Ry.*, 87 Me. 411, 32 Atl. 978.

As was said in the Pratt Case, property situated within any distance which will render it directly exposed to danger of fire is within the statute. In *Thompson v. Richmond & D. R. Co.*, 24 S. C. 366, it was contended that the company is given an insurable interest only in property placed on its right of way, but the court regards the language of the statute as indicating an exactly opposite intention. The intention was undoubtedly to give the company an insurable interest in property along the line of its route, and not simply that within the limits of its right of way. Without the act the company would have an insurable interest in all property delivered to it for transportation, and it is this property that is most generally placed on the right of way. The purpose of the act must have been to give the company an insurable interest in property along its route, which it would not otherwise have had. In construing the New Hampshire statute, it was said in *Hooksett v. Concord R. R.*, 38 N. H. 242, that the insurable interest extends to any property which is exposed to danger by fire, though not directly communicated to the property. The Supreme Court of the United States, construing the Vermont statute, said (*Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356), that the phrase "along the route" means in proximity to the track, and the fact that the statute gives an insurable interest in the property does not necessarily show that the only property intended was such as was outside the lines of the roadway. Property lawfully within those lines which the company did not own is equally within the protection. As said in *Lumbermen's Mut. Ins. Co. v. Kansas City, F. S. & M. Ry. Co.*, 149 Mo. 165, 50 S. W. 281, the plain deduction to be drawn from the cases is that the statute makes the railroad company liable for damages communicated by its engines, directly or indirectly, to property along its route in the neighborhood of its road, and that consequently it gives to the railroad company an insurable interest in all such property. This principle was applied in this case to support the liability of the railroad company for the destruction of a building some 165 feet from the main track of defendant's railroad.

In *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 293, it was held that the railroad company owning the road was liable for damage by fire, notwithstanding that the fire was communicated by an engine belonging to and used by another railroad company, to whom the

road had been leased. Consequently, as the corporation owning the road was liable, it had an insurable interest, though not operating it.

4. INSURABLE INTEREST BASED ON CONTRACT RELATIONS IN GENERAL.

- (a) Persons contracting to procure insurance.
- (b) Interest of insurer.
- (c) Buildings in process of erection.
- (d) Interest in profits or future compensation.
- (e) Lessor and lessee.
- (f) Same—Buildings erected by lessee.
- (g) Partners.
- (h) Stockholders.

(a) Persons contracting to procure insurance.

It was held, in *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390, that, where one agreed for a consideration to care for property and keep it insured, the liability which might arise out of this agreement created in him an insurable interest to the extent of the value of the buildings.

This rule is supported by *Lawrence v. St. Mark's Fire Ins. Co.*, 43 Barb. (N. Y.) 479; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 1 Am. Rep. 591; *Cushing v. Williamsburg City Fire Ins. Co.*, 4 Wash. 538, 30 Pac. 786; *Jacobs v. Mutual Ins. Co.*, 52 S. C. 110, 29 S. E. 533; *Wagner v. Westchester Fire Ins. Co.*, 92 Tex. 549, 50 S. W. 569; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578, 8 Am. Rep. 150, and *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548, affirming 55 Hun, 612, 8 N. Y. Supp. 762.

In the last case it was said that a person may insure against his liability with reference to property as well as his interest therein. In the case of one contracting to maintain insurance on property, there is a possible liability that, on failure to fulfill his agreement, he is liable for the value of the property, should a loss occur.

(b) Interest of insurer.

One who has insured property has an insurable interest therein which will support a contract of reinsurance.

This doctrine is supported by *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant, Cas. (Pa.) 71; *Manufacturers' Fire & Marine Ins. Co.*

v. Western Assur. Co. (Mass.) 14 N. E. 632; Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. 250; Johannes v. Phoenix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359; Alliance Marine Ins. Co. v. Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

So it was held in *Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 316, that a reinsurer had such insurable interest as would support a policy of second reinsurance. But the interest of the insurer extends no further than the risk which he has assumed in the original policy, according to *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475. In *Sun Insurance Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693, an insurer reinsured by a contract dated October 13th, against such loss or damage on property insured as might occur in the months of October, November, and December. As the policy was not limited to risks written prior to October 13th, it was contended that it covered risks in which the original insurer had no insurable interest, in that loss or damage might occur on policies written subsequent to October 13th. The Supreme Court decided that the insurer had no insurable interest in such risks. The Court of Errors and Appeals, however, reversed the decision (64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330), on the ground that any insurable interest acquired during the risk and subsisting at the time of the loss was sufficient to support the policy.

(c) Buildings in process of erection.

It was held, in *Foley v. Manufacturers' & Builders' Fire Ins. Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, affirming 71 Hun, 369, 24 N. Y. Supp. 1131, that the owner of land has an insurable interest in buildings in the process of erection thereon by a contractor who is to furnish the materials and labor, and who is to be paid only after completion of the work. It made no difference that the buildings were not completed when destroyed, and the owner was under no obligation to pay for them at the time of the fire, as they were the property of the owner, being annexed to the freehold and adding to its value. So, too, a contractor who undertakes to build and receive compensation on performance of the work

has an insurable interest in the building, so far as the work is complete at the time the insurance is taken.

Protection Ins. Co. v. Hall, 54 Ky. 411, and *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629.

A person who has contracted to build a house, furnishing the materials therefor, has an insurable interest, though he has received nearly full payment of the contract price.

Ulmer v. Phoenix Fire Ins. Co., 61 S. C. 459, 39 S. E. 712; *Cushing v. Williamsburg City Fire Ins. Co.*, 4 Wash. 538, 30 Pac. 736, and *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 820, 8 South. 222, 60 Am. Rep. 162.

(d) Interest in profits or future compensation.

A person engaged in moving houses has an insurable interest in a house which he is moving to the extent of the compensation he is to receive (*Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268). In *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707, it appeared that plaintiff was the manager of a factory under a contract for a 20-year term of service. In case of his death his wife was to receive a certain sum per year for the remainder of the 20-year term, and in case of a sale of the property he had certain privileges of purchase. It was held that he had an insurable interest, in view of the fact that by the destruction of the property he might suffer a loss in case the owner should be unable to rebuild and re-equip the factory. Where plaintiff licensed another to use a certain patent in consideration of specified royalties to be paid for such use (*National Filtering Oil Co. v. Citizens' Insurance Co.*, 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473, affirming 34 Hun, 556), he had an insurable interest in the property to be used in connection with such patents, for the reason that by the destruction of such property he might suffer a loss of his royalties.

The general rule that one has an insurable interest in the profits of a trade or business is supported by *Niblo v. North American Fire Ins. Co.*, 3 N. Y. Super. Ct. 551. An interesting case governed by this principle is *Hayes v. Milford Mutual Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754. Plaintiff, under his contract of agency with an insurance company, was to receive for his services a sum equivalent to 20 per cent. of premiums received on policies issued by

him on behalf of the company, and also 10 per cent. of the net profits of the business of the company. The net profits were to be estimated by considering as profits all premiums received or payable on account of policies issued within the year, deducting therefrom return premiums, premiums for reinsurance, losses, and expenses incidental to the adjustment thereof. It was held that, in view of the contract, plaintiff had an insurable interest in the property insured by the company sufficient to support a policy issued in his favor. The ground of the decision apparently is that by a destruction of the property insured by the first company plaintiff would suffer a direct pecuniary loss in the reduction or entire loss of profits of such company, in which he had a pecuniary interest.

(e) Lessor and lessee.

The rule that a landlord may insure property in the possession of his tenant was laid down in *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. In *Western Ins. Co. v. Carson*, 9 Ohio Dec. 848, it was said that a landlord has an insurable interest in improvements, repairs, and fixtures added to his building by the tenant. Where the landlord has the right to enter and distrain the property of a tenant for nonpayment of rent, he has an insurable interest in such property.

Columbia Ins. Co. v. Cooper, 50 Pa. 331; *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209.

Similarly it was held, in *Miltenberger v. Beacom*, 9 Pa. 198, that a lessor on ground rent, who has entered for arrears, and who looks to the tenements erected thereon as the chief, if not only, source of payment of the rent in arrear, has an interest therein which is insurable.

That a lessee has an insurable interest in property held under the lease is asserted in *Hidden v. Slayton Mutual Fire Ins. Co.*, 12 Fed. Cas. 121.

The principle is also supported by *Creech v. Richards*, 76 Ga. 36; *Ely v. Ely*, 80 Ill. 532; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414; *Georgia Home Ins. Co. v. Jones*, 49 Miss. 80; *Niblo v. North American Fire Ins. Co.*, 3 N. Y. Super. Ct. 551.

In the last case, however, it is said that his interest does not extend to the full value of the buildings. Even a tenant at will,

since he is entitled to 30 days' notice before he can be dispossessed, and has, therefore, a term of definite, fixed possession, has an insurable interest (*Schaeffer v. Anchor Mut. Fire Ins. Co.*, 113 Iowa, 652, 85 N. W. 985).

But see *Schaefer v. Anchor Mut. Fire Ins. Co.* (Iowa) 100 N. W. 857, where the court said that one in possession of a building under an agreement with the owner that, if he pay the taxes and insurance, he can do whatever he wants to do with it except sell it, is not a mere tenant at will as to his insurable interest, but has the right to the use of the building for life, subject to be defeated by his noncompliance with the conditions.

So, too, the assignee of a lease has an insurable interest in the leased premises (*Clemson v. Trammell*, 34 Ill. App. 414). Under the general principle announced in paragraph (a), a lessee who covenants to keep the property insured has an insurable interest based on such covenant.

Motley v. Manufacturers' Ins. Co., 29 Me. 337, 1 Am. Rep. 591; *Lawrence v. St. Marks Fire Ins. Co.*, 43 Barb. (N. Y.) 479.

(f) Same—Buildings erected by lessee.

In *Slobodisky v. Phoenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270, where the insured leased the premises for 20 years and erected thereon a building, the court held that, considering the building erected on the premises as affixed to the land and being part of the real estate, the lessee had, nevertheless, an insurable interest. And in *Allen v. Sun Mut. Ins. Co.*, 36 La. Ann. 767, where the lessee erected a building under an agreement with the lessor that the latter should purchase it at the close of the term at a price then to be agreed on, the lessee had an insurable interest therein. But where the charter of an insurance company provides that the insured must have a fee-simple title, or must be a tenant under perpetual lease, one holding under a lease for 10 years, renewable every 10 years until the lessor shall elect to take the buildings erected thereon, does not have an insurable interest (*Mutual Ins. Soc. v. Holt*, 29 Grat. [Va.] 612). Where one conveyed property to secure a debt, taking back a lease with a privilege of purchasing during the term on payment of the amount of the debt, the right so to purchase or redeem given by the lease supports an insurable interest (*Creighton v. Homestead Fire Ins. Co.*, 17 Hun, [N. Y.] 78).

Where the lease was conditioned that the lessee should erect a building on the premises, and at the expiration of the term surrender the premises in as good condition as reasonable use and wear would permit, it was held that the ownership of the building at the expiration of the term was in the lessor, and he had an insurable interest, though possession was acquired by an act constituting a trespass against the lessee.

Mayor of City of New York v. Exchange Fire Ins. Co., 22 N. Y. Super. Ct. 424, affirmed in 3 Abb. Dec. 261; *Same v. Hamilton Fire Ins. Co.*, 23 N. Y. Super. Ct. 537; *Same v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231.

In *Fowle v. Springfield Fire & Marine Ins. Co.*, 122 Mass. 191, 23 Am. Rep. 308, a lessee who had erected a building on the premises, and whose lease had still two years to run, had an insurable interest in the buildings, though the lease provided that at its expiration the buildings should belong to the lessor.

(g) Partners.

It was held, in *Voisin v. Commercial Mut. Ins. Co.*, 62 Hun, 4, 16 N. Y. Supp. 410, that a partner has an insurable interest in the property belonging to the firm, which he may protect by a policy in his own name.

This general principle is supported by *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551, 20 Am. Rep. 583; *Manhattan Ins. Co. v. Webster*, 59 Pa. 227, 98 Am. Dec. 332; *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. 828; *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 407, 88 Am. Dec. 337; *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552; *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389, 34 S. E. 503; *Blackwell v. Miami Valley Ins. Co.*, 10 Ohio Dec. 159.

Even if he is a nominal partner only, he has an insurable interest, according to *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504, 20 L. Ed. 729; and it does not affect his insurable interest that he has not yet paid for his partnership interest, according to *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100. If the property in question is a building purchased with partnership funds, but standing on land owned by one partner, as in *Converse v. Citizens' Mut. Ins. Co.*, 10 Cush. (Mass.) 37, the other partner has nevertheless an insurable interest.

(h) Stockholders.

The question whether a stockholder has an insurable interest in corporate property has provoked some discussion. In the early case of *Philips v. Knox County Mut. Ins. Co.*, 20 Ohio, 174, it was held that, where a building and the land on which it stands is the property of an incorporated company, stockholders of the company cannot insure the same as their individual property in a mutual insurance company. In a footnote published with this case it was said that the decision was based mainly on the construction of the charter of the insurance company involved. That charter gave the company a lien on the property insured, and, as the stockholders did not possess such a title to the property as would support a lien, they could not insure in the mutual company. The case cannot, therefore, be regarded as a general authority against the right of stockholders to insure corporate property. Twenty years later the question was again considered, in *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160, and it was held that the owner of stock in a corporation organized for pecuniary profit has, by reason of his position as stockholder, an insurable interest in the corporate property. Attention was called to the fact that the company involved in the *Philips Case* was a mutual company, and that the rule laid down as to mutual companies would not apply to an ordinary insurance company. These principles met with approval in *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 18 Fed. 250, where the question was raised on demurrer, and again in (C. C.) 21 Fed. 778, where the case was heard on the merits. The question came up again in *Riggs v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 466, and it was held that stockholders of a corporation have no insurable interest in the property of the corporation. This was, however, reversed on rehearing in (Super. Ct.) 5 N. Y. Supp. 183; and on final hearing in the Court of Appeals (125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716) the decision in 5 N. Y. Supp. was affirmed, and the rule laid down that a stockholder has an insurable interest.

The principle has also been upheld in *Blake Opera House Co. v. Home Ins. Co.*, 73 Wis. 667, 41 N. W. 968, and *Mannheim Ins. Co. v. Hollander* (D. C.) 112 Fed. 549, but was denied in *Pennsylvania Central Ins. Co. v. Gayman*, 7 Leg. Gaz. 234.

In *Sweeny v. Franklin Fire Ins. Co.*, 20 Pa. 337, it was held that where a company erected a house on land belonging to another,

without license or color of title, it was a mere intruder, and a stockholder would have no insurable interest in the building.

5. INSURABLE INTEREST OF AGENTS, CARRIERS, FACTORS, AND OTHER BAILEES.

- (a) Agents in general.
- (b) Consignees and persons holding property in trust or on commission.
- (c) Bailees—Warehousemen.
- (d) Carriers.

(a) Agents in general.

A general agent, having the care, management, and control of his principal's property, and liable to account therefor or for its proceeds, has an insurable interest in the property.

This rule is supported by *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Kline v. Queen Ins. Co.*, 69 N. Y. 614, affirming 7 Hun, 267; *Lane v. Maine Mut. Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Roberts v. Firemen's Ins. Co.*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, affirming 38 N. Y. Super. Ct. 281; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Graham v. Firemen's Ins. Co.*, 2 Disn. (Ohio) 255; *Page v. Western Marine & Fire Ins. Co.*, 19 La. 49.

Under the principle discussed in the preceding brief, where the agent has agreed to maintain insurance, this fact gives him an insurable interest.

Wagner v. Westchester Fire Ins. Co., 92 Tex. 549, 50 S. W. 569; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578, 8 Am. Rep. 150.

(b) Consignees and persons holding property in trust or on commission.

It is a well-established rule that a consignee or person holding property of another in trust or on commission has an insurable interest therein.

This rule is asserted in *Providence Washington Ins. Co. v. The Sidney* (D. C.) 23 Fed. 88; *Hamburg-Bremen Ins. Co. v. Lewis*, 4 App. D. C. 66; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Fox v. Capital Ins. Co.*, 93 Iowa, 7, 61 N. W. 211; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Page v. Western Marine & Fire Ins. Co.*, 19 La. 49; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Hough v. People's Fire Ins. Co.*, 36 Md. 398; *Planters' Mut. Ins. Co. v. Engle*, 9 Ins. Law J. 71; *Fire Ins. Ass'n*,

Limited, *v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169; *Lee v. Adsit*, 37 N. Y. 78; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, affirming 38 N. Y. Super. Ct. 281; *Roberts v. Firemen's Ins. Co.*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642.

So, if a consignee accepts goods with instructions to insure, his liability for failure to insure gives him an insurable interest (*Shaw v. Ætna Ins. Co.*, 49 Mo. 578, 8 Am. Rep. 150).

A consignee who has accepted a draft drawn against the goods or freight has an insurable interest distinct from other interests.

Bank of South Carolina v. Bicknell, 2 Fed. Cas. 674, and *Williams v. Crescent Ins. Co.*, 15 La. Ann. 651.

It may be, as intimated in *Lee v. Adsit*, 37 N. Y. 78, that the basis of an insurable interest of the consignee is that property held on commission is almost invariably subject to a lien in favor of the holder for charges or advances or both. It would seem, from the decisions in *Bank of South Carolina v. Bicknell*, 2 Fed. Cas. 674, and *Shaw v. Ætna Ins. Co.*, 49 Mo. 578, 8 Am. Rep. 150, that an insurable interest of a consignee is measured by the amount of his advances or commissions, but in other cases it is said that a consignee has an insurable interest commensurate with the full value of the property.

De Forest v. Fulton Fire Ins. Co., 1 N. Y. Super. Ct. 94; *Baxter v. Hartford Fire Ins. Co.* (C. C.) 12 Fed. 481; *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281, affirmed in 63 N. Y. 77.

(c) **Bailees—Warehousemen.**

It is established as a general rule that a bailee has an insurable interest.

Durand v. Thouron, 1 Port. (Ala.) 238; *Watkins v. Durand*, Id. 251; *Fire Ins. Ass'n, Limited, v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66.

In *Eichelberger v. Miller*, 20 Md. 332, where lumber to be used in a house was sent to the workshop of the carpenter to be prepared, and was destroyed by fire, it was held that the carpenter had an insurable interest in the lumber as bailee to the value of his work done upon it. Similarly a railroad company, in whose charge there are freight cars belonging to other roads under circumstances ren-

dering the company liable for such cars, has an insurable interest therein.

Home Ins. Co. v. Peoria & P. U. Ry. Co., 178 Ill. 64, 52 N. E. 862;
Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72.

So, too, a compress company has an insurable interest in cotton in its possession to be compressed, but not loaded on cars, and for which the compress shippers' receipt has been issued to the railroad company.¹

Hope Oil Mill Comp. & Mfg. Co. v. Phoenix Assur. Co., 74 Miss. 320, 21 South. 132; *California Ins. Co. v. Union Comp. Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730.

From the foregoing rule as to bailees generally it may be deduced that though a warehouseman has no pecuniary interest in goods in his possession and is not liable for their loss by fire, yet he has a general insurable interest enabling him to insure them as his own.

This is the rule laid down in *Home Ins. Co. v. Minneapolis, St. P. & S. M. Ry. Co.*, 71 Minn. 296, 74 N. W. 140; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Dawson v. Waldheim*, 80 Mo. App. 52; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Fire Ins. Ass'n, Limited, v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66.

The insurable interest of a warehouseman is commensurate with his liability, even to the full value of the goods.

Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562; *Dawson v. Waldheim*, 80 Mo. App. 52.

(d) Carriers.

A common carrier has a special property in goods intrusted to him for transportation, and for which he is liable, which gives an insurable interest therein.

This is the rule to be deduced from *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; *Providence Washington Ins. Co. v. The Sidney (D. C.)* 23 Fed. 88; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Fire Ins. Ass'n, Limited*,

¹ See Rev. Codes N. D. 1899, § 4452; Ann. St. S. D. 1901, § 5294; Civ. Code Mont. 1895, § 3402.

v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Eastern Railroad Company v. Relief Fire Ins. Co.*, 98 Mass. 420; *Home Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 71 Minn. 296, 74 N. W. 140; *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595; *Van Natta v. Mutual Security Ins. Co.*, 4 N. Y. Super. Ct. 490; *Savage v. Corn Exchange Fire & I. N. Ins. Co.*, 17 N. Y. Super. Ct. 1; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.²

It was held, too, in *California Ins. Co. v. Union Comp. Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730, and *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195, that a transportation company which has deposited cotton with the compress company to be compressed for carriage has an insurable interest therein. That the carrier is exempted from liability will not affect his insurable interest, according to *Home Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 71 Minn. 296, 74 N. W. 140. Nor will the fact that connecting roads had agreed to indemnify the carrier for any loss affect his insurable interest, according to *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72. In *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595, it was held that the interest of the carrier will continue, though the goods insured are transported to their destination by another carrier; and according to *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703, the insurable interest of the carrier is commensurate with the value of the property.

6. INSURABLE INTEREST OF CREDITORS AND LIENORS IN GENERAL.

- (a) Creditors in general.
- (b) Persons making advances.
- (c) Lienors in general.
- (d) Creditors having liens.
- (e) Liens of mechanics and materialmen.

(a) Creditors in general.

The principle asserted in *Guiterman v. German-American Ins. Co.*, 111 Mich. 626, 70 N. W. 135, that a debtor may insure his property

² See *Greenhood, Public Policy*, pp. 4452; *Ann. St. S. D.* 1901, § 5294; 256, 264; *Rev. Codes N. D.* 1899, § Civ. Code Mont. 1895, § 3402.

for the benefit of his creditors, would seem to be axiomatic. It has also been laid down as a general principle that a creditor may for his own benefit insure the property of the debtor.

White v. Hudson River Ins. Co., 7 How. Prac. (N. Y.) 341; *Spare v. Home Mutual Ins. Co.* (C. C.) 15 Fed. 708; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167 (dissenting opinion); *Herkimer v. Rice*, 27 N. Y. 163.

It was said in *Brown v. Cotton & Woolen Manufacturers' Mut. Ins. Co.*, 156 Mass. 587, 31 N. E. 691, that a creditor has an insurable interest in the estate of his debtor conveyed to an assignee in insolvency. The rule is qualified in *Guterman v. German-American Ins. Co.*, 111 Mich. 626, 70 N. W. 135, where it is said that a general creditor cannot insure the property of his debtor for his own benefit without the assent of the debtor.

On the other hand, it has been held, in *Foster v. Van Reed*, 5 Hun (N. Y.) 321, and *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134, that a simple-contract creditor, without a lien, either statutory or by contract, and having only a personal claim against his debtor, has no insurable interest in the debtor's property; and this rule appears to have governed *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167.

(b) Persons making advances.

The broad principle that any person making advances for the benefit of another has an insurable interest in the property of such other has been apparently asserted in several cases.

Reference may be made to *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Bowring v. Providence Washington Ins. Co.* (D. C.) 46 Fed. 119; *Roos v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 409; *Millaudon v. Atlantic Ins. Co.*, 8 La. 557; *Brugger v. State Investment Ins. Co.*, 4 Fed. Cas. 472; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167 (dissenting opinion).

In *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, however, the majority of the court took a different view, and held that, though a right of reimbursement for advances was one which the courts would guard and protect, yet until it was ascertained and defined by a decree of the court it was too uncertain to afford a basis for insurable interest. In general, however, it has been held that, where the advances are of such character as to create a lien on

the property for the benefit of which they were made, the person making the advances will have an insurable interest.

This seems to be the rule announced in *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516; *Phoenix Ins. Co. v. Hagar*, 11 Wkly. Notes Cas. (Pa.) 281; *Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *Bowring v. Providence Washington Ins. Co.* (D. C.) 46 Fed. 119; *Seamans v. Loring*, 21 Fed. Cas. 920.

(c) Lienors in general.

From the foregoing principles the general rule may be deduced that any person having a lien on the property of another has an insurable interest therein.

This rule is supported by *Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409; *Seamans v. Loring*, 21 Fed. Cas. 920; *Bowring v. Providence Washington Ins. Co.* (D. C.) 46 Fed. 119; *Southern Bldg. & Loan Ass'n v. Miller*, 110 Fed. 35, 49 C. C. A. 21; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287; *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111; *Lee v. Adsit*, 87 N. Y. 78; *Wood v. North Western Ins. Co.*, 46 N. Y. 421; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Rohrbach v. Ætna Ins. Co.*, 62 N. Y. 618, affirming 1 Thomp. & C. 339; *Harvey v. Cherry*, 76 N. Y. 436, affirming 12 Hun, 354; *Bates v. Commercial Ins. Co.*, 2 Cln. Super. Ct. (Ohio) 195; *Phoenix Ins. Co. v. Hagar*, 11 Wkly. Notes Cas. (Pa.) 281; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516; *Sun Mut. Ins. Co. v. Tufts*, 50 S. W. 180, 20 Tex. Civ. App. 147.

As said in *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409, the fact that the person having a lien has also the right to pursue his debtor personally for the debt does not affect his insurable interest.

(d) Creditors having liens.

In accord with the principles that have been deduced are *Donnell v. Donnell*, 86 Me. 518, 30 Atl. 67, and *McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343, holding that an attaching or execution creditor has an insurable interest in the debtor's property. It was said, in *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134, that after the death of the debtor the debt is no longer enforceable in personam, but only in rem. Consequently the right of the creditor to subject the specific property to his debt invests him with an interest but little less, if any, than that of an attaching or execution creditor. The court concludes, therefore, that a creditor of a de-

ceased debtor, whose personal estate is insufficient to pay the debts, has an insurable interest in property which by law may be subjected by proceedings in rem to the payment of the debts.

The same principle was approved in *Herkimer v. Rice*, 27 N. Y. 163, and *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451.

A pledgee of corporate stock held as security for money loaned has an insurable interest in the corporate property, according to *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680. It was held, in *Greve-meyer v. Southern Mut. Fire Ins. Co.*, 62 Pa. 340, 1 Am. Rep. 420, that a judgment creditor has no insurable interest, as his lien is a general and not a specific lien. The distinction thus made was, however, expressly repudiated in other cases.

Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; *Spare v. Home Mut. Ins. Co. (C. C.)* 15 Fed. 708; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499, where it was held that a judgment creditor has an insurable interest.

(c) Liens of mechanics and materialmen.

In the leading case of *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287, the insurable interest of mechanics and materialmen by virtue of their liens was discussed. It was contended that, until reduced to judgment or otherwise recognized by the court, there was a mere claim to a lien, which would not give an insurable interest. The court, however, took the view that the lien of a mechanic or materialman attaches to the land and buildings erected thereon from the time when work is begun or the first material furnished; that there is a lien in fact before judgment, just as truly as a mortgage is a lien before foreclosure; and that there is therefore an insurable interest. As a result of this and succeeding decisions the rule may be stated that a mechanic or materialman, who has a lien on property by virtue of a contract with the owner, has an insurable interest therein, limited only by the value of the property and the amount of the claim.

The rule is asserted in *Stout v. City Fire Ins. Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *Harvey v. Cherry*, 12 Hun (N. Y.) 354; *Edwards v. Arquette*, 88 Wis. 450, 60 N. W. 782; *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473.

7. INSURABLE INTEREST OF MORTGAGOR AND MORTGAGEE.

- (a) Mortgagee.
- (b) Mortgagor.
- (c) Other persons interested in mortgage.

(a) Mortgagee.

A mortgagee has an insurable interest in the property covered by the mortgage, separate and distinct from any other interest.

The insurable interest of a mortgagee is asserted in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710; *Westchester Fire Ins. Co. v. Foster*, 8 Ins. Law J. (Ill.) 596; *Honore v. La Mar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Kellar v. Merchants' Ins. Co.*, 7 La. Ann. 29; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 1 Am. Rep. 591; *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *King v. State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683; *Stearns v. Quincy Mut. Fire Ins. Co.*, 124 Mass. 61, 26 Am. Rep. 617; *Palmer Savings Bank v. Insurance Co. of North America*, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; *McDowell v. Morath*, 64 Mo. App. 290; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570; *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1; *Roussel v. St. Nicholas Ins. Co.*, 41 N. Y. Super. Ct. 279, 52 How. Prac. 495; *Foster v. Van Reed*, 5 Hun (N. Y.) 321; *Graham v. Phoenix Ins. Co.*, 17 Hun (N. Y.) 156; *Armstrong v. Agricultural Ins. Co.*, 56 Hun. 399, 9 N. Y. Supp. 873; *Hathaway v. Orient Ins. Co.*, 11 N. Y. Supp. 413, 58 Hun. 602; *Weed v. Fire Ins. Ass'n of Philadelphia*, 62 Hun. 621, 17 N. Y. Supp. 206, affirmed in 137 N. Y. 567, 33 N. E. 339, without opinion; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Stetson v. Insurance Co.*, 4 Phila. (Pa.) 8; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.) 139; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573; *Jerde v. Cottage Grove Fire Ins. Co.*, 75 Wis. 845, 44 N. W. 636; *Smith v. Union Ins. Co. (R. I.)* 55 Atl. 715.

In *Grevemeyer v. Southern Mut. Fire Ins. Co.*, 62 Pa. 340, 1 Am. Rep. 420, the insurable interest of a mortgagee appears to have been

upheld on the ground that his lien is a specific one, though this particular reason does not appear to be the basis of the decisions in other cases. According to *Williams' Adm'r v. Cincinnati Ins. Co.*, Wright (Ohio) 542, it does not affect his insurable interest that the mortgagee is not in possession and that the note for which the mortgage was given is not under his control.

One for whose benefit a deed of trust as security is given has an insurable interest.

Tilley v. Connecticut Fire Ins. Co., 86 Va. 813, 11 S. E. 120; *Southern Bldg. & Loan Ass'n v. Miller*, 110 Fed. 35, 49 C. C. A. 21.

And where B. gave two successive mortgages on his farm, and a deed of warranty, subject to the mortgages, taking back a third mortgage for the support of himself and wife during their lives (*Buck v. Phoenix Ins. Co.*, 76 Me. 586), it was held that, as mortgagee of the equity of redemption of the first two mortgages, he had an insurable interest. Even where the mortgage is on a homestead, and as such forbidden by Const. Tex. art. 16, §§ 50, 51, providing that any mortgage on the homestead shall be invalid, unless given for purchase money or improvements thereon, it was held, in *Parks v. Hartford Ins. Co.*, 100 Mo. 373, 12 S. W. 1058, that as the mortgage was voidable only the mortgagee had an insurable interest. Though the mortgagee has assigned the notes and mortgage, his liability on his assignment gives him an insurable interest.

New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41.

The insurable interest of a mortgagee is limited by the amount of the debt the mortgage is intended to secure.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111; *Kernochan v. New York Bowery Fire Ins. Co.*, 12 N. Y. Super. Ct. 1; *Kent v. Aetna Ins. Co.*, 82 N. Y. Supp. 817, 84 App. Div. 428; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

(b) Mortgagor.

Since a mortgagor relies on the property to pay his debt if it cannot be otherwise paid, and would suffer loss from the destruction of the property mortgaged, he has an insurable interest.

This is the principle announced in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Northern Trust Co. v. Snyder*, 76 Fed. 34, 22 C. C. A. 47; *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710;

Westchester Fire Ins. Co. v. Foster, 8 Ins. Law J. (Ill.) 596; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 1 Am. Rep. 591; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Stearns v. Quincy Mut. Fire Ins. Co.*, 124 Mass. 61, 26 Am. Rep. 617; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454; *Palmer Savings Bank v. Insurance Co. of North America*, 106 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; *McDowell v. Morath*, 64 Mo. App. 290; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *French v. Rogers*, 16 N. H. 177; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *McLaren v. Hartford Fire Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 210; *Graham v. Phoenix Ins. Co.*, 17 Hun (N. Y.) 156; *Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184; *Waring v. Loder*, 53 N. Y. 581; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Ætna Ins. Co. v. Miers*, 5 Sneed. (Tenn.) 139; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

The fact that the property is mortgaged for its full value does not affect his insurable interest.

Higginson v. Dall, 13 Mass. 96; *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473.

In *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184, the insurable interest of the mortgagor seems to have been based to some extent on the existence of a covenant to insure. But the fact cannot be regarded as controlling.

Even after judgment of foreclosure, the mortgagor has an insurable interest until the time of redemption expires, according to *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665.

A similar principle is announced in *Stephens v. Illinois Mut. Ins. Co.*, 43 Ill. 327; *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; *French v. Rogers*, 16 N. H. 177; *Marts v. Cumberland Ins. Co.*, 44 N. J. Law, 478; *Allen v. Franklin Fire Ins. Co.*, 9 How. Prac. (N. Y.) 501.

In *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507, it was held that a mortgagor whose right in equity to redeem has been seized on execution has nevertheless an insurable interest in the property.

(c) Other persons interested in mortgage.

A mortgagor has no insurable interest in the property after foreclosure of the mortgage and the expiration of the period for redemption. Even though the mortgagee has expressed a willingness to accept the debt due, this does not show an enforceable contract, and a person can have no insurable interest where his only right arises under a contract which is void or unenforceable either at law or in equity. (*Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 South. 29.)

According to *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 376, and *Southern Bldg. & Loan Ass'n v. Miller*, 110 Fed. 35, 49 C. C. A. 21, a trustee in a deed of trust in the nature of a mortgage has an insurable interest in the property distinct from that of the grantor. But it was held, in *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, that the trustees under a railroad mortgage, who were in possession of and running the road as such trustees, did not have an insurable interest by reason of advances made by them individually for the road until their rights by virtue of such advances had been ascertained and defined by decree of court. A grantee of premises mortgaged or subject to a deed of trust is deemed to have an insurable interest.

Agricultural Ins. Co. v. Clancey, 9 Ill. App. 137; *Stephens v. Illinois Mut. Ins. Co.*, 43 Ill. 327.

And in the *Stephens Case* the insurable interest was held to exist even after foreclosure, until the statutory right of redemption had expired. As said in *Insurance Co. v. Stinson*, 103 U. S. 25, 26 L. Ed. 473, it is immaterial whether the grantee is personally liable on the mortgage debt or not. An assignee of the mortgage is regarded as having an insurable interest, in *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570. In *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541, one holding a mortgage as collateral security was regarded as possessing an insurable interest to the extent of his claim. One who has a contract for the purchase of a mortgage, the purchase money being payable by installments, and who has made a part payment under the contract, is in equity the owner of the mortgage, and has an insurable interest in the property covered by it (*Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271, affirming 7 Lans. 138).

A consummated agreement for the sale of a deed of trust and the notes secured thereby vests an equitable title in the vendee,

so as to give him an insurable interest in the property covered by the deed, though the note is not indorsed by the vendor.

International Trust Co. v. Norwich Fire Ins. Soc., 71 Fed. 81, 17 C. C. A. 608; *Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616.

A guarantor of a mortgage, who thereby becomes personally liable for its payment, has an insurable interest in buildings on the mortgaged premises, according to *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711. Where the attorneys of a mortgagee have as such obtained an order of resale at the risk of the purchaser at foreclosure, they have an insurable interest in the property insured, according to *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

8. INSURABLE INTEREST OF VENDOR AND VENDEE.

- (a) Vendor.
- (b) Vendee in general.
- (c) Vendee holding under defective or fraudulent title.
- (d) Vendee in executory contract.
- (e) Vendee of personal property.

(a) Vendor.

From the principles already discussed it follows that a vendor of real property who retains a lien or takes back a mortgage has an insurable interest.

Such is the rule governing *Jerde v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Bates v. Commercial Insurance Co.*, 2 Cin. Super. Ct. Rep'r (Ohio) 195; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

In other cases it has been held in general terms that a vendor in a contract for sale of real property, where no conveyance has been made and only part of the purchase money paid, has an insurable interest in the property included in the contract.

This is apparently the principle of the decisions in *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Pa. 474; *Ladd v. Aetna Ins. Co.*, 70 Hun. 490, 24 N. Y. Supp. 384; *Insurance Company v. Updegraff*, 21 Pa. 513; *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. Rep. 129; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Shotwell v. Jefferson*

Ins. Co., 18 N. Y. Super. Ct. 247; *Parcell v. Grosser*, 109 Pa. 617, 1 Atl. 909; *Perry County Ins. Co. v. Stewart*, 19 Pa. 45; *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 86 L. R. A. 673, 58 Am. St. Rep. 663; *Trumbull v. Portage County Mut. Ins. Co.*, 12 Ohio, 305; *People's Ins. Co. v. Straehle*, 2 Cin. Super. Ct. Rep'r (Ohio) 186; *Ambrose v. First National Fire Ins. Co.*, 19 Pa. Super. Ct. 117; *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527.

It was held in *Merchants' Ins. Co. v. Nowlin* (Tex. Civ. App.) 56 S. W. 198, that a grantor who has deposited a deed in escrow, for delivery on performance of certain conditions, has an insurable interest in the property conveyed. Where one conveyed land by warranty deed to secure his grantee from liability as his surety, the grantee at the same time giving back an instrument of defeasance, which was not recorded (*Walsh v. Fire Association*, 127 Mass. 383), it was held that the grantor had an insurable interest in the house on the premises. One who has merely agreed to sell personal property, but has neither delivered it nor received the purchase price, has an insurable interest according to *Bell v. Fireman's Ins. Co.*, 3 Rob. (La.) 423. This rule was reaffirmed in *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, although it was possible that the court regarded the vendor as having a lien on the property and based its decision on that theory.

The general principle that one making an executory sale of personal property, retaining title until the price is paid, has an insurable interest is asserted in *Tallman v. Atlantic Fire & Marine Ins. Co.*, *42 N. Y. 87, reversing 29 How. Prac. 71.¹

In *Norcross v. Insurance Company*, 17 Pa. 429, 55 Am. Dec. 571, it was held that where A., having insured his goods, agreed to sell them to B., who paid part of the purchase money, giving a judgment note for the balance, A. retaining possession, he had nevertheless an insurable interest.

(b) *Vendee in general.*

An absolute contract for the sale of an interest in land, authorizing the purchaser to take immediate possession, the consideration to be paid on demand, vests in the purchaser the equitable interest in the land the moment it is executed and delivered, so as to give him an insurable interest in buildings on the premises (*McKechnie v. Sterling*, 48 Barb. [N. Y.] 330). Since one purchasing

¹ This case is also reported in 33 How. Prac. 400, and 4 Abb. Dec. 345.

property in his own name for the benefit of another has legal title as against every one, save such other and his creditors, it has been held (*Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y. 677, affirming 1 *Thomp. & C.* 215) that such person has an insurable interest.

A grantee of land subject to mortgage has an insurable interest.

Agricultural Ins. Co. v. Clancey, 9 Ill. App. 137; *Stephens v. Illinois Mut. Ins. Co.*, 43 Ill. 327.

In *Mott v. Coddington*, 1 Abb. Prac. N. S. (N. Y.) 290, it appeared that plaintiff and defendant entered into an agreement whereby defendant was to convey to plaintiff certain premises on which was situated a mill, in consideration of which plaintiff agreed to convey to defendant certain premises in Brooklyn. It was also agreed that defendant should retain possession of the mill for two months after deeds had been exchanged. The deeds were placed in escrow until certain liens on the Brooklyn property could be removed. It was held that plaintiff had an insurable interest in the mill, but that defendant, though in possession, had not.

(c) Vendee holding under defective or fraudulent title.

Where a tenant in common has purchased the interest of his co-tenant and paid the consideration under an oral agreement, but has not received a deed (*Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598), he has nevertheless an insurable interest in the whole property. It may be said generally that a mere defect in title will not affect the vendee's insurable interest, whether he holds under a deed imperfectly acknowledged (*Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358), or a conveyance executed under a fictitious name (*David v. Williamsburg City Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418, reversing 7 Abb. N. C. 47). It was held, in *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118, that where an executor, assuming to act under a power in a will, made a deed purporting to convey the premises, the grantee had an insurable interest, notwithstanding the fact that the will may not have authorized the executor to make such a conveyance. Even where one purchased by quitclaim deed, knowing that the title to the premises was in a third person, but believing that he gained title to the building (*American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249),

he took an insurable interest in such building. But, if a conveyance is absolutely void ab initio, the vendee has no insurable interest (*Perry v. Mechanics' Mut. Ins. Co.* [C. C.] 11 Fed. 478).

Even if the vendee practices a fraud on his vendor, in consequence of which his conveyance is subsequently set aside in equity, he nevertheless had an equitable interest, as the conveyance was not void, but merely voidable, sufficient to support his insurable interest (*Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43). In *Lerow v. Wilmarth*, 9 Allen (Mass.) 382, and *Home Ins. Co. v. Allen*, 19 S. W. 743, 93 Ky. 270, it was held that a conveyance in fraud of creditors, being good between the parties, would support the insurable interest of the grantee.

(d) Vendee in executory contract.

One in possession of premises under a valid subsisting contract of purchase or bond for title is an equitable owner, so as to give him an insurable interest, though he has not paid the whole of the consideration.

The rule thus stated is supported by *Rumsey v. Phoenix Ins. Co.* (C. C.) 1 Fed. 396; *Ramsey v. Same* (C. C.) 2 Fed. 429; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 48 Pac. 1115; *Hough v. State Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Allyn v. Allyn*, 154 Mass. 570, 28 N. E. 779; *Hubbard v. North British & Mercantile Ins. Co.*, 57 Mo. App. 1; *Franklin Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. (N. Y.) 85; *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Clapp v. Farmers' Mut. Fire Ins. Ass'n*, 126 N. C. 388, 35 S. E. 617; *Dunn v. Yakish*, 10 Okl. 388, 61 Pac. 926; *Reynolds v. State Mut. Ins. Co.*, 2 Grant, Cas. (Pa.) 326; *Mutual Fire Ins. Co. v. Wagner* (Pa.) 7 Atl. 103; *Tuckerman v. Home Ins. Co.*, 9 R. I. 414; *Gettelman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627; *Walner v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26; *Brooks v. Erie Fire Ins. Co.*, 177 N. Y. 572, 69 N. E. 1120.

Even where the contract provides for forfeiture on default on the part of the vendee, a failure to make payment as required by the terms of the contract will not affect his insurable interest, so long

as the vendor does not avail himself of his right to declare the contract at an end.

This rule is announced in *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Gilman v. Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544; *Chase v. Hamilton Ins. Co.*, 22 Barb. (N. Y.) 527; *Pelton v. West Chester Fire Ins. Co.*, 13 Hun (N. Y.) 23; *Farmers' & Mechanics' Mut. Ins. Co. v. Meckes*, 10 Wkly. Notes Cas. (Pa.) 306.

In *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587, it appeared that B. entered into an agreement with L. to grant him certain premises, on the consideration that L. should erect a building for B. on the adjacent lot. In pursuance of this agreement L. entered on the granted premises, erected his building, and nearly completed the building agreed to be erected for B. It was held that L. had an insurable interest by reason of his equitable title. Where plaintiff held a contract for the purchase of certain premises, and in turn contracted to sell them to C., but C. obtained a conveyance from plaintiff's vendor without plaintiff's consent, it was held, in *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 68, that plaintiff had the equitable title and consequently an insurable interest. In *Dupuy v. Delaware Ins. Co.* (C. C.) 63 Fed. 680, it appeared that the purchaser held possession of real estate under a parol contract providing that he should complete a building thereon within six months, and that the title should not pass until the building was completed. It was held that he had, nevertheless, an insurable interest, though the building was destroyed before its completion. It was said, in *Tuckerman v. Home Ins. Co.*, 9 R. I. 414, that, where a parol contract for the sale of land has been performed in part, a court of equity will enforce the agreement, and consequently the purchaser has an equitable interest which will give him an insurable interest; and according to *Keck v. Porter*, 9 Kulp (Pa.) 428, a mere verbal contract for the sale of land is sufficient to give the vendee in possession an insurable interest.

The assignee of a title bond for real estate, on which valuable improvements have been made by the assignor, has an insurable interest, according to *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553. Where the widow of a deceased owner of real estate and guardian of his infant heirs enters into an executory contract to sell such property as soon as the necessary authority could be obtained, and the purchaser goes into possession, it was

held, in *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647, that, as the contract was not one which could be specifically enforced, the interest acquired under such title was such as would give him an insurable interest. It has been held that the vendee in an executory contract has an insurable interest only to the extent of the amount he has paid thereon.

Davis v. Phoenix Ins. Co., 111 Cal. 409, 43 Pac. 1115; *Reynolds v. State Mut. Ins. Co.*, 2 Grant, Cas. (Pa.) 323.

But in New York (*Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247) it has been held that the vendee's interest is not merely commensurate with his payments, but is for the full value of the property.

(c) Vendee of personal property.

Where a vendee of goods paid the price thereof, the seller agreeing to store them free of expense and deliver them as wanted (*Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466), the vendee had an insurable interest, though the goods had not been separated from other goods belonging to the seller, nor weighed out, nor formally delivered and accepted by the vendee. A constructive delivery was regarded as sufficient in *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96. Where the owner of a stock of goods formed a partnership with another and sold him a half interest in the goods, to be paid for by note, as in *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100, such other person acquired an insurable interest, although, through inadvertence, he never signed the note. In *Heald v. Mutual Fire Ins. Co.*, 111 Mass. 38, where the lessees of a farm agreed that they would not sell, dispose of, or suffer to be carried away any of the hay without the consent of the lessor, and gave a bill of sale to a third person, it was held that no title passed to the vendee which would give him an insurable interest.

It was held, in *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326, that where property is purchased on credit, and by the contract the title is not to pass from the vendor until the price is fully paid, the vendee, nevertheless, takes an insurable interest.

The rule is also supported by *Reed v. Williamsburg City Fire Ins. Co.*, 74 Me. 537; *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477, 48 N. E. 620; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; *Lasher*

B.B. Ins.—18

v. N. W. Nat. Ins. Co., 55 How. Prac. (N. Y.) 324, 57 How. Prac. 222; Quinn v. Parke & Lacy Machinery Co., 5 Wash. 276, 31 Pac. 866.

It is said, in Michael v. St. Louis Mut. Fire Ins. Co., 17 Mo. App. 23, though one who is in possession of goods under a contract of purchase has an insurable interest therein, his interest is limited to the amount paid by him.

9. INSURABLE INTEREST IN SUBJECTS OF MARINE INSURANCE.

- (a) Insurable interest in vessel.
- (b) Same—Mortgagor and mortgagee.
- (c) Same—Vendor and vendee.
- (d) Same—Vessel under bottomry.
- (e) Same—Liens and advances.
- (f) Insurable interest in cargo.
- (g) Insurable interest in profits and commissions.
- (h) Insurable interest in freight.
- (i) Reinsurance.

(a) Insurable interest in vessel.

One may have an insurable interest in a vessel, though it is not enrolled in his name, according to McColdin v. Greenwich Ins. Co., 10 N. Y. St. Rep. 390. In accord with this principle are the cases which hold that the charterer of a vessel has an insurable interest.

Bartlet v. Walter, 13 Mass. 267, 7 Am. Dec. 143; Oliver v. Greene, 3 Mass. 133, 3 Am. Dec. 96; Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

A stockholder in a steamship company has an insurable interest in its steamers.

Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.) 18 Fed. 250, 21 Fed. 778; Riggs v. Commercial Mut. Ins. Co. (Super. Ct.) 5 N. Y. Supp. 183, reversing on rehearing 51 N. Y. Super. Ct. 466. This case was subsequently affirmed in 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716.

So, too, has one who has given his bond for the delivery of a vessel which had been attached (Fireman's Ins. Co. v. Powell, 13 B. Mon. [Ky.] 311). A ship's general agent has no insurable interest (China Mut. Ins. Co. v. Ward, 59 Fed. 712, 8 C. C. A. 229),

though he has power of attorney to sell, manage, direct, and charter; such power not being coupled with an interest. One who owns part of a vessel has no insurable interest in the other part, merely by reason of keeping accounts, receiving the avails, and making disbursements, or directing voyages of the vessel (*Finney v. Warren Ins. Co.*, 1 Metc. [Mass.] 16, 35 Am. Dec. 343). As said in *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 93, 29 N. E. 87, a commission claimed for procuring a charter for the vessel is merely a personal liability of the owner, and does not give the agent an insurable interest.

(b) Same—Mortgagor and mortgagee.

That a mortgagor of a vessel has an insurable interest is held in *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184, and according to *Higginson v. Dall*, 13 Mass. 96, it is immaterial that the mortgage is for the full value of the ship. The mortgagee also has an insurable interest.

Pike v. Merchants' Mut. Ins. Co., 26 La. Ann. 392; *Clark v. Washington Ins. Co.*, 100 Mass. 509, 1 Am. Rep. 135; *Stetson v. Insurance Co.*, 4 Phila. (Pa.) 8; *Roussel v. St. Nicholas Ins. Co.*, 52 How. Prac. (N. Y.) 495, 41 N. Y. Super. Ct. 279.

(c) Same—Vendor and vendee.

One who has agreed to sell a vessel, but has not delivered it or received the purchase price, has an insurable interest.

Bell v. Firemen's Ins. Co., 3 Rob. (La.) 423; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542.

The general rule that a vendor to whom the purchase price has not been paid has an insurable interest has governed in some cases.

Slocovich v. Oriental Mut. Ins. Co., 13 Daly (N. Y.) 264; *Vairin v. Canal Ins. Co.*, 10 Ohio, 223; *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 2 Pick. (Mass.) 249.

The vendee of a ship has an insurable interest, though title is retained by the vendor until the price is paid.

Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 259, and *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336.

It is immaterial that the contract is oral, according to *Amsinck v. American Ins. Co.*, 129 Mass. 185, as such contract, being merely voidable and not void, may be treated as valid as to third persons.

(d) Same—Vessel under bottomry.

It was held, in *Williams v. Smith*, 2 Caines (N. Y.) 13, that, though a vessel was under a bottomry bond in excess of her value, the owner in possession, having the right of redemption, had an insurable interest. This, however, was overruled in *Smith v. Williams*, 2 Caines, Cas. (N. Y.) 110, where it was held that the owner of a ship bottomed for more than her value had no insurable interest, for the reason that if the ship was lost he was not obliged to pay the bond, and consequently would gain by the loss. Similarly, it was held, in *Read v. Mutual Safety Ins. Co.*, 5 N. Y. Super. Ct. 54, that to the extent of the bottomry bond outstanding on a vessel the owner, not being under any personal liability, has no insurable interest.

(e) Same—Liens and advances.

A lien on outfits will support an insurable interest (*Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409); but an unconditional sale of outfits gives no lien which will support an insurable interest (*Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414).

It may be stated, as a general rule, that one who makes advances for the benefit and on the credit of the vessel, whether for repairs, equipment, or other purposes, has a lien for such advances, and consequently an insurable interest.

Such is the rule upheld in *Phoenix Ins. Co. v. Hagar*, 11 Wkly. Notes Cas. (Pa.) 281; *Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *Bowring v. Providence Washington Ins. Co.* (D. C.) 46 Fed. 119; *Seamans v. Loring*, 21 Fed. Cas. 920; *International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 93, 29 N. E. 87.

But if the owner of a cargo, without request from the owner of the vessel, repair her while on the voyage, he has no insurable interest as a result thereof, according to *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318, as his repairs were voluntary.

(f) Insurable interest in cargo.

Where A. borrowed money of B. for the purchase of a cargo, and assigned the same to B., with an agreement that B. should receive his debt from the proceeds of the cargo, if it should be sufficient and should arrive safely, the surplus, if any, to belong to A., it was held, in *Locke v. North American Ins. Co.*, 13 Mass. 61,

that A. had such an interest in the cargo as would support an insurable interest. Where a cargo consisting of lumber and other articles was shipped on plaintiff's vessel, consigned to the master on paying freight, the freight being fixed at three-fifths of the lumber (*Wiggin v. Mercantile Ins. Co.*, 7 Pick. [Mass.] 271), plaintiffs had an insurable interest in the lumber as property on board. According to *Russel v. Union Ins. Co.*, 4 Dall. 421, 21 Fed. Cas. 28, 1 L. Ed. 892, a surety for the payment of the value of a cargo in case of condemnation by a foreign court has an insurable interest therein. On the other hand, where the consignees of a ship abroad loaded the vessel with a cargo for which they paid with their own money, taking a bill of lading making the cargo deliverable to their agent in the United States, such agent being instructed to deliver the cargo to A. and B. on their paying a sum exceeding its cost, otherwise to dispose of it on account of the consignees, it was held, in *Warder v. Horton*, 4 Bin. (Pa.) 529, that A. and B. had no insurable interest; and in *Barker v. Marine Ins. Co.*, 2 Fed. Cas. 817, it was held that the master of a ship, who sells the cargo at public auction after an abandonment, and buys it in to prevent loss, does not thereby become the owner of the cargo, so as to have an insurable interest.

The consignee of a cargo has an insurable interest therein.

Providence Washington Ins. Co. v. The Sidney (D. C.) 23 Fed. 88; *Pouwerlin v. Louisiana State Marine & Fire Ins. Co.*, 4 Rob. (La.) 234.

But the insurable interest of the consignee is limited to the amount of his advances, or, perhaps, to his commissions (*Bank of South Carolina v. Bicknell*, 2 Fed. Cas. 674). The supercargo has an insurable interest to the extent of his commissions (*New York Ins. Co. v. Robinson*, 1 Johns. [N. Y.] 616). The insurable interest of the owner of the vessel and cargo extends to the cost of the goods and the premium, together with the freight charges thereon (*Pritchett v. Insurance Co. of North America*, 3 Yeates [Pa.] 461).

A common carrier has such an insurable interest in the cargo as will support a policy for his benefit.

Van Natta v. Mutual Security Ins. Co., 4 N. Y. Super. Ct. 490; *Providence Washington Ins. Co. v. The Sidney* (D. C.) 23 Fed. 88; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287.

This interest is not affected by the fact that the goods insured are transported in vessels belonging to other persons, chartered by the carrier for that purpose (*Chase v. Washington Mut. Ins. Co.*,

12 Barb. [N. Y.] 595). So the charterer of a steamship has an insurable interest in goods in his possession as carrier to the full extent of their value against any loss for which it is possible that he may become responsible (*Munich Assur. Co. v. Dodwell*, 128 Fed. 410, 63 C. C. A. 152, affirming [D. C.] 123 Fed. 841). One who is the president and principal stockholder in a steamship company has, as such stockholder, an insurable interest in shipments in vessels of the company, which will support a policy on account of whom it may concern (*Mannheim Ins. Co. v. Hollander* [D. C.] 112 Fed. 549).

(g) Insurable interest in profits and commissions.

That the interest in the vessel and cargo gives an interest in the profits of the voyage, and that such an interest is an insurable interest, was asserted in *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108.

This principle is also approved in *Tom v. Smith*, 3 Caines (N. Y.) 245; *Mumford v. Hallett*, 1 Johns. (N. Y.) 433, *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139, and *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659, and probably governed the decision in *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616, where it was held that one who agrees to purchase goods to be shipped by a certain vessel, with the provision "no arrival, no sale," has an insurable interest in the goods.

In *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397, plaintiff bargained with R. that he should have the right to one-half of a certain cargo to be imported by R. on paying one-half of the costs and charges. When R. received a bill of lading of the cargo, plaintiff elected to take one-half of it, paying R. a certain sum in advance. This sum was repaid to him, when it was learned that the cargo had been discharged at another port in a damaged condition. As there would have been a profit on the cargo if it had arrived, it was held that plaintiff had an insurable interest in the profits.

It was held in *Holbrook v. Brown*, 2 Mass. 280, that the master of a ship who has a commission on the cargo has an insurable interest, which he may insure as property on board. A commission merchant to whom the cargo of a vessel is consigned for sale has an insurable interest in his expected commissions, according to *Putnam v. Mercantile Marine Ins. Co.*, 5 Metc. (Mass.) 386; and so, too, has an assignee of commissions, according to *Wells v. Philadelphia Ins. Co.*, 9 Serg. & R. (Pa.) 103.

(b) Insurable interest in freight.

Generally speaking, one must be the owner of or have some substantial interest in the subject that is to produce freight, in order to have an insurable interest in the freight.

This is the rule asserted in *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139, and *Williams v. Insurance Co. of North America*, 9 How. Prac. (N. Y.) 365.

Where, as in *Williams v. Insurance Co. of North America*, 1 Hilt. (N. Y.) 345, a part proprietor of a vessel agreed with one of his co-proprietors for the sale of his interest to the latter, the purchaser agreeing to give a bill of sale of his own interest as security for the performance of the contract on his part, it was held that the vendor had nevertheless an insurable interest in freight to be earned by the vessel. But in *Riley v. Delafield*, 7 Johns. (N. Y.) 522, it was said that where A. sold a vessel to B., in whose name she was registered, and it was agreed between them that A. should have the whole benefit of the freight to arise from a voyage for which the vessel had been previously chartered, A. did not have such an interest in the vessel as would give him an insurable interest in the freight.

The general rule is undoubtedly as stated in *Gordon v. American Insurance Co.*, 4 Denio (N. Y.) 360, that there is an insurable interest in freight when the cargo is on board the ship, or if there is a charter party for the voyage, in the course of which the goods are to be taken on board and the freight earned, the insurable interest arises as soon as the ship breaks ground for the voyage. This rule is also upheld by *Melcher v. Ocean Ins. Co.*, 60 Me. 77. It was held, in *Sansom v. Ball*, 4 Dall. 459, 1 L. Ed. 908, that freight advanced, in consideration of which the person making the advance acquires a certain proportion of the tonnage, gives him an insurable interest; but where the owner of the cargo pays freight in advance to the owners of the vessel, as in *Minturn v. Warren Ins. Co.*, 2 Allen (Mass.) 86, he has no insurable interest in the freight prepaid, as he was not to receive freight on the arrival of the vessel.

Where a vessel sails under a charter party, the owners have an insurable interest in freight.

Hodgson v. Mississippi Ins. Co., 2 La. 341; *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163.

It was said in *Huth v. New York Mut. Ins. Co.*, 21 N. Y. Super. Ct. 538, that the charterer of a vessel has not ordinarily an insurable

interest in freight, but the court added that it might be that, if the freight exceeded the charter money, the charterer's interest as to the excess was insurable as freight. A different view, however, seems to have been taken in *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289. Where by the terms of a charter party the charterer has a lien on the freight for his advances, he has an insurable interest on account of such lien to the extent of his advances, according to *Lee v. Barreda*, 16 Md. 190.

An insurable interest in freight extends to the whole amount contracted to be carried, and not merely to the freight less the expense of carriage, according to *Lockwood v. Atlantic Mut. Ins. Co.*, 47 Mo. 50. So it was said in *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, that the insurable interest of the owner of a vessel extends to the whole amount of freight to be earned by the voyage, and the mere fact that he has pledged it to a third person as an agent from which to redeem a loan does not change the rule. He still has an insurable interest in the freight to its full value. According to *Pedrick v. Fisher*, 19 Fed. Cas. 92, the right of a master of a vessel to primage on freight is an insurable interest.

(1) Reinsurance.

The insurer by a marine policy acquires an insurable interest which will support a policy of reinsurance.

Alliance Marine Assur. Co. v. Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117; *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. 250.

In the last case it was said that such an interest will arise from a time policy, as well as from a voyage policy. According to *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475, the insurable interest of the insurer extends no further than the risk which he has assumed, and he may reinsure only for the exact risk assumed in the original policy, and not in contemplation of the loss occurring on a different voyage from that insured in the original policy. In view of the rule that in marine insurance a policy may be issued to cover property in which the insured has not at the time an interest, but in which he subsequently acquires an interest, and that the policy will attach when the interest is acquired, it has been held that a policy of reinsurance covering any and all losses to hulls, freights, cargoes, etc., insured by the plaintiff company at the date of the policy, October 19, 1897, or which they may insure during the currency

of the policy, is not void for want of insurable interest (*Boston Ins. Co. v. Globe Fire Ins. Co.*, 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303).

10. TERMINATION OF OR CHANGE IN INSURABLE INTEREST.

- (a) Effect of termination of interest.
- (b) What constitutes termination of interest in general.
- (c) Transfer of subject of insurance.
- (d) Same—Executory contract.
- (e) Same—Reserving lien or mortgage.
- (f) Same—Transfer to secure debt or by way of mortgage.
- (g) Effect of judicial sale.
- (h) Adjudication in bankruptcy or assignment for benefit of creditors.
- (i) Interest of vendee.
- (j) Interest of mortgagor and mortgagee.
- (k) Effect on rights of third persons.
- (l) Temporary suspension of interest.
- (m) Change of interest.

(a) Effect of termination of interest.

In view of the principle, heretofore discussed, that the insured must have an insurable interest at the time the loss occurs, it may readily be inferred that the termination of the insurable interest of the person insured in the subject of the insurance terminates the policy. This is true, irrespective of any provision of the policy providing for forfeiture in case of alienation or other change of interest, a question which will be discussed in a later brief. As said in *McCarty v. Commercial Ins. Co.*, 17 La. 365, a policy is a personal contract of indemnity with the insured, and if he part with all his interest in the property before the loss occurs the policy terminates, and the insured cannot recover.

The rule thus laid down is approved in *American Basket Co. v. Farmville Ins. Co.*, 1 Fed. Cas. 618; *Hidden v. Slater Mut. Fire Ins. Co.*, 12 Fed. Cas. 121; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 8 Am. Rep. 149; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Wilson v. Hill*, 8 Metc. (Mass.) 66; *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325; *Morrison's Adm'r v. Tennessee Mar. & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Kip v. Mutual Fire Ins. Co.*, 4 Edw. Ch. (N. Y.) 86; *Hodges v.*

Tennessee Mar. & Fire Ins. Co., 8 N. Y. 416; Mt. Vernon Mfg. Co. v. Summit County Mut. Fire Ins. Co., 10 Ohio St. 347.

See, also, *Wilson v. Trumbull Mut. Fire Ins. Co.*, 19 Pa. 372, where the principle that if the interest is terminated the policy is at an end was applied to support a decision to the effect that after one insured in a mutual company has parted with his interest in the property insured he is no longer liable for assessments.

(b) What constitutes termination of interest in general.

It was said in *Hancox v. Fishing Ins. Co.*, 11 Fed. Cas. 409, that an insurance on outfits in a whaling voyage does not terminate pro tanto with their consumption or distribution, but attaches to the proceeds of the adventure, nor does the interest cease to be insurable in the progress of the voyage, simply because it is subject to contingencies, or has not at the moment anything corporeal on tangible to which it is attached, and consequently where on a sealing voyage stores for the use of the crew are dealt out and sold to them during the voyage, thus giving a lien on their share of the profits, the fact that a large portion of such stores are sold before the loss does not affect insurable interest. But, according to *Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414, a lien for advances given to a merchant on an outfit of the vessel for a fishing voyage is dissolved where he parts with the possession of the property under an unconditional sale, and he has, therefore, no insurable interest in the outfit.

Where a cargo was taken on board in breach of the nonintercourse law of March 1, 1809, by reason of which the vessel might be forfeited and the property immediately vested in the government (*Fontaine v. Phoenix Ins. Co.*, 11 Johns. [N. Y.] 293), the owner's insurable interest was thereby divested. On the other hand, it was held, in *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184, that the interest of the mortgagor of a vessel was not terminated by the forfeiture of the vessel for violation of the act of 1831, regulating the coasting trade.

It was held, in *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57, that the insurable interest of A. in a house built on his land by C., without any agreement that it should be held as personal property or consent that it might be removed, is not terminated by an understanding between A. and C. that the former should hold the land for C. to purchase, nor by consent, revoked before the sale, that the house might be sold as personal property on an execution against C. The insurable interest of a debtor in

possession of property pledged is not terminated until full title vests in the pledgee or purchaser, without any right of redemption on the part of the pledgor (*Nussbaum v. Northern Ins. Co.* [C. C.] 37 Fed. 524, 1 L. R. A. 704).

(c) Transfer of subject of insurance.

An absolute transfer of the title of the insured in the subject of the insurance divests him of his entire insurable interest and terminates the policy.

The rule is approved in *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Leavitt v. Western Marine & Fire Ins. Co.*, 7 Rob. (La.) 351; *Pike v. Merchants' Mut. Ins. Co.*, 26 La. Ann. 392; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Gordon v. Mass. Fire & Marine Ins. Co.*, 2 Pick. (Mass.) 249; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Balow v. Teutonia Farmers' Mut. Fire Ins. Co.*, 77 Mich. 540 43 N. W. 924; *Kip v. Mutual Fire Ins. Co.*, 4 Edw. Ch. (N. Y.) 86; *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Mt. Vernon Mfg. Co. v. Summit County Mut. Fire Ins. Co.*, 10 Ohio St. 347; *Knight v. Eureka Marine Ins. Co.*, 26 Ohio St. 664, 20 Am. Rep. 778; *Grevenmeyer v. Southern Mutual Fire Ins. Co.*, 62 Pa. 340, 1 Am. Rep. 420.

It does not change the effect of the sale, as divesting the insured of his insurable interest, that the company before the sale wrote a letter continuing the policy in force "under the conditions of the policy" (*Pike v. Merchants' Mut. Ins. Co.*, 26 La. Ann. 505).

The reason for the foregoing principle is, as said in *Leavitt v. Western Marine & Fire Ins. Co.*, 7 Rob. (La.) 351, that a policy insuring against loss or damage to property is a personal contract, and not one running with the property insured.

That this is the basis of the principle is also shown by *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Manley v. Insurance Co. of North America*, 1 Lans. (N. Y.) 20; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835. And that the policy does not run with the property is shown by other cases in which the question of insurable interest is not involved. Reference may be made to *Doggett v. Blanke*, 70 Mo. App. 499; *Lindley v. Orr*, 83 Ill. App. 70; *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457; *Hubbard v. Austin*, 8 Ohio Dec. 111, 6 Ohio N. P. 249; *Disbrow v. Jones*, Har. (Mich.) 48.

It was held in *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515, that a mere feigned sale, with a secret trust and bargain that the

property is not really changed, is nevertheless such a sale as divests the interest of the insured. On the other hand, it was said, in *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778, that, though the interest of the insured would be extinguished by the bona fide sale, it would not be terminated by a mere sham sale. But the transfer must be a valid one, which may be enforced as against the transferror.

Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647.

(d) Same—Executory contract.

However, where the contract of sale is merely executory, and no conveyance has actually been made, whether a part of the purchase price is paid or not, the interest of the vendor is not divested.

Such is the doctrine of *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Bell v. Firemen's Ins. Co.*, 3 Rob. (La.) 423; *Boston & Salem Ice Co. v. Royal Insurance Co.*, 12 Allen (Mass.) 381, 90 Am. Dec. 151; *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Shotwell v. Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247; *Ladd v. Ætna Ins. Co.*, 70 Hun, 490, 24 N. Y. Supp. 384; *People's Ins. Co. v. Straehle*, 2 Cin. Super. Ct. Rep'r, 186; *Trumbull v. Portage County Mut. Ins. Co.*, 12 Ohio, 805; *Norcross v. Insurance Company*, 17 Pa. 429, 55 Am. Dec. 571; *Perry County Ins. Co. v. Stewart*, 19 Pa. 45; *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Pa. 474; *Parcell v. Grosser*, 109 Pa. 617, 1 Atl. 909. But, see *Cottingham v. Fireman's Fund Ins. Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627, which seems to indicate that a different rule prevails in Kentucky.

Even where the deed has been deposited in escrow, for delivery on the performance of certain conditions (*Merchants' Ins. Co. v. Nowlin* [Tex. Civ. App.] 56 S. W. 198), the interest of the grantor is not divested if the conditions remain unperformed at the time of loss. Since the deed does not take effect as an operative instrument, though left in the hands of the grantee after the execution by the grantor, if it be so left merely for transmission to a third person, in whose hands the parties have agreed it shall remain until the happening of a certain event, it was held, in *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543, that such deed did not terminate the insurable interest of the grantor.

The fact that the insured entered into a contract for the sale of the total output of his plant to one corporation, which released the insured, as between the parties thereto, from liability for loss by

fire on the goods insured, was not one of which the insurer could take any advantage to defeat its liability to the insured for a loss under the policy on the ground that the insured had no insurable interest, especially where it appeared that the purchase price of the goods had not been paid, and that, though the purchaser applied for the insurance, the seller paid the premiums (*Burke v. Continental Ins. Co.* [Sup.] 91 N. Y. Supp. 402).

(e) Same—Reserving lien or mortgage.

Where the vendor of property reserves a lien, or stipulates for or takes back a mortgage, for the unpaid purchase money, his interest is not divested.

This rule is supported by *Bell v. Firemen's Ins. Co.*, 5 Rob. (La.) 428; *Morrison's Adm'r v. Tenn. Marine & Fire Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404; *Bates v. Commercial Ins. Co.*, 2 Cin. Super. Ct. Rep'r, 195; *Stetson v. Insurance Co.*, 4 Phila. (Pa.) 8; *Fire & Marine Ins. Co. v. Morrison*, 11 Leigh (Va.) 354, 36 Am. Dec. 385; *Jerde v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636.

This rule seems to be based on the principle that a mere change in the nature of an interest will not terminate the policy, as long as a real or substantial interest exists.¹ It was held in *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665, that where the insured sold the property, and afterwards took it back on account of non-payment by the vendee, his interest was not divested.

(f) Same—Transfer to secure debt or by way of mortgage.

The general principle that a mere conditional transfer to secure a debt will not divest the insurable interest of the transferor was announced in *Gordon v. Mass. Fire & Marine Ins. Co.*, 2 Pick. (Mass.) 249. The same principle governed the decision in *Nussbaum v. Northern Ins. Co. (C. C.)* 37 Fed. 524, 1 L. R. A. 704. In *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553, where the holder of a title bond was the person insured, two judges out of four held that the mere nominal transfer by the assignment of the title bond as collateral security for debts which were subsisting liens on the property did not terminate the insured's interest. One judge, however, held that, as the transfer was absolute on its face, it terminated the interest, though it was in fact merely as collateral.

¹ See post, p. 211.

The transfer by the insured by way of mortgage, while it may create an insurable interest in the mortgagee, does not divest the mortgagor of his insurable interest.

Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. (Mass.) 249;
Jackson v. Massachusetts Mut. Fire Ins. Co., 23 Pick. (Mass.)
418, 34 Am. Dec. 69; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14
N. E. 454.

In the *Jackson Case* the application of the rule was restricted to the case of the mortgagor still in possession, where there has been no entry for foreclosure. But, in *French v. Rogers*, 16 N. H. 177, the court indorsed the general rule, and apparently takes the position that it made no difference that the mortgagee had entered for foreclosure. In *Hidden v. Slater Mut. Fire Ins. Co.*, 12 Fed. Cas. 121, it was held that the insurable interest of the lessee is divested by mortgage of his leasehold interest, and the court seems to lay stress on the fact that the mortgagee, some months before the loss, gave notice of his intention to foreclose the mortgage for breach of the conditions, and took possession of the leasehold interest. Even where the conveyance was absolute in form, it was held, in *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. 416, that the grantor might show that the deed was in fact a mortgage, in which case his insurable interest would not be divested.

See, also, *Balow v. Teutonia Farmers' Mut. Fire Ins. Co.*, 77 Mich. 540, 43 N. W. 924. It was held in this case that the grantor in an absolute deed was divested of his insurable interest, if in a suit to have such deed declared a mortgage the bill was dismissed and no appeal taken.

In *Read v. Mutual Safety Ins. Co.*, 5 N. Y. Super. Ct. 54, it appeared that after the making of a time policy on a vessel, in which she was valued, the master executed a bottomry bond, which was outstanding when the vessel was lost. It was held that by the bottomry the interest of the insured was to that extent divested.

(g) Effect of judicial sale.

The effect of a judicial sale of the insured premises has been considered in several cases, and the rule has been stated to be that, when the property is sold at such sale, the insurable interest is not divested until the sale is reported to and confirmed by the court.

Manhattan Ins. Co. v. Stein, 5 Bush (Ky.) 652; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. 23; *Slobodsky v. Phenix Ins. Co.*, 53 Neb. 816, 74 N. W. 270.

In the leading case of *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619, affirming 3 *Thomp. & C.* 33, it was held that, where the property was sold at sheriff's sale, the insurable interest of the insured was not divested as long as he had a right to redeem.

This rule seems to have governed the decisions in *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507, *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 5 Am. Rep. 297, and *Chamberlain v. Insurance Co. of North America*, 8 N. Y. Supp. 701, 51 Hun, 636.

The *Cone Case*, indeed, went further, and held that an insurable interest was not divested as long as the judgment creditors of the insured had the right to redeem, though the debtor's right had lapsed. It was, however, held, in *Williams v. North German Ins. Co. (C. C.)* 24 Fed. 625, that where the property was sold under a decree, and not redeemed, the insurable interest was extinguished; and in *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, it was said that, where the interest of the insured has been divested by a judicial sale, it cannot be restored by a verbal agreement that, if the debtor will repurchase the property, the policy will be continued in force.

(b) Adjudication in bankruptcy or assignment for benefit of creditors.

It was said, in *Re Carow*, 5 Fed. Cas. 101, and in *Re Hamilton (D. C.)* 102 Fed. 683, that, where there has been an adjudication in bankruptcy, the title of the bankrupt by operation of law passes to the receiver in bankruptcy and his insurable interest is extinguished. In the early case of *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. (Mass.) 76, it appeared that the insured assigned all his effects, including the subject-matter of the insurance, in trust to pay creditors and pay over the surplus, if any, to himself. The court said that if this was an absolute assignment, so that no property or interest remained in the insured at the time of loss, it would terminate his insurable interest. Under this assignment the insured retained no interest in the vessel unless there was a surplus coming to him from the proceeds of the assigned property, and his insurable interest was extinguished unless he showed that there was such a surplus. Subsequently, it appearing that the surplus remained, the court held in 19 Pick. (Mass.) 81, that the whole insurable interest of the insured was not divested by the assignment. In *Hanover Fire Ins. Co. v. Orr*, 56 Ill. App. 621, affirmed in 158 Ill. 149, 41 N. E. 854, 49 Am. St. Rep. 146, it was held that

the insurable interest is not entirely divested by an assignment, but that the insured could not recover, as the assignment was an alienation within the condition of the policy prohibiting the alienation of the subject of the insurance. In *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, where the assignor remained in possession, it was held that the assignment did not extinguish his interest. On the other hand, *Ohio Farmers' Ins. Co. v. Waters*, 65 Ohio St. 157, 61 N. E. 711, supports the principle that where there has been an assignment for the benefit of creditors, and the assignee has accepted the trust and is in position to execute it, the assignor no longer has an insurable interest in the property. The court distinguishes the *Lawrence Case* on the ground that in the latter case the assignor retained possession, while in the present case constructive possession was in the assignee, and the assignor had possession merely as tenant at sufferance. The doctrine that insurable interest is divested by the assignment is apparently approved in *Highlands v. Lurgan Mut. Fire Ins. Co.*, 177 Pa. 566, 35 Atl. 728, 55 Am. St. Rep. 739.

(1) Interest of vendee.

Where a contract for the purchase of lands, the purchase money being payable in installments, provided that, if the vendee should fail to perform, the vendor might declare the contract void and treat the vendee as a tenant holding over, and the vendee, having made default, was notified to surrender possession of the premises, which demand was complied with (*Birmingham v. Empire Ins. Co.*, 42 Barb. [N. Y.] 457), the vendee's insurable interest was extinguished so as to terminate the insurance. In *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. 260, it appeared that M. conveyed lands to I. in consideration of \$600, \$200 paid in cash and the residue in four installments, retaining the vendor's lien to secure the deferred payments. Subsequently it was stipulated that I. should remain in possession for a certain period, taking care of the property and keeping up the taxes, and at the expiration thereof surrender possession to M., giving up the deed, and that M. should surrender the notes, and the sale should be canceled. If, however, I. should meet all payments due, the original contract should remain in force. It was held that, notwithstanding the agreement to rescind the contract of sale, until such rescission was actually consummated I.'s insurable interest was not extinguished. Where the vendor of a horse agreed that, if the horse should die before the notes therefor

were paid, he would take the insurance and return the vendee's notes, such agreement did not divest the vendee's insurable interest. (*Kells v. Northwestern Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 58 Am. St. Rep. 541.)

(j) Interest of mortgagor and mortgagee.

It has been held in some instances that the interest of the mortgagor is divested by the foreclosure of the mortgage.

Reynolds v. London & Lancashire Fire Ins. Co., 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17; *McLaren v. Hartford Fire Ins. Co.*, 5 N. Y. 151, overruling 1 Edm. Sel. Cas. 210.

On the other hand, in *Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401, it was held that as long as a right to redeem existed the mortgagor's interest was not extinguished by foreclosure sale.

This rule was approved in *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *Stephens v. Illinois Mut. Ins. Co.*, 43 Ill. 327; *McLaren v. Hartford Fire Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 210, overruled in 5 N. Y. 151; and apparently in *Marts v. Cumberland Ins. Co.*, 44 N. J. Law, 478. It was also approved in *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759, and the court added that his insurable interest is terminated by a failure to redeem within the specified period.

In *Insurance Co. v. Sampson*, 38 Ohio St. 672, it was said that the insurable interest of the mortgagor in possession is not divested by the authorized sale and confirmation thereof. In *Stephens v. Ill. Mut. Ins. Co.*, 43 Ill. 327, it was held that the interest of the grantee of the mortgaged premises was not divested by the foreclosure until the period of redemption had expired.

In the leading case of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044, it was held that where a mortgagee insured solely on his own account the policy ceases to have any operation from the time his debt is paid or extinguished.

This rule was approved in *Smith v. Union Ins. Co.* (R. I.) 55 Atl. 715, and *Wall v. Commercial Ins. Co.*, 2 Wkly. Law Bul. 113, 7 Ohio Dec. 823.

It was held, in *Springfield Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711, that the insurable interest of the guarantor of the mortgage debt was extinguished by the payment of the mort-

gage; but according to *Haley v. Manufacturers' Fire & Marine Ins. Co.*, 120 Mass. 292, where the mortgagee of chattels assigns his mortgage and the assignee made but a partial payment of the purchase price, the mortgagee's interest was not divested by the partial payment.

(k) Effect on rights of third persons.

In *Birdsey v. City Fire Ins. Co.*, 26 Conn. 165, where the original holder of a policy assigned it to B. as security for a debt and afterwards conveyed the property to C., it was held that he could not recover for the benefit of B., since his entire interest was extinguished by the conveyance. In *Tallman v. Atlantic Fire & Marine Ins. Co.*, 29 How. Prac. (N. Y.) 71, it was held that if the insurance is on the interest of A., who took out the policy, a transfer by A. would extinguish the interest, so that B., to whom it was payable, could not recover. A similar principle was approved in *Perry v. Mechanics' Mut. Ins. Co. (C. C.)* 11 Fed. 478. But the Tallman Case was reversed in *42 N. Y. 87, 33 How. Prac. 400, 4 Abb. Dec. 345, on the ground that the insurance in this case was an insurance by B. of his interest, and consequently he could recover, notwithstanding the fact that A.'s interest had been extinguished by giving a chattel mortgage on the property. In *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 376, affirmed in 81 Mo. 103, it was held that, as a trustee in a deed of trust has an insurable interest distinct from that of the grantor, a conveyance by the grantor will in no way affect his interest; and according to *Georgia Home Ins. Co. v. Jones*, 49 Miss. 80, a lessor cannot affect the lessee's insurable interest by giving a lien on the property.

In *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, it was held that where the policy is on the interest of the mortgagor, for the benefit of the mortgagee, an extinguishment of the mortgagor's interest terminates the policy as to the mortgagee.

The same principle is asserted in *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711, *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759, and *Reynolds v. London & Lancashire Fire Ins. Co.*, 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17.

Where a part owner of a vessel agreed with one of his co-owners to sell the latter his interest, the vendee agreeing to give a bill of sale of his own interest as security for the performance of the contract on his part (*Williams v. Insurance Co. of North America*,

1 Hilt. [N. Y.] 345), it was held that the seller had an insurable interest in freight to be earned by the vessel which was not extinguished by the sale of the vendee's interest on execution.

(l) Temporary suspension of interest.

To be effective as a termination of the policy, the extinguishment of the insurable interest must be continuous. It is well settled, as said in *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. 914, 19 L. R. A. 114, that though the insured may have been divested of his interest temporarily, if he regained it before the loss occurred he may recover.

This principle is also supported in *Mutual Fire Ins. Co. v. Wagner* (Pa.) 7 Atl. 108; *Insurance Co. of North America v. Lewis*, 14 Ins. Law J. 879; *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665.²

(m) Change of interest.

In the early case of *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217, it was said that the right to recover is not affected by changes in the formal title as to part of the subject of the insurance. A change of interest, to affect the policy, must, according to *Ayers v. Home Ins. Co.*, 21 Iowa, 185, be actual, and not merely nominal. The broad principle that, in the absence of any provision to the contrary, any change in the insurable interest of the insured, whether by complete sale of a part of the property or a change in the title to a part or the whole of the property, does not avoid the policy, provided that at the time of the loss the insured has an insurable interest, was asserted in *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325. The principle seems to have been approved in *Duncan v. China Mut. Ins. Co.*, 129 N. Y. 237, 29 N. E. 76. It naturally follows that the mere diminution of interest does not terminate the policy.³

Franklin Ins. Co. v. Findlay, 6 Whart. (Pa.) 483, 37 Am. Dec. 430; *Read v. Mutual Safety Ins. Co.*, 5 N. Y. Super. Ct. 54; *Haley v. Manufacturers' Fire & Marine Ins. Co.*, 120 Mass. 292; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149.

² See *Greenhood, Public Policy*, p. 277; *Rev. Codes N. D. 1899*, § 4456; *Ann. St. S. D. 1901*, § 5298; *Civ. Code Mont. 1895*, § 3406.

³ See *Greenhood, Public Policy*, p. 271; *Rev. Codes N. D. 1899*, § 4457; *Ann. St. S. D. 1901*, § 5299; *Civ. Code Mont. 1895*, § 3407.

A change in the nature or character of the interest does not terminate the policy.

Jerdee v. Cottage Grove Fire Ins. Co., 75 Wis. 345, 44 N. W. 636; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542. This principle has been applied in *Stetson v. Insurance Co.*, 4 Phila. (Pa.) 8, and *Phelps v. Gebhard Fire Ins. Co.*, 22 N. Y. Super. Ct. 404, to the case of a transfer of property where the vendor takes back a mortgage.

In accordance with this principle, also, it has been held that a sale of insured property to a firm of which the vendor is a member does not extinguish his interest, so as to terminate a policy.

Cowan v. Iowa State Ins. Co., 40 Iowa, 551, 20 Am. Rep. 583; *Blackwell v. Miami Valley Ins. Co.*, 19 Wkly. Law Bul. 87, 10 Ohio Dec. 159.

In *Waring v. Loder*, 53 N. Y. 581, it was said that, where a mortgagor whose bond to pay the mortgage debt accompanies the mortgage conveys the property, his interest is not extinguished, since he still has an interest in the preservation of the property, in order that his debt may be paid out of it. In *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920, it was held that, where property occupied by a husband and wife as a homestead was conveyed by the husband to the wife, his insurable interest therein was not extinguished.

In *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.) 301, it was held that where two persons, owning property jointly, effected an insurance in both their names, and before the loss one conveyed his interest to the other, there could be no recovery for want of a joint interest at the time of loss. Chief Justice Bronson dissented, however, holding that a mere transfer of interest between the two persons on whose interest the policy had originally been issued did not terminate the policy. *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210, has been regarded as announcing a doctrine similar to the Howard Case. The decision was that where two tenants in common are insured, and before the loss one conveys his interest to the other, they cannot maintain a joint action on the policy. In *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570, the Supreme Court held that, where several owners of property are jointly insured, a sale by one of them to the others is not such a change of interest as will terminate the policy, but the cause was reversed in the court of appeals (5 N. Y. 405). The rule thus announced is

also approved in *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. 311, 72 Am. Dec. 705. The principle of the New York cases has apparently been overruled in later cases.

Wilson v. Genesee Mut. Ins. Co., 16 Barb. 511; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, affirming 24 N. Y. Super. Ct. 501.

It was said in the *Hoffman* Case that it is merely where the transfer is to a third person that it will terminate the policy by reason of a change of interest, and not one which is merely to one whose interest is already covered by the policy. So it was held, in *Lockwood v. Middlesex Mut. Ins. Co.*, 47 Conn. 553, that in order to affect a change of interest that will terminate the policy, the change must be in the form of a sale by the insured to one not insured. A transfer of interest between parties jointly insured will not terminate the policy. This doctrine has been applied to cases involving a transfer of interest between the partners. As was said in *Powers v. Guardian Fire & Life Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20, where a partnership is insured, the partners are to be regarded as so far only one person that changes between themselves in the relative amounts or nature of their respective insurable interests would not be such an extinguishment of interest as would terminate the policy.

The rule is also supported by *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11, 7 Am. Rep. 581; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69, 21 Am. Rep. 544; *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich. 15, 8 N. W. 554; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1, 22 Am. Rep. 294; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, affirming 24 N. Y. Super. Ct. 501.⁴

The rule is disapproved in *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. 311, 72 Am. Dec. 705, and *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405, reversing 7 Barb. 570, but this case must be regarded as overruled by later New York cases. It was also disapproved in *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552, where it was said that if a policy is taken out on the property of the partnership, and one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss. This

⁴ See Rev. Codes N. D. 1899, § 4462; Ann. St. S. D. 1901, § 5303; Civ. Code Mont. 1895, § 3411.

has sometimes been based on the theory that at the time of loss the old firm had no insurable interest in the property, but the insurance company may also well contend that the new firm is not the party with whom they contracted. It is not a mere change of relative interests, but it is a new party, a new business, and the contract with the old firm cannot be changed into a contract with the new firm without the consent of the company.

11. PLEADING AND PRACTICE AS TO INSURABLE INTEREST IN PROPERTY.

- (a) Pleading insurable interest—Necessity.
- (b) Same—Insurable interest of assignees, appointees, etc.
- (c) Same—Sufficiency of allegations.
- (d) Same—Defects, objections, and aid by verdict.
- (e) Right to raise defense of want of insurable interest.
- (f) Same—Estoppel to deny interest.
- (g) Pleading lack of insurable interest.
- (h) Reply.
- (i) Issues, proof, and variance.
- (j) Evidence—Presumptions and burden of proof.
- (k) Same—Admissibility.
- (l) Same—Weight and sufficiency.
- (m) Trial and review.

(a) Pleading insurable interest—Necessity.

The fact that at common law wager policies of marine insurance were regarded as valid has already been pointed out.¹ Under this rule of the common law it was held, naturally, in the early cases of marine insurance, that an averment of interest was not necessary in an action on the policy.

This is the rule laid down in *Clendinning v. Church*, 3 Caines (N. Y.) 141, and *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 332.

On the authority of the cases just cited, the Supreme Court of New York, in *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. 143, held that an averment of interest is unnecessary in declaring on a policy of insurance. The court regarded the issuing of the policy as an admission by the insurer of the interest of the insured in the property, and, as the insured was not therefore bound to prove his interest, he was not bound to allege it, under the general

¹ See ante, p. 134.

rule that the suitor need not allege that which he is not bound to prove. One judge dissented on the ground that as the existence of an insurable interest, both at the issuance of the policy of fire insurance and at the time of loss, was necessary, such interest must be averred. A few years later the question was again raised in *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. 247, 14 Abb. Prac. 398. Judge Emott, who was the dissenting judge in the *Fowler Case*, wrote the opinion. He said that the decision in the *Fowler Case* could not be sustained; that the cases cited as authority were cases of marine insurance, in which averment of interest was unnecessary, as such policies were valid, even if wagers. On the other hand, fire policies without interest were void both at common law and under the statute against gaming. Consequently, in order to state a cause of action, a complaint on a fire policy must contain an allegation of interest. Subsequently the decision in the *Fowler Case* was reversed by the Court of Appeals (26 N. Y. 422), and an allegation of insurable interest held to be necessary, on the authority of the *Freeman Case*. It had already been held in *Williams v. Insurance Co. of North America*, 9 How. Prac. 365, that, in view of the statute (1 Rev. St. p. 662, §§ 8-10) prohibiting wagers, it was necessary to allege that the insured had an insurable interest. It was contended that plaintiff need not allege that the contract was within the exception of the statute, but the court said that, while it is true that if a statute declares a contract void if made in a particular manner or on a specified consideration, it is not necessary in declaring on the contract to negative the condition, if a statute declares a contract void unless made under certain conditions or on a specific consideration, the fact that the contract is in the exception must be alleged.

That the insured, in an action on the policy, must allege an insurable interest in the property insured, may be regarded as settled.

The general rule is asserted in *Earnmoor v. California Ins. Co.* (D. O.) 40 Fed. 847; *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236; *Indiana Live Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237, 30 N. E. 7; *Western Assur. Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95; *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306; *Bayles v. Hillsborough Ins. Co.*, 27 N. J. Law, 163; *Bryan v. Farmers' Mut. Indemnity Ass'n*, 81 N. Y. Supp. 145, 81 App. Div. 542; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

In accordance with the principle already established, that the insured must have an insurable interest at the time of loss,² it is also well settled that the existence of such an interest must be alleged.

Such is the rule established by *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 18 Fed. 250; *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Western Assur. Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265; *Phenix Ins. Co. v. Moffitt* (Ind. App.) 51 N. E. 948; *Farmers' Ins. Co. v. Burris*, 23 Ind. App. 507, 55 N. E. 773; *Prussian National Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Vernon Ins. & Trust Co. v. Bank of Toronto*, 29 Ind. App. 678, 65 N. E. 23; *Royal Ins. Co. v. Horton*, 14 Ins. Law J. 871; *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534; *Harness v. National Fire Ins. Co.*, 62 Mo. App. 245; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Chrisman v. State Ins. Co.*, 18 Or. 283, 18 Pac. 466; *Hardwick v. Same*, 20 Or. 547, 26 Pac. 840; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628; *German Ins. Co. Everett* (Tex. Civ. App.) 36 S. W. 125; *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185; *Dickerman v. Vermont Mut. Fire Ins. Co.*, 67 Vt. 99, 30 Atl. 808; *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095.

In some cases the rule has been qualified, and it has been said that the allegation of interest at the inception of the policy is sufficient, as the presumption is that the interest continued until the time of loss.

This was the decision in *Roussel v. St. Nicholas Ins. Co.*, 41 N. Y. Super. Ct. 279, 52 How. Prac. 495, and *Davis v. Grand Rapids Fire Ins. Co.*, 15 Misc. Rep. 263, 36 N. Y. Supp. 792, affirmed without opinion in 157 N. Y. 685, 51 N. E. 1090. But the principle was denied in *Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

In *Henshaw v. Mutual Safety Ins. Co.*, 11 Fed. Cas. 1189, it was said that, where the declaration alleges the existence of an insurable interest at the time of loss, it need not allege that the insured had such an interest at the inception of the risk. Apparently in a number of the cases cited above it is held that the existence of interest both at the inception of the policy and at the time of loss must be alleged. The general principle that the declaration must allege

² See ante, p. 137.

insurable interest at the inception of the policy has also been qualified in *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095, where, on the ground that a policy may be valid, though the property is acquired subsequent to its delivery, it was held that an allegation that interest was acquired subsequent to the delivery of the policy is sufficient.

On the other hand, it has been held in Colorado and Nebraska that an insurable interest need not be alleged, as the want of such interest is properly a matter of defense.

Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 Pac. 537; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 68 N. W. 847.

This principle is approved in *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368. In *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 8 South. 222, 60 Am. Rep. 162, it was held that no averment of interest is necessary under the provisions of the Code. Code 1876, § 2979, provides that any pleading which conforms substantially to the schedule of forms given therein is sufficient. Form 16, on page 704, is framed for an action on a policy of insurance, and contains no averments of insurable interest. The court says it must be inferred, therefore, that the Legislature regarded the averment that the policy was issued by the insurer as equivalent to an averment that the insured had an insurable interest.

(b) Same—Insurable interest of assignees, appointees, etc.

The general rule that the declaration must contain an allegation of insurable interest in the person for whose benefit the contract was made was asserted in *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247, 14 Abb. Prac. 398; but, as pointed out in *Frink v. Hampden Ins. Co.*, 45 Barb. (N. Y.) 384, 1 Abb. Prac. (N. S.) 345, 31 How. Prac. 30, in the *Freeman Case* the plaintiffs, who had no interest, were the persons insured, and not the persons who really owned the property, while in the present case the policy was taken out by one who had the interest in the property, and he merely appointed another to receive the money. It was, therefore, not necessary that such appointee should allege in his complaint that he had an insurable interest. Where an agent without interest, with whom the contract has been made, sues in his own name, he must allege the beneficial interest of his principal (*Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. D. C. 66). In *Peabody v. Wash-*

ington County Mut. Ins. Co., 20 Barb. (N. Y.) 339, it was held that an assignment of the policy as collateral security will not enable the assignee to maintain an action, if it does not appear in the complaint that at the time of the fire he had an interest in the property insured.

This rule seems to have met with approval in *Bayles v. Hillsborough Ins. Co.*, 27 N. J. Law, 163, and *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 422, where the court remarked that even at common law the interest of the assignee must be stated to make out a cause of action.

In *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466, where the policy was issued to one person and assigned to another, who had succeeded to the interest in the property covered by the policy, and in consenting to such assignment the company agreed that the loss should be payable to the mortgagee as his interest might appear, it was held that in an action by the mortgagee on the policy he must allege his interest.

(c) Same—Sufficiency of allegations.

A general averment of interest is sufficient.

Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302; *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122.

As said in the last case, there is no reason why plaintiff should set out the nature and character of his interest specifically.

This principle is also announced in *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman (Ill.) 236; *Henshaw v. Mutual Safety Ins. Co.*, 11 Fed. Cas. 1189; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

But the declaration or complaint must set out sufficient facts to show that an insurable interest exists.

Spare v. Home Mut. Ins. Co. (C. C.) 15 Fed. 708; *Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman (Ill.) 236.

In accord with this rule is *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046. In this case it was alleged that plaintiff was the owner of the goods insured and had an insurable interest therein. It was contended that the clause "had an insurable interest therein" modified the former allegation of ownership,

leaving the petition, in legal effect, with but an allegation that plaintiff had an insurable interest, and such an allegation is but a legal conclusion. The court, however, did not regard this as a fair construction of the petition, holding that there was nothing to indicate that plaintiff intended to assert distinct kinds or degrees of interest, such as ownership and an insurable interest less than ownership; that, having alleged ownership, such allegation carried with it insurable interest. In *Bayles v. Hillsborough Ins. Co.*, 27 N. J. Law, 163, the action was brought by an assignee of a policy, and the declaration averred simply that the policy was assigned to him as collateral security for a bond. It was held that the allegation was insufficient, in that there was no averment that the bond was secured by a mortgage on the premises, or that plaintiff had any interest whatever in the premises.

It was held in *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520, that an allegation that the company insured plaintiff on his certain property is a sufficient allegation of insurable interest.

The same rule seems to have been approved in *German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706; *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471; *American Cent. Ins. Co. v. White* (Tex. Civ. App.) 73 S. W. 827; *Pennsylvania Fire Ins. Co. v. Jameson Bros.*, 31 Tex. Civ. App. 651, 73 S. W. 418; *People's Fire Ins. Co. v. Heart*, 24 Ohio St. 331.

In *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620, the policy was attached to the petition and its recitals were made a part thereof. The policy recited that the company insured S. against loss by accident, etc., to the property described. It was held that this showed an insurable interest in S. In *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, the complaint, after reciting that the company insured against loss "plaintiff's personal property," describing the property, and alleging the loss, recited, "all of which loss plaintiff without fault or negligence on his part has sustained; that plaintiff gave notice of his loss, and subsequently rendered to the defendant due proof of his loss * * * as aforesaid." The court said that, while it would have been better pleading to have averred directly the interest of plaintiff in the property insured, the complaint sufficiently shows that he had an interest, both at the time of insurance and at the time of loss. So, too, in *Van Natta v. Mutual Security Ins. Co.*, 4 N. Y. Super. Ct. 490, it was held that it is a sufficient averment of interest to allege that the insurance was for the account and benefit of plaintiff as a common

carrier; but in *Dickerman v. Vermont Mut. Fire Ins. Co.*, 67 Vt. 99, 30 Atl. 808, where it was alleged that defendants promised plaintiffs to pay them certain sums of money if their buildings, etc., were destroyed by fire between certain dates, the court regarded it as doubtful whether this was a sufficiently definite allegation of insurable interest, though the point was not decided.

The allegation in *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520, was that the company insured plaintiff to an amount of \$3,000 on 10,000 bushels of oats. This case was criticised in *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582, where it was said that the allegation was utterly insufficient to show an insurable interest, and violated the rule that facts essential to sustain the action must be positively alleged, and not merely by way of inference.

The principle is also repudiated in *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73, and *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840.

In *Young v. Phenix Ins. Co.*, 61 N. Y. 650, where an open policy was involved, the complaint alleged that the policy by its terms insured the several persons whose names should thereafter be indorsed thereon, and that by a proper indorsement duly made on the policy it insured plaintiffs against loss or damage on a certain cargo. The court held that a demurrer on the ground that there was no sufficient averment of interest could not be sustained, as the allegation of the proper indorsement duly made, taken in connection with the condition in the policy, was equivalent to an allegation of interest.

Where the declaration avers that plaintiff is the owner of the property, such averment must be construed as an averment of insurable interest according to *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

A similar principle seems to have governed in *Jones v. Philadelphia Underwriters*, 78 Mo. App. 298, and *Insurance Co. of North America v. Hegewald*, 66 N. E. 902, 161 Ind. 631.

In the last case the complaint alleged that plaintiff was owner at the time the property was insured, and while the policy was in force the property was damaged by fire, but that "after the loss and injury to his said property" the adjuster visited the premises, etc.

It was held that the complaint sufficiently alleged that plaintiff was owner of and had an insurable interest in the premises at the time of the fire. In *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, the complaint set out that on a certain date plaintiff was interested in the property thereafter more fully described, and so continued interested until the destruction of the property. The property was also described in the policy, which was filed with and made a part of the complaint. The court regarded the complaint as sufficient. In accord with these cases is *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726. The action was brought against an agent for failure to insure as agreed. The complaint stated that plaintiff, at the time he procured defendant to effect the insurance, was the owner of the property, and is now the owner; that he continued to own the property for more than two years after the agreement was made; that the building was destroyed in about three months after the parties entered into the agreement. It was held that, while the complaint did not specifically state an insurable interest at the time of loss, the existence of such an interest was nevertheless sufficiently shown. Even where the designation of the property insured is "on his barn," etc., this was regarded as sufficient by implication as an allegation of plaintiff's interest and ownership (*Bondurant v. German Ins. Co.*, 73 Mo. App. 477). So, in *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150, an allegation that "his [plaintiff's] store was consumed by fire," though not a technical averment of interest, was sufficient, after verdict, on motion in arrest. But where the petition alleged that plaintiff owned the business conducted in the building containing the property insured, and that he was damaged to a certain amount by the destruction of the property (*Story v. American Cent. Ins. Co.*, 61 Mo. App. 534), the allegation was held to be insufficient. Similarly, where plaintiff had purchased the property before the fire, an allegation that the insured was the owner of the property at the time the policy was issued and occupied it at the time of the fire is insufficient as an allegation that the insured had an insurable interest at the time of the fire (*Phenix Ins. Co. v. Moffitt* [Ind. App.] 51 N. E. 948).

It was held, in *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185, that the fact that the insured had an insurable interest in the premises at the time they were destroyed can be inferred from an allegation that the loss happened under circumstances rendering the company liable on the policy. An in-

surable interest is sufficiently alleged, according to *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629, where the policy, which by agreement of the parties is made a part of the complaint, contained a builder's risk clause, describing plaintiff's interest as that of contractor on a building in the course of erection, and the complaint alleged that plaintiff had an interest in the building as contractor. Where the declaration states that plaintiff became the owner of a portion of the property, and was so at the time of loss (*Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095), it is a sufficient allegation of interest as to that portion, though the declaration is defective as to the remainder of the property. In *Davis v. Grand Rapids Fire Ins. Co.*, 15 Misc. Rep. 263, 36 N. Y. Supp. 792, affirmed without opinion in 157 N. Y. 685, 51 N. E. 1090, the complaint stated the issuance of the policy, described the property in the same words used in the policy, and made it a part of the complaint. The policy required sole ownership by the insured, the written consent of the company to be attached to the policy in the event that an interest other than that possessed by the insured existed, and that the property should be the insured's own or held in trust. It was held that such requirements formed a part of the complaint, and together showed that plaintiff had an insurable interest as owner or holder in trust. In *Alamo Fire Ins. Co. v. Davis* (Tex. Civ. App.) 45 S. W. 604, where the action was brought for the benefit of an association, plaintiff alleged that after the policy was issued to him he executed a mortgage of the premises to the association to secure a certain sum, and with the consent of the company assigned the policy to said association. It was held that the averments did not show that the association had any insurable interest in the property. A complaint conforming substantially to form 16, p. 704, Code Ala. 1876, was held to be sufficient, though insurable interest was not definitely alleged. But in *Williams v. Insurance Co. of North America*, 9 How. Prac. (N. Y.) 365, an averment that plaintiffs furnished defendant with due proof of loss and of interest, was held not to constitute a sufficient averment of interest. In *People's Ins. Co. v. Hart*, 3 Am. Law Rec. 657, 5 Ohio Dec. 237, however, the court seems to regard an averment that proper and sufficient proof of loss was made, as equivalent to an allegation of insurable interest under the rule of code pleading, that a pleading must be construed most favorably to the pleader.

(d) **Same—Defects, objections, and aided by verdict.**

The objection that the declaration or complaint is defective in that it fails to aver that plaintiff had an insurable interest, or that the allegation is insufficient, may be raised by demurrer.

Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150, *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265, *Vernon Ins. & Trust Co. v. Bank of Toronto*, 29 Ind. App. 678, 65 N. E. 23, *Bryan v. Farmers' Mut. Indemnity Ass'n*, 81 N. Y. Supp. 145, 81 App. Div. 542, and *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628.

In *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125, a general demurrer had been interposed. It was contended that as, in testing the sufficiency of a petition on general demurrer, the court should consider everything properly alleged which by a reasonable construction is embraced within the allegations, the trial court did not err in overruling the demurrer. The court held, however, that even by indulging every reasonable intendment in favor of the allegations there was nothing to warrant the court in concluding that plaintiff intended to allege that she had an interest in the property at the time of the loss. Such an interest being one of the essential facts on which her right to recover depends, it cannot be supplied by intendment, in the absence of specific averment. However, according to *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185, a complaint which fails to allege that plaintiff was owner of the premises at the time of loss is good on general demurrer, where such ownership can be inferred from other facts alleged. It is only where there is no specific averment of ownership at the time of loss, or allegation from which the fact of ownership can be reasonably inferred, that a general demurrer can be sustained, and while the principle quoted in the *Everett Case* is correct, when a special exception is interposed, it should be limited to cases where the absence of such specific averment is specially excepted to, and is not correct where the exception is general and does not point out the defect. As special demurrers are abolished in Virginia, and it was held in *Mutual Fire Ins. Co. v. Ward*, 28 S. E. 209, 95 Va. 231, that a failure to allege an insurable interest is not open to general demurrer, the objection is no longer a ground of demurrer in that state. In *People's Ins. Co. v. Hart*, 3 Am. Law Rec. 657, 5 Ohio Dec. 237, a demurrer on the ground that the petition did not show that the insured had an insurable interest was overruled, and the company filed an answer

setting up the defense of lack of insurable interest. At the trial the company withdrew its answer and permitted the case to stand as in default. Judgment being rendered for plaintiff, the company brought error. The court said that if its action was governed by the common-law system of pleading, which requires every averment to be taken most strongly against the pleader, it might be that the petition would have to be construed as not alleging an insurable interest, but under the Code every pleading is to be construed most favorably to the pleader. If the pleading in this case is objectionable, it is simply because of the want of definiteness and certainty, a defect which can be reached only by motion.

In *Clevinger v. Northwestern Nat. Ins. Co.*, 71 Mo. App. 73, where the petition did not allege an insurable interest, it was held that the omission of the answer to deny the existence of insurable interest did not by implication amount to an admission, so as to cure the defect in the petition. Such defects may be cured by amendment, even after motion for nonsuit (*Koshland v. Fire Association of Philadelphia*, 31 Or. 362, 49 Pac. 865). In *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471, where the complaint had been demurred to on the ground that there was no allegation of insurable interest, and an amended complaint had been filed, it was held that the amended complaint superseded the other, which, with the demurrer thereto, ceased to be part of the record.

Under the general rule that, though a defective averment may be aided by verdict, an entire omission of a fact essential to a recovery cannot be cured by the verdict,* it was held, in *Home Ins. Co. v. Duke*, 75 Ind. 535, that, if the complaint fails to allege the substantive fact that the insured had an insurable interest at the time of loss, the omission will not be cured by a verdict, since the allegation is essential to the right of action.

The rule was also applied in *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265, and *Western Assur. Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95, where it was said that the verdict will not cure a failure to allege insurable interest, though the sufficiency of the complaint is called in question for the first time on appeal, and *Farmers' Ins. Co. v. Burris*, 23 Ind. App. 507, 55 N. E. 773, where it was said that, though the rule that a mere defect in a complaint is cured by verdict applies when its sufficiency is first questioned on appeal, it does not apply where the sufficiency of the complaint is challenged by demurrer in the trial court.

* See *Century Digest*, vol. 39, "Pleading," col. 2894, § 1454, and col. 2902, § 1459.

The rule that a defective allegation will, after verdict, be held sufficient by intendment, no demurrer or motion to make definite having been interposed, is asserted in *Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426. In *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534, 38 Pac. 136, it was held that the omission of an allegation that plaintiff had an insurable interest at the time of loss was cured by the admission of evidence on that point without objection and by verdict.

(e) Right to raise defense of want of insurable interest.

In *Wheeler v. Factors' & Traders' Ins. Co.*, 101 U. S. 439, 25 L. Ed. 1055, where A. and B. were authorized by C. to effect insurance for advances, which they did under a policy in their own names, C. being indebted to F. and the debt being secured by a mortgage stipulating that C. should insure for F.'s benefit, it was held that F. had no claim to the insurance made by A. and B., and could not plead that they had no insurable interest; such defense being available only to the company. Similarly, it was held in *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081, that where the owner of stamps destroyed by fire, having received payment therefor under a contract of insurance, seeks to recover for the use of the insurer against one who is liable to reimburse him for his loss, it is immaterial whether he had an insurable interest or not, as such an objection could be raised only by the insurer. In *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 5 Am. Rep. 297, it was said that one who has acquired title to the insured premises by levy of execution cannot deny the insurable interest of the execution debtor, since that question is one between the debtor, who is the insured, and the company only.

It was held in *Mayor of City of New York v. Hamilton Fire Ins. Co.*, 23 N. Y. Super. Ct. 537, and *Same v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231, that the insurer cannot deny the insurable interest of the insured on the ground that the acts by which he gained possession of the property constituted a trespass against another. Where an executor of an estate, assuming to act under a power in the will, made a deed purporting to convey the premises on which was situated the building insured (*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118), the insurer cannot raise the objection that the will did not authorize the executor to make such conveyance. Similarly, where one purchased property in his own name for the benefit of another, the fact that he so purchased is

no defense, as the insurer does not stand in the position of one who can question his title (*Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y. 677, affirming 1 Thomp. & C. 215). Nor can the insurer contend that a contract of purchase was forfeited by default of the vendee, so as to extinguish his insurable interest; no forfeiture having been declared by the vendor (*Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. [N. Y.] 527). Where the purchaser of real property has received a deed vesting him with the legal title, the fact that he practiced a fraud on his vendor, on account of which his conveyance was subsequently set aside in equity, cannot be pleaded to impeach his insurable interest (*Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43). In *German Ins. Co. v. Hyman*, 34 Neb. 704, 52 N. W. 401, it was said that the fact that a gift from a husband to his wife was in fraud of creditors could not be pleaded by the company as against the wife's insurable interest.

(f) Same—Estoppel to deny interest.

Where the insurer, with full knowledge of the facts, has issued a policy, it is estopped to deny the insurable interest of the insured.

Brugger v. State Investment Ins. Co., 4 Fed. Cas. 472; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364. The principle seems also to have been approved in *Monroe County Mut. Ins. Co. v. Robinson*, 5 Wkly. Notes Cas. (Pa.) 389.

On the other hand, in *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 708, where it was contended that the company, being informed as to the nature of plaintiff's interest when he effected the insurance, is estopped to say that he had no insurable interest, the court held that, as wager policies are contrary to public policy, neither party is estopped from showing the facts.

▲ like principle was asserted in *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326, and *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772.

The rule that, where the company issues a policy payable to another, it cannot deny his interest, is asserted in *Franklin v. National Ins. Co.*, 43 Mo. 491. Where an insurance company issues a policy on mortgaged property to the mortgagor, making the loss payable to the mortgagee as his interest may appear, it is estopped to say that the mortgagor had no insurable interest (*Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 50 N. W. 1100). It was held in *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424,

that, since an application for consent to the assignment of a policy is notice that the assignee has acquired or is about to acquire some interest in the subject of the insurance, the company cannot deny his interest after having consented to the assignment. In *Blackburn v. St. Paul Fire & Marine Ins. Co.*, 116 N. C. 821, 21 S. E. 922, it was said that where an assignment is made to one having no interest, if made with the consent of the insurer, procured without false representations or suppression of facts, it is nevertheless valid. In *Wachter v. Phoenix Assur. Co.*, 132 Pa. 428, 19 Atl. 289, 19 Am. St. Rep. 600, it appeared that the insured mortgaged his property, and that the mortgagor called on the agent of the company to procure an assignment of the policy to the mortgagee. The agent indorsed the assignment, and his action was approved by the company. Afterwards the insured sold the property, and again called on the agent to have the policy transferred, so as to operate as a continuing security to the mortgagee, but the agent informed him that no such transfer was necessary. It was held that the company was estopped to set up a want of insurable interest. In *Light v. Countrymen's Mut. Fire Ins. Co.*, 169 Pa. 310, 32 Atl. 439, 47 Am. St. Rep. 904, plaintiff sold the lands on which was a building covered by a policy, taking back a judgment for part of the price. Under the advice of the secretary of the company, who knew the circumstances, he delivered the deed to the purchaser without transferring the policy, paying the assessments on the policy for three years. It was held that the company was estopped from asserting a want of insurable interest in the plaintiff at the time of loss.

An interesting case is *Highlands v. Lurgan Mut. Fire Ins. Co.*, 177 Pa. 566, 35 Atl. 728, 55 Am. St. Rep. 739. The insured made an assignment for the benefit of creditors, which was accepted by the assignee. The assignee informed the agent of the insurer of the assignment, and proposed to have the policy transferred. The agent, however, told him that this was not necessary, and it was not done. Subsequently the company demanded an assessment from the assignee, which was paid. It was held that this estopped them to deny the insurable interest. Where it was contended that the assignment of a policy with the consent of the company made a new contract between the company and the assignee, so that the defense of no insurable interest, though available as against the assignor, was not available as against the assignee, it was held, in *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772, that the

rule did not extend to a policy void at its inception. If the policy was void at its inception because the insured had no interest, the company is not estopped by its consent to the assignment to plead such fact.

In an action for an assessment on a deposit note given to a mutual insurance company at the time of taking out the policy, the maker of the note, being a member of the company, is estopped from setting up a want of insurable interest in the property as a defense, according to *New England Mutual Fire Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140.

(g) Pleading lack of insurable interest.

In *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537, it was held that the omission to allege in the complaint an insurable interest in the plaintiff is not ground of demurrer, but the defense must be raised by answer. But in *Clevinger v. Northwestern National Ins. Co.*, 71 Mo. App. 73, it was said that, where a petition does not allege an insurable interest, the mere omission of the answer to deny such interest does not amount to an admission thereof. A plea in an action on an insurance policy averring that when plaintiff purchased the goods insured she was and still remains a married woman, and that she purchased them on credit, has not paid and refuses to pay for them, and denies her liability, and hence has no insurable interest therein, is insufficient, according to *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51, in the absence of an allegation that she has no separate estate which she could and did bind for the payment of the goods, or that her husband dissented from the purchase.

(h) Reply.

A reply to an answer alleging that the insured is not the owner of the property, which admits that he was not the owner of the legal title, but fails to allege that he has any insurable interest, is demurrable, according to *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. 772. In *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134, the replication averred that the decedent owned no real estate other than that insured, in which his widow had a dower and homestead interest. It further alleged that M. was a creditor of the decedent, stating the amount of his claim, the insufficiency of the personal assets to pay the debts, and that there was no other real property. As

the interest of the widow does not include the entire estate, it was held that the reply showed an insurable interest for the creditor.

(1) Issues, proof, and variance.

In *Western Assur. Co. v. Koontz*, 17 Ind. App. 54, 46 N. E. 95, it was held that, where there is no allegation of insurable interest or ownership in the complaint, evidence of such interest or ownership is not admissible. And in *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. 821, it was said that an instruction purporting to state what averments are necessary to be proved to entitle the plaintiff to recover is erroneous, if it omits that of plaintiff's insurable interest.

Want of insurable interest, if relied on, must be pleaded specially.

Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 Pac. 537; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847; *Katheman v. General Mut. Ins. Co.*, 12 La. Ann. 35.

It was said in *Roos v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 409, that in an action on a valued policy the plaintiff is not put on proof of his interest by a plea of the general issue. Where, however, the company pleaded non assumpsit, with notice of special matter to be given in evidence under the plea (*Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman [Ill.] 236), it was held that under such plea and notice the defendant might show lack of insurable interest.

In *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 200, the general rule was stated that under a general allegation plaintiff may give in evidence any interest he may have, but if the interest averred is special it must be proved as stated. In accordance with this principle it has been held, in *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, 2 L. Ed. 324, and *Finney v. Bedford Commercial Ins. Co.*, 8 Metc. (Mass.) 348, 41 Am. Dec. 515, that the insurable interest of a copartnership cannot be given in evidence under an averment of individual interest, nor can the averment of interest of the company be supported by evidence of individual interest. Similarly it was said, in *Stetson v. Insurance Co.*, 3 Phila. (Pa.) 380, that a joint interest cannot be proved under a count setting forth an interest in one only; and in *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575, it was said that where a joint interest is averred it must be proved, and cannot be supported by proof of a sole interest. In *Rediker v. Queen Ins. Co.*, 107 Mich. 224, 65

N. W. 105, the complaint in an action brought by R. alleged that the policy was issued to M. and R. as partners; that it was assigned to R. by the partnership; that at the time of the execution of the policy, and from the time of such assignment until the loss, R. was the sole owner of the property. It was held that, as the point was not raised by demurrer, the complaint would not be considered as stating that at the issuing of the policy plaintiff was sole owner, but that at that time he owned an undivided interest, and from the time of the assignment a sole interest, so that evidence in proof of these facts was not variant. Under a statement that plaintiff is the owner of the property, he is bound to prove only an insurable interest, according to *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386.

(3) Evidence—Presumptions and burden of proof.

In *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469, it was held that a person in possession of property, claiming and occupying it as his own, is *prima facie* presumed to be seised in fee, so as to give him an insurable interest. In *Roussel v. St. Nicholas Ins. Co.*, 41 N. Y. Super. Ct. 279, 52 How. Prac. 495, it was held that, where an insurable interest is shown to have existed at the time of effecting the insurance, the legal presumption is that it continued to the time of loss, under the general principle that facts shown to exist will be presumed to have continued. But, as said in *David v. Williamsburgh City Fire Ins. Co.*, 7 Abb. N. C. (N. Y.) 47, the presumption is not retroactive, and the existence of a fact will not give rise to the presumption that it existed at a previous time.

The rule that, where the allegations of the complaint are put in issue by the answer, the burden of proof is on plaintiff to show an insurable interest, is asserted in *Petrel Guano Co. v. Providence Washington Ins. Co.*, 52 N. Y. Super. Ct. 297.

It is also asserted in *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Vairin v. Canal Ins. Co.*, 10 Ohio, 223; *Beale v. Pettit*, 2 Fed. Cas. 1109; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563.

Where, as in *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 21 Fed. 778, a sale of a vessel is shown by a bill of sale and enrollment, the burden of showing that the sale was a sham one is on the insured. The general principle that the burden of showing want of insurable interest is on the insurer is asserted in *Sheppard*

v. Peabody Ins. Co., 21 W. Va. 368. It was said in *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572, that where the insurer, with opportunity to inquire as to the interest of the insured, issues to him a policy, the burden is on the insurer to disprove his insurable interest. Similarly it was held, in *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252, and *Lindner v. St. Paul Fire & Marine Ins. Co.*, 93 Wis. 526, 67 N. W. 1125, that where a policy describes the property as that of the insured the burden is on the company to disprove his insurable interest.

(k) Same—Admissibility.

In *Tuckerman v. Home Ins. Co.*, 9 R. I. 414, it was held that evidence to the effect that plaintiff is owner of the estate, that he bought it with his own money, and that it was transferred to another, who paid nothing, to hold for plaintiff, is competent to show his insurable interest. The record of proceedings in the circuit court of Illinois in equity, under which legal title to real estate was decreed to the equitable owner, was held admissible, in *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. 323, to show the existence of an insurable interest in the person insured at the date of the policy, though the proceedings were not commenced until after a loss had occurred. It was said, in *Sprigg v. American Central Ins. Co.*, 40 S. W. 575, 101 Ky. 185, that a record and judgment establishing the validity of the title of the insured, as against a deed to another relied on by the company, was admissible, though the company was not a party to the suit, which had terminated before the loss occurred. Where the policy provides that the loss shall be payable to another than the insured as his interest may appear, as in *Graham v. Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707, evidence as to the terms of the contract under which the insured had possession of the property is admissible. In *Beale v. Pettit*, 2 Fed. Cas. 1109, it was said that a certificate given by the supercargo, who at the time it is offered in evidence is dead, is inadmissible to prove an interest in the return cargo, and a bill of lading on an outward cargo is no proof interest in a homeward cargo. In *Vairin v. Canal Ins. Co.*, 10 Ohio, 223, it appeared that the owner of a boat had sold her, but had not received the price in full. The vendees wrote to him, stating that in consequence of the purchase of the boat for the principal, part on time, they requested him to take out a policy of insurance in his own name as

collateral security. The court held that this letter was admissible in evidence as showing plaintiff's insurable interest.

Parol evidence of facts tending to show an insurable interest is admissible.

California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; *Lawrence v. St. Mark's Fire Ins. Co.*, 43 Barb. (N. Y.) 479.

Similarly in *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. 416, it was held that parol evidence was admissible to show that an absolute deed was in fact a mortgage, for the purpose of showing that the insured had not entirely parted with his interest, so as to terminate the policy. In *McCarty v. Louisiana Mut. Ins. Co.*, 25 La. Ann. 354, it was regarded as error to exclude a declaration of the insured, made after the fire, to the effect that the premises were not his and that he had never had an insurable interest therein. The declarations of a master and part owner of a vessel, while in possession, made to a third party, to the effect that an insurance on the vessel had been effected by him for the benefit of himself and others, are admissible to show the interest of the others in the vessel; and the enrollment of the vessel by the master in the name of himself and others is evidence of the interest of the others in the vessel, according to *Hall v. Insurance Co.*, 3 Phila. (Pa.) 331.

(1) Same—Weight and sufficiency.

That the policy is itself prima facie evidence of the insurable interest of the person insured was asserted in *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.) 63.

The principle has also been asserted in *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537; *Kansas Ins. Co. v. Berry*, 8 Kan. 159; *Farmers' & Merchants' Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068; *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. (N. Y.) 143; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 50 N. W. 1100; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Lindner v. St. Paul Fire & Marine Ins. Co.*, 93 Wis. 526, 67 N. W. 1125.

It was said in *Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 316, that the insurable interest of plaintiffs was sufficiently shown by proof that they were themselves reinsurers.

In *Bulkley v. Derby Fishing Co.*, 1 Conn. 571, the general principle was asserted that exercising acts of ownership over property, with possession, is adequate evidence of property therein.

▲ similar principle seems to have governed *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; *Wood v. American Fire Ins. Co.*, 78 Hun, 109, 29 N. Y. Supp. 250; *Sprigg v. American Cent. Ins. Co.*, 40 S. W. 575, 101 Ky. 185; *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563.

In *Sturm v. Atlantic Mut. Ins. Co.*, 38 N. Y. Super. Ct. 281, affirmed in 63 N. Y. 77, it was said that proof that plaintiff himself purchased the goods insured and paid for them is prima facie evidence of insurable interest. In *Seaman v. Enterprise Fire & Marine Ins. Co. (C. C.)* 21 Fed. 778, it was held that a bill of sale and enrollment of a vessel were prima facie evidence of a bona fide sale, which would terminate the interest of the insured. The fact that a deed relied on to show extinguishment of insurable interest is recorded is only prima facie evidence, which may be rebutted, according to *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543. In *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068, it appeared that the property had formerly been owned by a corporation, which executed a deed to the property to the insured, subject to certain mortgages. The deed was placed on record before the policy was issued. It was not shown who caused the instrument to be recorded, and it was contended that the recorded deed was prima facie evidence only of delivery, and not of the acceptance thereof by the grantee, so as to give him an insurable interest. The court said that whether the rule thus stated was correct or not need not be determined, for the reason that, since the insured had introduced the deed and the record thereof in evidence, it was sufficient proof of his acceptance of the conveyance.

Where a bill of lading and invoice were offered in evidence to show the extent of the insurable interest (*Blagg v. Phoenix Ins. Co.*, 3 Fed. Cas. 557), and the paper was contested by a testamentary declaration executed by the captain, the court held that, while the bill of lading and invoice were ordinarily evidence of property, they may be contradicted as to their genuineness, authenticity, and truth, and the evidence being submitted to the jury, who returned a verdict for plaintiff, basing their verdict on the bill of lading, a new trial was denied on the ground that it was for the jury to

determine the weight to be given to the document. *Clark v. Dwelling House Ins. Co.*, 81 Me. 373, 17 Atl. 303, was an action brought by a husband on a policy covering property once owned by him, and which he had conveyed to his wife before taking the policy. There was evidence that when he executed the deed to her he indorsed thereon the fact that he had no interest, that he twice procured the property to be insured in her name, and when the loss occurred, before litigation commenced, had advised her to make proof before him as magistrate stating that she alone had any interest in the property. At the same time he himself swore that she alone was interested. It was held that such testimony would outweigh his testimony that the deed was never delivered.

(m) Trial and review.

Where A. built a schoolhouse under a written contract, and after making the contract bought the land on which the house was built, having promised to do so if the town would vote to locate the school there, and the building was used as a schoolhouse, A. participating in town meetings at which it was voted to raise money for the purpose of insuring it, it was held, in *Batcheller v. Commercial Union Assur. Co.*, 143 Mass. 495, 10 N. E. 321, that these facts were sufficient to warrant a submission to the jury of the question whether, as between A. and the town, it belonged to the latter as personal property. In *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663, the company pleaded that the insurer had parted with all interest in the property before the policy was issued. There was evidence tending to show that, while negotiations had been carried on for the sale of the property and a deed actually executed, the deed had not been delivered and the contract had not assumed an obligatory form until some time after the issuance of the policy. It was held that the question whether the insured was, at the time the policy was issued, the owner of the property, was properly submitted to the jury. In *Mitchell v. Home Ins. Co.*, 32 Iowa, 421, the insured property was held by D. under a lease, and was subsequently sublet to T. The building insured was erected by the sublessee. It was held that the question whether T. had an insurable interest should have been determined by the jury under proper instructions. The trial court charged that plaintiff had an insurable interest in the property; the plaintiff being the assignee of T.'s interest in the policy. The court says that this instruction is not correct, as

plaintiff, of course, had no interest in the building; that it was probably the intention of the trial court to charge that T. had an insurable interest, but that such an instruction even was of doubtful propriety, as the question should have been left to the jury. In *Southern Ins. & Trust Co. v. Lewis*, 42 Ga. 587, it appeared that B. had entered into an agreement with L. to grant him certain lands on the consideration that L. should erect for him a building on an adjacent lot. In accordance with this agreement L. entered upon the property, erected a building for himself, and nearly completed the building to be erected for B. The trial court charged the jury that "in his opinion L. had an insurable interest in the house on B.'s land." The court held that this was not a proper instruction, and that he should have instructed the jury that, if they found the facts as stated, then they should find that L. had an insurable interest. A special verdict, answering in the affirmative the interrogatory, "Did said defendant, in consideration of \$18 paid by plaintiff, insure her against loss on her dwelling house and additions thereto?" is a sufficient finding that plaintiff was the owner of the property at the time of the insurance, but it does not show that plaintiff was owner at the time of the fire, according to *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331, 49 N. E. 471.

Findings of fact or a verdict as to insurable interest will not be disturbed on appeal, when supported by evidence.

Berry v. American Central Ins. Co., 55 Hun, 612, 8 N. Y. Supp. 762, affirmed in 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Cole v. Louisiana Ins. Co.*, 2 Mart. N. S. (La.) 165; *Richmond v. Niagara Fire Ins. Co.* (N. Y.) 9 Ins. Law J. 117; and *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663.

12. INSURABLE INTEREST—GUARANTY AND INDEMNITY INSURANCE.

- (a) General principles.**
- (b) Fidelity insurance.**
- (c) Credit insurance.**
- (d) Contract insurance.**
- (e) Judicial insurance bonds.**
- (f) Title insurance.**
- (g) Liability insurance.**
- (h) Conclusion.**

(a) General principles.

The question of the necessity of insurable interest to support contracts of guaranty and indemnity insurance does not appear to have been directly raised or decided. It is, however, obvious from general principles, and from the analogy which exists between these and the ordinary forms of insurance, that an insurable interest is as necessary to support such a contract as it is to support a contract of fire or life insurance. Recalling the definition of insurance, that "a contract of insurance is an agreement by which one party for a consideration promises to pay money, or its equivalent, or to do some act of value to the assured, upon a destruction or injury of something in which the other party has an interest" (*Commonwealth v. Wetherbee*, 105 Mass. 149), it is clear that if contracts to indemnify against loss by the infidelity of persons in places of trust (*Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464), by the insolvency of debtors (*Claffin v. United States Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528), by the nonperformance of contracts (*German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682), by defects in the title to lands (*Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116), or by reason of liability to third persons for personal injuries (*Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 529), are to be classed as contracts of insurance under this definition, we are justified in assuming that an insurable interest is necessary to support a contract of either guaranty or indemnity insurance. Furthermore, the general principle, emphasized in all cases involving the extent of liability under guaranty and indemnity contracts, that the contracts are strictly contracts of indemnity and that the measure of liability is the extent

of actual loss (*German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 190 Pa. 247, 42 Atl. 682), is strictly in accord with the principle that insurable interest is necessary, and it is consonant, also, with the general rule prevailing in fire and marine policies that the extent of recovery is limited to the extent of interest. Since a guarantor cannot be held liable on his guaranty, except to the extent that the original debtor or risk is liable on his contract (*Arents v. Commonwealth*, 18 Grat. [Va.] 750), it is evident that under a contract of guaranty insurance the extent of insurable interest is measured by the interest in the risk. In short, the general principles on which liability under these contracts is determined rest upon rules which are founded on the doctrine of insurable interest.

On the other hand, recalling the definitions of insurable interest, it is a general rule that whatever furnishes a reasonable expectation of pecuniary benefit from its continued existence, or damage from its loss or destruction, is capable of supporting an insurable interest (*International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516); that is to say, an insurable interest exists whenever there is a reasonable degree of probability that the insured will suffer loss by reason of any contingency which affects the subject of the insurance (*Agricultural Ins. Co. v. Clancey*, 9 Ill. App. 137). It is therefore clear that the expectancy of loss from the infidelity of employés, the insolvency of debtors, defects in the title to real estate, etc., furnishes as reasonable a basis for insurable interest as the expectancy of loss by reason of fire, storm, or death.

(b) Fidelity insurance.

That an employer may suffer loss from the defalcations of a trusted employé is evident. The very purpose of the contract of fidelity insurance is to protect the employer from loss from this source, or, in the case of public officers, to protect the public. Consequently the employer in the one case and the public in the other has such an interest, based on the possibility of loss, in the fidelity of the employé or officer as to constitute an insurable interest, within the definitions, sufficient to support contracts of insurance indemnifying against such losses. Nor can it be said that the insurance against loss from this cause so reduces the interest of the employer in the honesty and fidelity of the employé as to remove such insurable interest (*Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464),

and to render the contract objectionable as contrary to public policy. Even where one employs a firm to perform certain duties involving the handling of funds, he has such an interest as will support a contract insuring against acts of fraud on the part of a member of the firm (*Clifton Mfg. Co. v. United States Fidelity & Guaranty Co.*, 60 S. C. 128, 38 S. E. 790). These principles are undoubtedly applicable where the person against whose infidelity the insurance is granted is a public officer. They are obviously applicable when the person whose fidelity is relied on stands, not in a contract relation as of employer and employé, but in a fiduciary relation strictly.

On the other hand, it is just as evident that a third person, between whom and the employé there exists no fiduciary relation, has no such interest as will support a contract guarantying the employé's honesty. Hence it is clear that on elementary principles a contract of guaranty insurance cannot be entered into by way of speculation. Such a contract would be void as a wager policy.

(c) Credit insurance.

Since a contract of credit guaranty is regarded as a contract of insurance, within the definition of insurance, and such definition requires that the contract should be based on an interest in the subject-matter covered by the policy, we are justified in assuming that an insurable interest is necessary to support a contract of credit insurance (*Clafin v. United States Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528). The peril of loss by the insolvency of customers is just as definite and real a peril to the merchant or manufacturer as the peril of loss by accident, fire, lightning or tornado, and is in fact much more frequent (*Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920). It is therefore evident that the possibility of loss from this source gives the merchant such an interest in the solvency of his customers as to constitute an insurable interest sufficient to support a contract of insurance against loss from insolvency.

(d) Contract insurance.

In the case of contract insurance—that is to say, policies or bonds to secure the performance of contracts—it is somewhat difficult to trace the necessity of insurable interest, though it is evident that the theory of insurable interest lies back of most of the

cases. There is a class of cases which have been interpreted as denying the applicability of the principles of insurable interest to this class of contracts. These are cases involving contractors' bonds. While it may be conceded that a person who has employed the contractor has such an interest in the timely and proper performance of the contract as to give him an insurable interest, can it be said, ordinarily, that other persons not parties to the principal contract can have such an interest as would entitle them to recover on the bond? An illustrative case is *United States v. National Surety Co.*, 92 Fed. 549, 34 C. C. A. 526, where the action was by persons furnishing labor and material. Since they were allowed to recover, this case and others like it have been regarded as ignoring the doctrine of insurable interest; but it is to be remarked that the contractor's bond ran to the United States. Under 28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523], it is provided that such bonds shall be for the benefit of persons supplying labor and materials, and such persons are given the right of action thereunder. In analogy to the statutes giving railroad companies an insurable interest in property along their lines of road for the destruction of which they might be liable, the person supplying labor and materials may be looked upon as being given a special insurable interest by force of the statute. The cases cannot, therefore, be interpreted as asserting the principle that insurable interest is not necessary in guaranty insurance. On the contrary, they rather support the doctrine that an insurable interest is necessary.

Reference may also be made to *United States v. American Bonding & Trust Co.* (C. C.) 89 Fed. 921; *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717.

The principles on which the federal cases just cited involving contractors' bonds were decided are supported by *American Surety Co. v. Thorn-Halliwell Cement Co.*, 9 Kan. App. 8, 57 Pac. 237; a statute of Kansas making special provision that bonds taken from any contractor shall be for the benefit of the persons furnishing labor and materials. So, also, the principles are supported in *American Surety Co. v. Lauber*, 22 Ind. App. 326, 53 N. E. 793, the bond providing that it should be security for the benefit of third persons, though it does not appear that there was any express statutory provision. The principle thus asserted in the *Lauber Case* undoubtedly governed *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420, 24 C. C. A. 650, where the bond guarantied the contracts

of an accident insurance company; the bond running to the state for the use and benefit of the beneficiaries of the policies issued by such accident company. Apparently the case proceeds on the principle that a beneficiary in such policies has an insurable interest under the guaranty contract, so that he can recover on such contract directly. So, in *Herrick v. Guarantors' Finance Co.*, 58 App. Div. 30, 68 N. Y. Supp. 560, where the guaranty was to secure the holder of a note, it was held that, even if the note was transferred, the guaranty accompanied it, so as to enable subsequent holders to sue on the guaranty.

In view of the interpretation that the federal cases did not require insurable interest, the case of *American Surety Co. v. United States*, 127 Ala. 349, 28 South. 664, has been regarded as opposed to those cases. In this case, however, though the bond ran to the United States, the labor and materials were furnished to a subcontractor. It was held that, as the contractor himself was not liable for such labor and materials, the insurer on the bond was not liable. This is merely the converse of the doctrine expressed in the federal cases mentioned, and does not deny, but in fact affirms, the doctrine that to recover on such bonds a person must have an insurable interest in the subject-matter. So the necessity of insurable interest is asserted in *Electric Appliance Co. v. United States Fidelity & Guaranty Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609, where it was said that, to entitle a third person to recover on a contract of guaranty insurance—in this case, a contractor's bond—there must be, not only an intent to secure some benefit to such third person, but also a promise legally enforceable.

A purchaser of ground rents on unimproved lands has such an interest in a contract for buildings to be erected thereon as will give him an insurable interest to support a policy to insure the performance of such contract and against such loss as might occur by noncompletion of the buildings (*German-American Title & Trust Co. v. Citizens' Trust & Surety Co.*, 42 Atl. 682, 190 Pa. 247).

(c) Judicial insurance bonds.

In the case of judicial insurance bonds it is obvious that the person or party to the action, for whose benefit the bond is given, has such an interest in the performance of the condition of the bond as constitutes an insurable interest. Therefore the rules applied in ordinary insurance apply to the policies of this class. Cases in which any question involving the doctrine of insurable interest can

arise are, however, extremely rare, yet, though not arising in the form of an objection based on a want of insurable interest, the principle that such an interest is necessary undoubtedly governed the decision in *Fidelity & Deposit Co. v. Singer*, 94 Md. 124, 50 Atl. 518. In this case, a vendee of goods having made an assignment in trust for creditors, the seller took the goods, giving a replevin bond, in which the debtor and his trustee in their individual capacity were made obligees. It was held that, as the obligees in their individual capacity had no actual interest in the subject-matter, they could not recover on the bond in an action in their own names for the use of the trustee in his representative capacity. The theory was that the obligee as an individual had no interest in the goods, and that a deprivation thereof or of the possession of them could do him no substantial injury.

(f) Title insurance.

That an insurable interest is at the foundation of contracts of title insurance is evident from the character of the contract and the risk assumed. The nature of the interest in such cases is practically the same as that existing in ordinary insurance of property. The insured must have such an interest in the estate that he would suffer loss if by reason of defects in the title (*Wheeler v. Real Estate Title Ins. & Trust Co.*, 160 Pa. 408, 28 Atl. 849), the existence of incumbrances (*Minnesota Title Ins. & Trust Co. v. Drexel*, 70 Fed. 194, 17 C. C. A. 56), or the like, he is in danger of losing the property and suffering pecuniary loss. As in the case of fire insurance, this interest may be that of an owner (*Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116), of a mortgagee (*Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404), or of a purchaser of ground rents (*Gauler v. Solicitors' Loan & Trust Co.*, 9 Pa. Co. Ct. R. 634).

(g) Liability insurance.

There are three classes of liability insurance—insurance against liability for personal injury to employés, against liability for injuries to persons other than employés, and against liability for injuries to all classes of persons. That contracts insuring against such liabilities are based on the theory of insurable interest might be deduced from their analogy to ordinary accident policies; but the interest, unlike that supporting an accident policy, is not direct.

It is not an actual interest in the person, or in his life or health. An employer does not necessarily have such an interest in an employé that he will suffer a loss by reason of an accident to such employé, whatever may be the nature and cause of the accident. It is only when the accident is of such nature and so caused that the employer becomes liable to the employé in damages that the insurable interest exists. That an insurable interest does exist in such case is asserted in *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 529, where, commenting on the similarity between accident insurance and liability insurance, the latter was characterized as a contract to indemnify the insured against losses by injuries to persons in whom he has an insurable interest, because he is legally liable for the results of the accident. The indemnity contracted for is always for the loss caused to the insured by an accident for the effects of which he is legally responsible.

There are two classes of liability policies. In one the liability of the insurer is limited to the loss actually sustained and paid by the insured; that is to say, it insures against actual loss only. In the other class, the insurer agrees to indemnify the insured against the liability for loss, and it is not a condition precedent that the insured should have actually paid the damages to the employé. Under the first class the employé cannot be said to have any interest in the policy (*Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500) which would enable him to maintain an action thereon. On the other hand, if the contract falls within the second class, it is a contract to pay when the liability attaches, and the employé acquires an interest in the policy entitling him to recover thereon (*Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689).

Attention has been called elsewhere to the principle that a carrier of goods has such an interest therein, because of his liability for loss or injury, as will support a contract of insurance to indemnify him for liability incurred by reason of such loss or injury. So, too, a carrier of passengers has such an insurable interest by reason of the liability for injury to such passengers as will support a policy of liability insurance (*Trenton Passenger R. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213).

Analogous to the ordinary liability policies is the contract involved in *French v. Vix*, 2 Misc. Rep. 312, 21 N. Y. Supp. 1016,

affirmed in 143 N. Y. 90, 37 N. E. 612. In this case an owner of property on which building operations were being conducted took a bond from the contractor to indemnify him for any damages to persons residing in the neighborhood and passers-by during the performance of the work. It was held that such an agreement did not make the contractors insurers against injury to the property of a neighbor for whom the owner did not act as agent; such owner having no insurable interest in the property of the neighbor which would support a contract of insurance for his benefit.

(h) Conclusion.

From an examination of the cases involving contracts of guaranty and indemnity insurance, we are led to the conclusion that the doctrine of the necessity of an insurable interest to support the contract of insurance is applicable to policies of the classes named to the same extent as it is in the case of ordinary insurance of property or lives. Furthermore, the interest necessary to support such contracts is of the same nature as the interest necessary to support the ordinary contract of insurance. Contracts not founded on such an interest would be void as wager contracts.

III. INSURABLE INTEREST IN HUMAN LIFE OR HEALTH.

- ✓ 1. **Necessity of insurable interest in human life or health.**
 - ✓ (a) **Necessity at common law.**
 - ✓ (b) **The modern rule.**
 - ✓ (c) **Reasons for the rule—Wager contracts void.**
 - ✓ (d) **Same—Incentive to crime.**
 - ✓ (e) **Same—Public policy.**
 - ✓ (f) **Policy procured by person insured payable to one without interest.**
 - ✓ (g) **Same—Payment of premiums by beneficiary.**
 - ✓ (h) **Same—Good faith.**
 - ✓ (i) **Mutual benefit insurance.**
 - ✓ (j) **Conclusion.**
- ✓ 2. **Necessity of insurable interest of assignee of life policy.**
 - ✓ (a) **In general.**
 - (b) **New York.**
 - (c) **Massachusetts.**
 - (d) **Maryland.**
 - (e) **Wisconsin.**
 - (f) **Indiana.**
 - ✓ (g) **Other states holding interest unnecessary.**
 - (h) **Missouri.**
 - (i) **Louisiana.**
 - (j) **Federal cases.**
 - (k) **Pennsylvania.**
 - (l) **Kansas.**
 - (m) **Texas.**
 - (n) **Other states holding interest to be necessary.**
 - (o) **Good faith—Payment of premiums.**
 - (p) **Public policy—Incentive to crime.**
 - (q) **Special provisions of the contract, rules, or statutes.**
- ✓ 3. **What constitutes an insurable interest in human life or health.**
 - ✓ (a) **General principles.**
 - (b) **Interest based on relationship—Pecuniary interest not necessary.**
 - ✓ (c) **Relationship insufficient—Pecuniary interest necessary.**
 - (d) **Same—Nature of pecuniary interest.**
 - (e) **Same—Modification of doctrine that relationship is sufficient.**
 - (f) **Husband and wife.**
 - (g) **Same—Illegal marriage.**
 - (h) **Parent and child.**
 - (i) **Grandparent and grandchild.**
 - (j) **Brothers and sisters.**
 - (k) **Other relationships.**
 - (l) **Third persons other than relatives or creditors.**
 - (m) **Same—Persons under engagement to marry.**
 - (n) **Business connections—Creditors.**

3. What constitutes an insurable interest in human life or health—(Cont'd).
 - (o) Same—Partners.
 - (p) Same—Sureties and other business relations.
 - (q) Conclusion.
4. Wager policies and rights dependent on extent of interest.
 - (a) Scope of discussion.
 - (b) Wager policies in general.
 - (c) Same—Rights of parties.
 - (d) Creditors' policies.
 - (e) Same—Pennsylvania rule.
 - (f) Same—Rights of parties.
 - (g) Assignment without interest or as security.
 - (h) Same—Rights of parties.
- ✓ 5. Extinguishment of insurable interest in human life.
 - (a) General principles.
 - (b) Policy payable to wife—Effect of divorce.
 - (c) Creditors' policies—Payment of debt.
 - (d) Same—Discharge other than by payment.
 - (e) Policies assigned to creditors.
 - (f) Particular applications of the rule.
- ✓ 6. Pleading and practice in relation to insurable interest in life.
 - (a) Pleading insurable interest.
 - (b) Who may plead lack of insurable interest.
 - (c) Estoppel to deny interest.
 - (d) Same—Estoppel of beneficiary.
 - (e) Pleading lack of insurable interest.
 - ✓ (f) Evidence—Presumptions and burden of proof.
 - (g) Same—Admissibility and sufficiency.
 - (h) Questions for jury and instructions.

1. NECESSITY OF INSURABLE INTEREST IN HUMAN LIFE OR HEALTH.

- (a) Necessity at common law.
- (b) The modern rule.
- (c) Reasons for the rule—Wager contracts void.
- (d) Same—Incentive to crime.
- (e) Same—Public policy.
- (f) Policy procured by person insured payable to one without interest.
- (g) Same—Payment of premiums by beneficiary.
- (h) Same—Good faith.
- (i) Mutual benefit insurance.
- (j) Conclusion.

(a) Necessity at common law.

Whether insurable interest in the life insured was necessary to support a policy of life insurance at common law has been disputed.

In view of the fact that prior to St. 14 Geo. III, c. 48,¹ insurance without interest was common in England, it has been considered by some courts that interest was not necessary at common law. Such is the opinion expressed in *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576.

It has been indorsed, also, in *De Ronge v. Elliott*, 23 N. J. Eq. 486, *Vivar v. Supreme Lodge Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36, *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746, *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414, and *Packard v. Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469. In New York a similar opinion was expressed in *St. John v. American Mut. Life Ins. Co.*, 9 N. Y. Super. Ct. 419, and *Miller v. Eagle Life Ins. Co.*, 2 E. D. Smith, 268.²

On the other hand, as early as 1815, interest was regarded as necessary, even at common law, in *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38, and this view seems to have met with approval in *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.) 396, and *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844. The principle was also apparently approved in *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313. The opinion expressed in the New York cases has since been repudiated in that state. The question whether interest was necessary at common law was raised, but not decided, in *Valton v. National Loan Fund Assur. Soc.*, 20 N. Y. 32. In *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516, however, the court held that the statutes forbidding wager policies were merely declaratory of the common law, and that an insurable interest was necessary at common law. The same view was subsequently taken in *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 22 Hun (N. Y.) 320.

(b) The modern rule.

Whatever may have been the rule at common law, it is settled as a fundamental principle of American law that one taking out a

¹ This statute provides that no insurance shall be made by any person on the life of any person wherein the person for whose use or benefit or on whose account such policy shall be made shall have no interest, and that in all cases where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount

or value of the interest of the insured in such life or lives. It is generally conceded that this statute did not become effective in America.

² See *Abbott v. Sebor*, 3 Johns. Cas. 39, 2 Am. Dec. 189, *Juhel v. Church*, 2 Johns. Cas. 333, and *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318. See, also, *Biddle*, Ins. vol. 1, §§ 183, 184.

policy of insurance on the life of another person for his own benefit must have an interest in the continuance of the life insured.

This principle is supported by a multitude of cases, the citation of which would serve no useful purpose. The following are the more important: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Orotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566; *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550; *Brockway v. Mut. Benefit Life Ins. Co. (C. C.)* 9 Fed. 249; *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Bloomington Mut. Life Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Elkhart Mutual Aid, Beneficial & Relief Ass'n v. Houghton*, 98 Ind. 149; *Id.*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 9 Ind. App. 181; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908; *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267; *Basye v. Adams*, 81 Ky. 368; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473, 9 N. W. 497; *Standard Life & Accident Ins. Co. v. Catlin*, 106 Mich. 138, 63 N. W. 897; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *McFarland v. Creath*, 35 Mo. App. 112; *Heusner v. Mut. Life Ins. Co.*, 47 Mo. App. 336; *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638; *Lanouette v. La Plante*, 67 N. H. 118, 36 Atl. 981; *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516; *Rawls v. American Life Ins. Co.*, 36 Barb. 357, affirmed in 27 N. Y. 282, 84 Am. Dec. 280; *Olmsted v. Keyes*, 85 N. Y. 593; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 233, 9 Am. St. Rep. 111; *McDermott v. Prudential Ins. Co.*, 7 Kulp (Pa.) 246; *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134; *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189. But, as said in *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380, it is not necessary that an insurable interest should appear on the face of the policy.

In a number of states there are special statutory provisions relating to the necessity of insurable interest.³

³ See *Deering's Civ. Code Cal.* §§ 2551, Code Ga. § 2114; *Hurd's Rev. St. Ill.* 2763; *Rev. St. Mo.* 1889, § 5866; *Civ.* 1899, p. 591, § 134; *Horner's Ann. St.*

Notwithstanding the fact that the weight of authority is decidedly in favor of the rules stated above, a few courts have questioned it or repudiated it altogether, although it is to be noted that such holdings were not usually necessary to the decision of the case. The leading case, holding that an insurable interest is not necessary, is *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576, where, reasoning from the premise that interest was not essential at common law, the supreme court of New Jersey held that, in the absence of a statute forbidding an insurance without interest, an insurable interest is not necessary to support a contract of life insurance.

This view was approved in *De Ronge v. Elliott*, 23 N. J. Eq. 486, and *Vivar v. Supreme Lodge, Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36.

In *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066, where the vice chancellor on the trial had relied on the *Johnson* and *Vivar* Cases, the Court of Errors and Appeals said that the questions dealt with in those cases in the Supreme Court, having never been presented to the Court of Errors and Appeals, ought not to be passed on, unless it was necessary so to do. The doctrine of the New Jersey cases seems to have met with approval in *Mowry v. Home Life Ins. Co.*, 9 R. I. 346, where the court said that the reasons generally given for requiring an interest as a matter of public policy are not very forcible; but later Rhode Island cases do not go so far. In *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496, the court raised, but did not decide, the question whether an interest was necessary; and in *Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570, 40 Atl. 497, the court apparently regards an insurable interest as necessary. The Supreme Court of Missouri, in *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414, seems to approve the doctrine of the *Johnson* Case that insurable interest need not be shown, in the absence of statute; but this was distinctly repudiated in *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321. Even the Supreme Court of New York, in *Reed v. Provident Savings Life Ins. Co.*, 36 App. Div. 250, 55 N. Y. Supp. 292, has questioned the logical basis of the requirement of an insurable interest. It was contended in that case that the

Ind. 1901, § 3781h; P. & L. Dig. Laws Rev. Codes N. D. 1899, § 4611; Ann.
Pa. col. 2380, par. 79; Ky. St. 1899, St. S. D. 1901, § 5445; Civ. Code Mont.
§ 678; Rev. St. Wis. 1898, § 1955c; 1895, § 3561.

doctrine that the person to whom insurance is payable must have some interest in the life insured should no longer prevail where the insured himself joins in the application.⁴ The court said that there is probably no logical answer to this argument, but they did not feel authorized to give effect to it, as such a doctrine could be safely declared only by a court of last resort.⁵

(c) Reasons for the rule—Wager contracts void.

The necessity of an insurable interest in the insurance of property is confessedly based on the principle that such insurances are strictly contracts of indemnity. In view of the principle, held by most courts to be fundamental, that life insurance is not a contract of indemnity,⁶ it would seem that, so far as those courts are concerned, the reason for demanding an insurable interest in the life insured as a pre-requisite to a valid insurance loses much of its force. The rule is, however, supported by other considerations which are in themselves of sufficient force and weight. As pointed out by Mr. May,⁷ it is not the particular piece of property or the particular life that is insured, but it is the interest in the property or in the life. So, in *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429, the court said that, if the insured have no interest whatever in the thing or life insured, he sustains no risk. If one take out a policy of insurance upon the life of a person in whom he has no interest whatever, his risk is created by the contract itself, and it falls within the category of wagering or gambling contracts. Therefore it is said that a contract of life insurance, not founded on an insurable interest in the life insured, is a speculative or wagering contract, and as such prohibited by the statutes against gaming.⁸

The principle that insurance without interest is in effect a speculative or wagering contract is supported by *In re Slingluff* (D. C.) 106 Fed. 154; *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4; *West v. Sanders*, 104 Ga. 727, 31 S. E. 619; *Guardian Mut. Life*

⁴ See *Cooke, Life Ins.* § 58.

⁵ See *Zinn's Estate*, 2 Pa. Dist. R. 801, where the right to death benefits in a beneficial association known as the Philadelphia Fire Department Relief Association was involved. The court held that such an association is not an insurance company, and as the payment of benefits is in the nature of a gratuity only, and not insurance, it is immaterial

whether the beneficiary has an insurable interest or not.

⁶ See ante, p. 89.

⁷ *May, Ins.* vol. 1, § 72.

⁸ Gaming contracts and transactions in general, see *Cent. Dig.* vol. 24, "Gaming," cols. 1530-1668, §§ 1-107. See *Hurd's Rev. St. Ill.* 1899, p. 591, § 134; *Deering's Civ. Code Cal.* § 2558.

Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; *Cisna v. Shelbley*, 88 Ill. App. 385; *Bloomington Mut. Life Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518; *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Mutual Ben. Ass'n v. Hoyt*, 46 Mich. 473, 9 N. W. 497; *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Reed v. Provident Savings Life Ins. Soc.*, 86 App. Div. 250, 55 N. Y. Supp. 292; *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409; *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; *United Brethren Mut. Aid Ass'n v. McDonald*, 122 Pa. 324, 15 Atl. 489, 1 L. R. A. 238, 9 Am. St. Rep. 111; *Ramsay v. Myers*, 6 Pa. Dist. R. 468.

One of the grounds of the decision in *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576, was that the New Jersey statute did not prohibit all wagers, but only particular kinds of gaming. In *McDermott v. Prudential Ins. Co.*, 7 Kulp (Pa.) 246, in which the policy involved was issued in New Jersey and was to be paid there, the court said that, notwithstanding the fact that the New Jersey Supreme Court had in several decisions intimated that wagering policies were not void and that an insurable interest was not necessary, such a policy could not be enforced in the courts of Pennsylvania.

(d) Same—Incentive to crime.

It is also urged that, where insurable interest is lacking, the person to be benefited by the policy is interested in the death, rather than the life, of the person insured. Such contracts, therefore, are incentives to crime, in that they tempt the beneficiary to hasten the event on which the policy matures by encompassing the death of the insured.*

This reason has been urged in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288; *Steinback v. Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761.

* Death caused by beneficiary or assignee as risk not covered by policy, see post, vol. 4, p. 3153.

The doctrine has, however, been criticised in *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, where it was said that the force of the suggestion that such contracts are incentives to crime may well be doubted. Such a doctrine, carried to its logical result, would strike down legacies to strangers which might become known to the legatee before the death of the testator,¹⁰ limitations in remainder after the death of a life tenant, and conveyances of property in consideration that the grantee shall support the grantor, yet there is no case in which such dispositions or conveyances have been declared void on that ground.

It is also disapproved in *Lamont v. Grand Lodge Iowa Legion of Honor* (C. C.) 31 Fed. 177; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Johnson v. Van Epps*, 110 Ill. 551; *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Crosswell v. Connecticut Indemnity Ass'n*, 51 S. O. 112, 28 S. E. 200; *Reed v. Provident Savings Life Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292; and, apparently, in *Nye v. Grand Lodge, A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429.¹¹ And see *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, where it was said that, while an insurance without interest might lead to crime, it is not necessarily criminal.

(e) Same—Public policy.

In view of the reasons given, it may be laid down as an established principle that the rule requiring insurable interest in the life insured is based on considerations of public policy, and that insurances without interest are void as contrary to public policy.¹²

Such is the principle to be deduced from *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *In re Slingsluff* (D. C.) 106 Fed. 154; *Helmetag's Adm'r v. Miller*, 78 Ala. 183, 52 Am. Rep. 316; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *West v. Sanders*, 104 Ga. 727, 31 S. E. 619; *Cisna v. Shelbley*, 88 Ill. App. 385; *Continental Life Ins. Co. v. Tullidge* (Ind.) 17 Am. Law Rev. 1020; *Kessler v. Kuhns*, 1 Ind. App. 511, 27 N. E. 980; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *Bayse v. Adams*, 81 Ky. 368; *Rombach v. Insurance Co.*, 35 La.

¹⁰ Disqualification of devisee or legatee causing or procuring death of testator, see Cent. Dig. vol. 49, "Wills," col. 2614, § 1692.

¹¹ See, also, *Cooke, Life Ins.* §§ 58-60.

¹² Contracts void on grounds of public policy in general, see Cent. Dig. vol. 11, "Contracts," cols. 451-700, §§ 468-722. See, also, *Clark, Contracts*, § 182 et seq.; *Greenhood, Public Policy*, p. 279.

Ann. 233, 48 *Am. Rep.* 239; *Mutual Ben. Ass'n v. Hoyt*, 46 *Mich.* 473, 9 *N. W.* 497; *Standard Life & Accident Ins. Co. v. Catlin*, 106 *Mich.* 138, 63 *N. W.* 897; *Ohlsholm v. National Capitol Life Ins. Co.*, 52 *Mo.* 213, 14 *Am. Rep.* 414; *Ashford v. Metropolitan Life Ins. Co.*, 80 *Mo. App.* 638; *Downey v. Hoffer*, 110 *Pa.* 100, 20 *Atl.* 655; *Seigrist v. Schmoltz*, 113 *Pa.* 326, 6 *Atl.* 47; *United Brethren Mut. Aid Soc. v. McDonald*, 122 *Pa.* 324, 15 *Atl.* 489, 1 *L. R. A.* 238, 9 *Am. St. Rep.* 111; *Hendricks v. Reeves*, 2 *Pa. Super. Ct.* 545; *Schonfield v. Turner*, 75 *Tex.* 324, 12 *S. W.* 628, 7 *L. R. A.* 189; *American Mut. Life Ins. Co. v. Bertram* (*Ind. Sup.*) 70 *N. E.* 258, 64 *L. R. A.* 935; *Beard v. Sharp*, 100 *Ky.* 606, 38 *S. W.* 1057; *Trinity College v. Travelers' Ins. Co.*, 113 *N. C.* 244, 18 *S. E.* 175, 22 *L. R. A.* 291; *Equitable Life Assur. Soc. v. Hazlewood*, 75 *Tex.* 338, 12 *S. W.* 621, 7 *L. R. A.* 217, 16 *Am. St. Rep.* 893; *Wilton v. New York Life Ins. Co.* (*Tex. Civ. App.*) 78 *S. W.* 403.

In *Seigrist v. Schmoltz*, 113 *Pa.* 326, 6 *Atl.* 47, the court said, moreover, that, since the rule of law respecting insurable interest is founded on considerations of public policy, it is not sufficient that the transaction is in good faith.

(f) Policy procured by person insured payable to one without interest.

That one has an unlimited insurable interest in his own life is an elementary principle, as to the existence of which the cases are unanimous.

Reference to the following cases supporting this principle is deemed sufficient: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 *U. S.* 457, 24 *L. Ed.* 251; *Central Nat. Bank v. Hume*, 128 *U. S.* 195, 9 *Sup. Ct.* 41, 32 *L. Ed.* 370; *Lamont v. Grand Lodge Iowa Legion of Honor (C. C.)* 31 *Fed.* 177; *Allen v. Hartford Life Ins. Co.*, 72 *Conn.* 693, 45 *Atl.* 955; *Union Fraternal League v. Walton*, 109 *Ga.* 1, 34 *S. E.* 317, 46 *L. R. A.* 424, 77 *Am. St. Rep.* 350; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 *Ill.* 35, 22 *Am. Rep.* 180; *Provident Life & Investment Co. v. Baum*, 29 *Ind.* 236; *Franklin Life Ins. Co. v. Sefton*, 53 *Ind.* 380; *Davis v. Brown*, 159 *Ind.* 644, 65 *N. E.* 908; *Campbell v. New England Mut. Life Ins. Co.*, 98 *Mass.* 381; *Loomis v. Eagle Life & Health Ins. Co.*, 6 *Gray (Mass.)* 396; *Mutual Life Ins. Co. v. Allen*, 138 *Mass.* 24, 52 *Am. Rep.* 245; *Valton v. National Loan Fund Assur. Soc.*, 22 *Barb. (N. Y.)* 9; *Baker v. Union Mut. Life Ins. Co.*, 43 *N. Y.* 283; *N. W. Masonic Aid Ass'n v. Jones*, 154 *Pa.* 99, 26 *Atl.* 253, 35 *Am. St. Rep.* 810; *Crosswel v. Connecticut Indemnity Ass'n*, 51 *S. C.* 112, 28 *S. E.* 200; *Fairchild v. N. E. Mut. Life Ass'n*, 51 *Vt.* 613; *New York Life Ins. Co. v. Davis*, 96 *Va.* 737, 32 *S. E.* 475, 44 *L. R. A.* 305.

It follows, therefore, that one may take out a policy of insurance on his own life and make it payable to whom he will. \It is not

necessary that the person for whose benefit it is taken should have an insurable interest. This was regarded as unsettled in *Valton v. National Loan Fund Assur. Soc.*, 22 Barb. (N. Y.) 9. In *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, it was said that, when the insurance is taken out by the person insured, no question of insurable interest can arise. The rule was finally established by the leading case of *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, and by *Provident Life & Invest. Co. v. Baum*, 29 Ind. 236, and *Hogle v. Guardian Life Ins. Co.*, 29 N. Y. Super. Ct. 567, decided about the same time. ←

The principle is supported by *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, affirming *France v. Ætna Life Ins. Co.*, 9 Fed. Cas. 657; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Langdon v. Union Mut. Life Ins. Co.* (C. C.) 14 Fed. 272; *Lamont v. Grand Lodge Iowa Legion of Honor* (C. C.) 31 Fed. 177; *Ingersoll v. Knights of the Golden Rule* (C. C.) 47 Fed. 272; *Robinson v. U. S. Mut. Acc. Ass'n* (C. C.) 68 Fed. 825; *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51; *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56; *Fidelity Mut. Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294; *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *United States Mut. Accident Ass'n v. Hodgkin*, 4 App. D. C. 516; *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Massachusetts Mut. Life Ins. Co. v. Kellogg*, 82 Ill. 614; *Johnson v. Van Epps*, 110 Ill. 551; *Bloomington Mut. Life Ben. Ass'n v. Blue*, 24 Ill. App. 518, affirmed in 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Moore v. Chicago Guaranty Fund Life Soc.*, 178 Ill. 202, 52 N. E. 882, affirming 76 Ill. App. 433; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Elkhart Mut. Aid Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 9 Ind. App. 131; *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908; *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267; *Succession of Hearing*, 26 La. Ann. 326; *Stuart v. Sutcliffe*, 46 La. Ann. 240, 14 South. 912; *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 52

N. W. 1012; *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; *Whitmore v. Supreme Lodge Knights and Ladies of Honor*, 100 Mo. 36, 13 S. W. 495; *Masonic Benevolent Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25; *McFarland v. Creath*, 35 Mo. App. 112; *Heusner v. Mut. Life Ins. Co.*, 47 Mo. App. 336; *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638; *Van Cleave v. Union Casualty & Surety Co.*, 82 Mo. App. 668; *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Vivar v. Supreme Lodge Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36; *Hogle v. Guardian Life Ins. Co.*, 4 Abb. Prac. N. S. (N. Y.) 346; *Steinback v. Diepenbrock*, 1 App. Div. 417, 37 N. Y. Supp. 279; *Corbett v. Metropolitan Life Ins. Co.*, 37 App. Div. 152, 55 N. Y. Supp. 775; *Grattan v. Nat. Life Ins. Co.*, 15 Hun (N. Y.) 74; *Freeman v. National Ben. Society*, 42 Hun (N. Y.) 252; *Tucker v. Mutual Ben. Life Ins. Co.*, 50 Hun, 50, 4 N. Y. Supp. 505, affirmed without opinion 121 N. Y. 718, 24 N. E. 1102; *Butler v. State Mut. Life Assur. Co.*, 55 Hun, 301, 8 N. Y. Supp. 411; *Classey v. Metropolitan Life Ins. Co.*, 84 Hun, 350, 32 N. Y. Supp. 335; *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 622; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Olmsted v. Keyes*, 85 N. Y. 593; *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Carraher v. Metropolitan Life Ins. Co.*, 11 N. Y. St. Rep. 665; *Albert v. Mutual Life Ins. Co. of New York*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Gass v. United States Life Ins. Co.*, 4 Ohio S. & C. P. Dec. 234, 3 Ohio N. P. 216; *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Hill v. United Life Ins. Ass'n*, 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807; *N. W. Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Burke v. Prudential Ins. Co.*, 155 Pa. 295, 26 Atl. 445; *Melly v. Hershberger*, 16 Wkly. Notes Cas. (Pa.) 186; *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200; *Clement v. N. Y. Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *Fairchild v. N. E. Mut. Life Ass'n*, 51 Vt. 613; *Hurd v. Doty*, 21 L. R. A. 750, 86 Wis. 1, 56 N. W. 371.

Baker v. Union Mut. Life Ins. Co., 43 N. Y. 283, has been regarded as opposed to the doctrine, in view of the language of the court to the effect that one may lawfully insure for his own benefit, or in favor of any one having an interest in his life; but the case cannot be considered as holding that, where the insurance is taken out by the person insured, the beneficiary must of necessity have an insurable interest. The statement of the court was probably only a general one, and, moreover, such does not seem to be the rule in New York. So, too, in *Tate v. Commercial Bldg.*

Ass'n, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, the court held that an agreement that insurance shall be effected by a person on his own life for the benefit of another having no interest in his life is void as against public policy. It is likely, however, that the theory of the court was that such agreement was merely a device to evade the law against wagering contracts, and it cannot be said that the case holds that an insurance taken out by the insured on his own life for the benefit of another would be void, if taken in good faith. Rev. St. Mo. 1889, § 5866, prohibits life insurance in favor of one who has no insurable interest; but it has been held in *N. Y. Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, that this prohibition relates only to insurance in assessment companies.

It is, of course, to be expected that the rule allowing the insured to designate as beneficiary one having no insurable interest must give way to positive provisions of the contract to the contrary. Thus, in *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012, where the policy provided that the production of the policy and of a receipt for the sum insured, by any person furnishing satisfactory proof that he or she is the beneficiary, executor or administrator, husband or wife, or relative by blood or connection by marriage of the insured, shall be conclusive evidence that such sum has been paid to and received by the person entitled thereto, the court held that under such provision the beneficiary must have an insurable interest. It would seem, however, that in Kentucky the beneficiary must have an insurable interest.

Van Bibber's Adm'r v. Van Bibber, 82 Ky. 347; *Caudell v. Woodward*, 96 Ky. 646, 29 S. W. 614; *Embry's Adm'r v. Harris*, 52 S. W. 958, 107 Ky. 61; *Barbour's Adm'r v. Larue's Assignee*, 51 S. W. 5, 106 Ky. 546.

The decision in the case last cited seems to be based on the provisions of the act of 1870, where it was declared that if a policy of insurance is effected by any person on his own life or on another life, in favor of some person, other than himself, having an insurable interest therein, the beneficiary is entitled to the proceeds as against creditors of the person effecting the insurance.

The courts of Texas have qualified the rule, and, while recognizing the validity as against the insurer of a policy taken out by the insured for the benefit of one having no interest, regard the beneficiary in such policy as merely a trustee for the heirs and

representatives of the insured. This doctrine is based on the analogy between the designation of a beneficiary having no interest and an assignment to one without interest; such an assignment being regarded as invalid in Texas.¹³ Thus, in *Equitable Life Assur. Soc. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, it is said that the only distinction between the assignment of a policy taken out by a person on his own life to one having no insurable interest and the designation of such person in the original transaction as beneficiary is that the insurer may not know of the assignment, but would necessarily be aware of the designation in the policy. So far as the question of public policy is concerned, we can see no substantial distinction between the proceedings, and, if one is invalid, it seems the other should be held equally so. A person having no insurable interest, designated in the policy as beneficiary, should be treated as a trustee to receive the proceeds for whoever may be entitled to enjoy them; and in *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478, the court said, referring to the objection that the beneficiary had no insurable interest in the life insured, that the question thus raised is not one of ultimate right to the money to be recovered, but of right to maintain the action. The fact that the beneficiary may recover against the insurance company does not cut off inquiry between him and the legal representatives or heirs of the insured as to whether he had an insurable interest.

These views govern the decisions in *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564, *Knights and Ladies of Honor v. Burke* (Tex. App.) 15 S. W. 45, *Mayher v. Manhattan Life Ins. Co.*, 27 S. W. 124, 87 Tex. 169, *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107, and *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286, though in *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185, it was regarded as an open question, and in *Fletcher v. Williams* (Tex. Civ. App.) 66 S. W. 860, it was held that, where the policy was taken out by the insured, he may dispose of the proceeds by will to one who has no insurable interest.

As in the case of policies taken out by one having no interest, it has been said, as in *Lanouette v. La Plante*, 67 N. H. 118, 36 Atl. 981, that a policy taken out by the insured himself, payable to one having no interest, is open to the objection that it offers an incentive to crime. As said, however, in *Lamont v. Grand Lodge Iowa Legion of Honor* (C. C.) 31 Fed. 177, there is no more danger of

¹³ See post, p. 272.

evil resulting from allowing one to name a stranger as beneficiary in a policy than from allowing one to devise property to a stranger.

A similar view is taken in *Union Fraternal League v. Walton*, 109 Ga. 1, 84 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350, and *Johnson v. Van Epps*, 110 Ill. 551.¹⁴

(g) Same—Payment of premiums by beneficiary.

In some of the decisions cited above, in support of the doctrine that one may insure his own life in favor of one having no insurable interest, stress is laid on the fact that the premiums were paid by the insured or by his procurement.

Such is the case in *United States Mut. Accident Ass'n v. Hodgkin*, 4 App. D. C. 516; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 898; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908; *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; *Albert v. Mut. Life Ins. Co. of New York*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Fairchild v. Northeastern Mut. Life Ass'n*, 51 Vt. 613.

In *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679, it was held that where one insures the life of another, in whom he has no insurable interest, the void contract will not be validated by the afterthought or consideration of the insured reimbursing the premiums paid. But, as said in *Langdon v. Union Mut. Life Ins. Co. (C. C.)* 14 Fed. 272, the payment of premiums by the beneficiary is not conclusive that the policy was taken out by him. In the leading case of *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, affirming 9 Fed. Cas. 657, it was regarded as immaterial whether the beneficiary paid the premiums.

This principle is also asserted in *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550; *Fidelity Mut. Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; *Johnson v. Van Epps*, 110 Ill. 551; *Belknap v. Johnston*, 114 Iowa, 263, 86 N. W. 267; *Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; *Walton v. National Loan Fund Life Assur. Soc.*, 22 Barb. (N. Y.) 9; *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286; *Mayher*

¹⁴ See, also, *Cooke, Life Ins.* § 60, where it is said that the argument used, that when the insured takes out the policy himself he may, if he so desires, put

his life in hazard, is inconsistent with the doctrine that it is public interest, and not private interest, that avoids wager policies.

v. Manhattan Life Ins. Co., 27 S. W. 124, 87 Tex. 169. And see *Prudential Ins. Co. v. Oummins' Adm'r* (Ky.) 44 S. W. 431, where it was said that, if a policy is payable to the personal representative of the insured, the fact that the premiums are paid by one who has no insurable interest, under the belief that the insurance is for his benefit, does not render the policy void.

On the other hand, in *Ancient Order of United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890, Justice Lumpkin, in a dissenting opinion, regarded it as determining the character of the policy as a wagering contract that the premiums were paid by a beneficiary who had no insurable interest.

That the premiums were paid by the beneficiary was also regarded as a factor in *Gordon v. Ware Nat. Bank* (C. C. A.) 132 Fed. 444, and *Hinton v. Mutual Reserve Fund Life Ass'n*, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161.

(h) Same—Good faith.

In other cases the general doctrine is qualified by the proviso that the transaction is in good faith and not intended as an evasion of the rule against wager policies. This was laid down as the true rule in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

It is also supported by *Lamont v. Grand Lodge Iowa Legion of Honor* (C. C.) 31 Fed. 177; *Kentucky Life & Accident Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42; *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *United States Mut. Accident Ass'n v. Hodgkin*, 4 App. D. C. 516; *Cisna v. Sheibley*, 88 Ill. App. 385; *Johnson v. Van Epps*, 14 Ill. App. 201; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 906; *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200.

(i) Mutual benefit insurance.

The general principle that one cannot take out insurance on the life of one in whom he has no interest has also been applied in the case of mutual benefit associations. It was held, in *Elkhart Mut. Aid, Benevolent & Relief Ass'n v. Houghton*, 98 Ind. 149, that one who has no interest in the life of another cannot obtain a membership for such other in a mutual benefit society, where the membership carries with it insurance on the life of the member. Obviously, if the statutes governing mutual benefit associations or the rules and regulations of such associations contain provisions pre-

scribing what classes of persons may be beneficiaries, the rule as to contracts making third persons beneficiaries must be modified to correspond with such provisions.

The prohibition in Rev. St. Mo. 1889, § 5866, forbidding life insurance in favor of one who has no insurable interest, was held, in *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, to relate only to insurance in assessment companies. In *Harding v. Littlehale*, 150 Mass. 100, 22 N. E. 703, it was held that the provisions of St. 1885, c. 183, forbidding insurance on the assessment plan for the benefit of a person not having an insurable interest, did not prevent insurance for the benefit of the applicant, the proceeds to go to his personal representative for the benefit of his estate.

The law under which a benefit association is incorporated, existing at the time of the admission of a member, is part of the contract between him and the association (*Nelson v. Gibson*, 92 Ill. App. 595); and if the act provides that the member may designate by will a beneficiary having no insurable interest, a subsequent act providing that he cannot do so is unconstitutional, as impairing the obligation of the contract between the member and the association.

In *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267, the association involved was an Illinois corporation, and it issued a policy on the life of a citizen of Iowa. By the law of Illinois a member could change his beneficiary at will. The member surrendered his certificate and obtained a new one, payable to a different beneficiary; the change being made at the Illinois office. Such a transaction was not prohibited by the law of Iowa when the original certificate was issued. At the time the substitution was made, Acts 21st Gen. Assem. c. 65, § 7, was in force, providing that no mutual benefit association operating under the act should issue a policy, except in favor of a member of the family, legal representative, heir, or legatee of the insured. It was held that the beneficiary could recover, though not within the classes named, as the policy was an Illinois contract, which could not be affected by the laws of a foreign state subsequently enacted, though between the issuing of the original and the substituted policy the association had become amenable to the laws of Iowa by obtaining a license to do business in that state.

Where the laws of the order provide, as in *Lamont v. Grand Lodge Iowa Legion of Honor (C. C.)* 31 Fed. 177, for furnishing aid to the widows, orphans, heirs, or devisees of a member, the

court held that the words "heirs or devisees" were not restricted to members of the family, but might include strangers.

The same rule was followed in *Bloomington Mut. Life Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518, and *Masonic Benevolent Ass'n v. Bunch*, 109 Mo. 500, 19 S. W. 25.

In the last case the association involved was an Illinois corporation, and the court regarded the contract as governed by the interpretation given to similar contracts of the association in the Blue Case. The application of the general rule to fraternal or mutual benefit associations was discussed at some length in *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350, where it was said that, as one has an insurable interest in his own life, there is no reason why he may not designate as a recipient of his bounty one to whom he is bound by ties of friendship, gratitude, sympathy, or love. This decision was apparently based on Civ. Code 1895, § 2114, which provides that the life insured may be that of the person taking out the insurance or of another in the continuance of which he has an interest. Justice Lumpkin dissented, holding that a policy of life insurance naming as the beneficiary one who has no insurable interest in the life insured is a wagering policy, and void. It is to be noted that in this case it did not appear that there were any limitations as to the class of persons who might be designated as beneficiaries, and the court regarded this as an additional ground for holding the policy valid. On a second trial, however, it was shown that by the laws of the order a member could designate as beneficiary only persons having a legal insurable interest; and it was held, therefore, in *Union Fraternal League v. Walton*, 112 Ga. 315, 37 S. E. 389, that under the laws of the order a member could not take out a benefit certificate in favor of one not having an insurable interest. In *Lamont v. Hotel Men's Mut. Ben. Ass'n* (C. C.) 30 Fed. 817, where the by-laws of the association provided that benefits might be paid to the person designated by the member in his application or by his last will, the court held that the member might designate any person as his beneficiary, without regard to whether the person had or had not an insurable interest. A similar decision was arrived at in *Berkeley v. Harper*, 3 App. D. C. 308, where the charter provided that benefits should be paid to the member's family or disposed of as he should direct, and in *Ingersoll v. Knights of the Golden Rule* (C. C.) 47 Fed. 272, where the laws of

the order provided that the beneficiary might be changed at the will of the insured. So it has been held that, in the absence of any law limiting beneficiaries to any particular class of persons, a member may make his certificate payable to one having no insurable interest in his life.

Bogart v. Thompson, 24 Misc. Rep. 581, 53 N. Y. Supp. 622; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Massey v. Society*, 102 N. Y. 523, 7 N. E. 619.

On the other hand, in *Lyon v. Rolfe*, 76 Mich. 146, 42 N. W. 1094, where the statute (Comp. Laws 1871, c. 94) under which the association was organized permitted such associations to be formed for the purpose of securing a benefit to the family or heirs of a member, it was held that the certificate of membership could not be payable to one having no insurable interest. It is, however, to be noted that in *Silvers v. Michigan Mut. Ben. Ass'n*, 94 Mich. 39, 53 N. W. 935, the law in question was construed, and it was held that neither under the statute nor under the amendment of 1887, providing that mutual benefit associations shall not issue policies in which the beneficiary has no insurable interest, was it intended to exclude heirs, though such heirs may not have, strictly speaking, an insurable interest.

A similar rule was announced in *Coudell v. Woodward*, 96 Ky. 646, 29 S. W. 614, *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, and *Welgelman v. Bronger*, 96 Ky. 132, 28 S. W. 334, where the laws of the associations involved limited the beneficiaries to the family, heirs, or dependents. The rule prevailing in Kentucky and Texas as to insurance policies generally was followed in *Hotopp v. Hotopp*, 9 Ky. Law Rep. 649, *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, and *Knights and Ladies of Honor v. Burke* (Tex. App.) 15 S. W. 45, where mutual benefit associations were involved.

(J) Conclusion.

Whatever may have been the rule at common law, it is now settled that a life insurance policy, to be valid, must be based on an insurable interest, on the part of the person procuring the insurance, in the life insured. The weight of authority is that one may take out insurance on his own life for the benefit of one having no insurable interest in the life insured. While it is perhaps unsettled whether the validity of such a policy is affected if the beneficiary pays the premiums, good faith and the absence of any intent to evade the law against speculative policies seem to be essential. In

the case of mutual benefit insurance, the validity of a certificate payable to one having no interest in the life insured is to be determined by the rules of the association and the statutes under which it is organized.

2. NECESSITY OF INSURABLE INTEREST OF ASSIGNEE OF LIFE POLICY.

- (a) In general.
- (b) New York.
- (c) Massachusetts.
- (d) Maryland.
- (e) Wisconsin.
- (f) Indiana.
- (g) Other states holding interest unnecessary.
- (h) Missouri.
- (i) Louisiana.
- (j) Federal cases.
- (k) Pennsylvania.
- (l) Kansas.
- (m) Texas.
- (n) Other states holding interest to be necessary.
- (o) Good faith—Payment of premiums.
- (p) Public policy—Incentive to crime.
- (q) Special provisions of the contract, rules, or statutes.

(a) In general.

One of the most important questions in life insurance is whether a policy valid in its inception may, in the absence of statutory provisions, be assigned by the insured or the beneficiary to one having no insurable interest in the life insured. As said in *Crosswell v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200, the authorities are in hopeless conflict. The courts of the different states have divided on the question on well-defined lines, and there is no common ground on which the different views can be reconciled.

(b) New York.

Probably the earliest case involving the question at issue is *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 529, affirming 9 N. Y. Super. Ct. 419, where it was held that a policy of insurance is a mere chose in action governed by the same principles as other agreements involving pecuniary obligations, and consequently it is not necessary that the assignee should have an insurable interest in the life insured. So long as the policy is valid

in its inception, an assignment thereof does not change the liability of the company.

The doctrine thus announced was subsequently approved in *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32, *Hogle v. Guardian Life Ins. Co.*, 29 N. Y. Super. Ct. 567, 4 Abb. Prac. (N. S.) 346, *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283, and *Olmsted v. Keyes*, 85 N. Y. 593.

In the last case the court discusses the question at some length and reiterates the principle that a policy valid in its inception may be assigned to any person, whether he has an insurable interest or not.

The principle has been approved in *Butler v. State Mut. Life Assurance Co.*, 55 Hun, 301, 8 N. Y. Supp. 411; *Classey v. Metropolitan Life Ins. Co.*, 84 Hun, 350, 32 N. Y. Supp. 335; *Steinback v. Diepenbrock*, 1 App. Div. 417, 37 N. Y. Supp. 279, affirmed in 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; *Fuller v. Kent*, 13 App. Div. 529, 43 N. Y. Supp. 649; *Reed v. Provident Sav. Life Assur. Soc.*, 55 N. Y. Supp. 292, 36 App. Div. 250; *McDonough v. Aetna Life Ins. Co.*, 78 N. Y. Supp. 217, 38 Misc. Rep. 625; *Wright v. Mutual Ben. Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749.

It would seem, however, that in *Steinback v. Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424, the rule was limited to cases where there is no question of a colorable evasion of the law as to wager policies. It is intimated very strongly that, should the circumstances surrounding the transaction show an intent to evade the law, the assignment would be invalid.

The rule thus announced by the New York courts has been criticised in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, and *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136, on the ground that, if there is any sound reason for holding a policy invalid when taken out by a person who has no interest in the life insured, it is difficult to see why the reason is not as cogent and operative against a person taking an assignment of a policy on a life in which he has no interest. The reasons for which the one is held invalid should also invalidate the other.

(c) Massachusetts.

In *Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782, the right to assign a policy of life insurance, like any other chose in action, was recognized. *Stevens v. Warren*, 101 Mass. 564, has

often been cited as supporting the principle that an assignee must have an insurable interest, and, indeed, was expressly followed in the earlier cases in Indiana. The case does not, however, support such a principle. It is true the policy in that case was assigned to one who had no interest in the life insured, and the court took the position that the assignment was invalid. It would appear, however, that there was an insuperable objection to the assignment in any case, as it was made without the consent of the company; such consent being made a condition precedent in the policy. This feature of the case is pointed out in *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, which is regarded as a leading case supporting the rule that, if a policy of life insurance is issued to a person having an insurable interest, an assignment thereof to one having no such interest is nevertheless valid. The court says that the main question in the *Stevens Case* is the point whether such an assignment, made without the consent of the insurer, is valid, where the policy contains a provision that assignment without such consent should be void; and though the court in that case said that transfers without interest contravene the rule against wager policies, it is apparent that the language was not intended to apply to all assignments in which the assignee has no interest, but only to such as were found to be in fact gaming transactions. The court, therefore, regarded the *Stevens Case* as an authority against assignments without interest only in those cases where it is evident that the assignment is made merely as an evasion of the rule that one cannot procure insurance on the life of another if he has no interest in such life.

The rule thus announced in the *Allen Case* has been approved in *Tateum v. Ross*, 150 Mass. 440, 23 N. E. 230; *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 N. E. 430; *Brown v. Greenfield Life Ass'n*, 172 Mass. 498, 53 N. E. 129; *King v. Cram*, 185 Mass. 103, 69 N. E. 1049.

(d) Maryland.

The rule in Maryland is that an assignee need not have an insurable interest.

This is the effect of the decisions in *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, *Souder v. Home Friendly Soc.*, 72 Md. 511, 20 Atl. 137, *Robinson v. Hurst*, 78 Md. 67, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266; *Ologg v. McDaniel*, 89 Md. 416, 43 Atl. 795. It is also regarded as supported by *New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742, and *Emerick v. Coakley*, 35 Md.

188, where it was held that a policy is assignable like any other chose in action; the question of insurable interest not being involved.

But in *Diffenbach v. New York Life Ins. Co.*, 61 Md. 370, the necessity of insurable interest was recognized for the purpose of determining the extent to which several assignees should share in the proceeds of the policy.

(c) Wisconsin.

The leading case in Wisconsin supporting the principle that a policy originally obtained for the benefit of a person having an insurable interest in the life assured may be assigned to any person with the assent of the insurance company¹ is *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848.

The decision in this case was based on *Kerman v. Howard*, 23 Wis. 108, *Clark v. Durand*, 12 Wis. 223, *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542, and *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217.

An examination of the authorities cited, however, show that they do not in fact support the principle enunciated in the main case. At the very most the *Howard Case* merely supports the principle that a policy of life insurance is assignable, the only point really decided being as to the assignability where a policy was taken out by a husband on his own life for the benefit of the wife, and it was held that where he survived the wife he may dispose of the policy by will or otherwise; the practical question being whether the wife had a vested interest. So in *Clark v. Durand* it was held that a party who procured insurance on his own life, though intended for the benefit of another, might, with the consent of the company, transfer the same to a third person, to be kept up by him for his own benefit. In the *Archibald Case* the holding was that one might transfer a life policy, so as to vest such title in the assignee as would give him the right to sue on the policy. In *Foster v. Gile* the point really decided is that one who procures a policy of insurance on his own life may dispose of it by will or otherwise, to the exclusion of the beneficiary named in the policy; the real issue

¹ Mr. Joyce, in his work on Insurance, vol. 2, § 916, apparently lays some stress on the consent of the insurer to the assignment. The requirement that a policy shall not be assigned without

the consent of the insurer is, however, based on reasons entirely distinct from the question of necessity of insurable interest.

being whether the beneficiary had a vested interest. This construction of the opinion is borne out by the fact that reference is made to *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N. W. 772, 38 Am. Rep. 289, where the point in issue was as to the vested interest of the beneficiary. In the separate opinion published in 8 N. W. 217, Judge Cassoday takes the same view as the majority opinion, relying on *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; but, as pointed out in *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, the only point decided in the *Hutson* Case was that where a wife took out a policy of insurance on the life of her husband, and died before the husband, her right and interest in the policy went to her heirs under the statute of distribution. The court expressly said in that case that the transfer by operation of law on the death of the holder of the policy was an entirely different matter from a transfer by purchase and assignment during the life of the holder.

The doctrine was, however, approved in *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746, and *Strike v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 95 Wis. 583, 70 N. W. 819.*

(2) *Indiana.*

The decisions in Indiana have not been uniform. In *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313, the court said that as authorities elsewhere are in conflict, the case being one of first impression in Indiana, they were at liberty to decide it in conformity with what seemed to them the general principles of law applicable to the question, and they regarded it as beyond doubt that a policy transferred to an assignee who had no insurable interest in the life insured would be void. Apparently they based their decision largely on *Stevens v. Warren*, 101 Mass. 564. As has been already pointed out, the decision in the Massachusetts case was based more on the lack of consent to the assignment than on the lack of insurable interest in the assignee, and was afterwards distinguished in that regard in the *Allen* Case.² The effect of this decision has, as will be seen later, been limited in a later case. The same policy and the assignment thereof was subsequently considered in *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, and it was contended that the *Hazzard* Case was in conflict with

* Under Laws Wis. 1895, p. 41, c. 20, amending the act incorporating the association involved in the *Strike* Case,

assignments to persons having no insurable interest are prohibited.

² See ante, p. 284.

Hutson v. Merrifield, 51 Ind. 24, 19 Am. Rep. 722. In the Hutson Case it was held that one holding a life policy, whether on the life of another or on his own life, has a valuable interest therein, which he may assign like any other chose in action. But the court in the present case said that, while there is no doubt as to the assignability of a policy of insurance, it does not necessarily follow that it is assignable to one incapable, by reason of public policy, of receiving the assignment. So Bushnell v. Bushnell, 92 Ind. 503, wherein the court says that a life policy is a chose in action which may be assigned, citing the Hutson Case, cannot be regarded as deciding more than the bare proposition that a policy of insurance is assignable; no question being raised as to insurable interest. The doctrine of the Hazzard Case was approved in Kessler v. Kuhns, 1 Ind. App. 511, 27 N. E. 980.

The Supreme Court of Indiana, however, has repudiated the doctrine of the Hazzard and Sefton Cases in Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722, and it has been held that a policy valid in its inception may in good faith be assigned like any other chose in action. The Hazzard and Sefton Cases are considered as turning on the fact that the transaction was found to be merely colorable and to cover a speculative transfer. Again, in Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95, the Supreme Court of Indiana said that when one in good faith takes a contract of insurance on his own life, paying the premiums himself, it is immaterial whether the assignee of the policy has any insurable interest in the life insured or not. This is the doctrine as settled in this state and in accordance with the decided weight of authority. The question was again carefully considered in Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, and the court said: "The admission that a life policy, valid at its inception, may be assigned to one not having an insurable interest in the life of the insured, when not used as a cloak for a wager, is sustained by abundant authority. There are some cases that seemingly hold that an assignment of a policy to one who has no interest in the life of the insured is void. The case of Insurance Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313, is one on which others are founded. While there are expressions in that case which seemingly indicate that an assignment to one who has no interest in the life insured is void, the decision actually turned upon another point. The assignment was held void, not because the assignee had no interest, but because of the disproportion between the amount paid for it

and the amount of the policy." The rule that an assignee need not have an interest has received later approval in *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908.

(g) Other states holding interest unnecessary.

In *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269, a life insurance policy was regarded as assignable, though no question of insurable interest was involved. The question was raised, but not decided, in *Quinn v. Supreme Council Catholic Knights of America*, 99 Tenn. 80, 41 S. W. 343, but, as it appeared in that case that the assignment was purely speculative, it was declared void. In *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650, however, the court held that the weight of authority is to the effect that when the insured contracts directly with the insurer, paying the premiums himself, he may assign it to another who has no insurable interest, so long as the assignment is made in good faith and not as a mere colorable evasion of the provision in regard to wagering contracts. In *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066, the question was raised, but not decided. The vice chancellor had held that an interest on the part of the assignee was not necessary, but the Court of Errors and Appeals declined to pass on the question.

The principle that an assignee need not have an insurable interest in the life insured is also supported by *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288; *Bowen v. National Life Ass'n*, 63 Conn. 460, 27 Atl. 1060; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Moore v. Chicago Guaranty Fund Life Soc.*, 178 Ill. 202, 52 N. E. 882, affirming 76 Ill. App. 433; *Farmers' & Traders' Bank v. Johnson*, 118 Iowa, 282, 91 N. W. 1074; *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; *Eckel v. Renner*, 41 Ohio St. 232; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Mechanics' National Bank v. Comins*, 72 N. H. 12, 55 Atl. 191.

(h) Missouri.

The rule may scarcely be regarded as settled in Missouri. In *McFarland v. Creath*, 35 Mo. App. 112, it was held that, though the assignee may have had no insurable interest, a transfer to him cannot be regarded as void, unless it is shown that the arrange-

ment between the insured and the assignee was in point of fact a wagering contract. The policy in this case was a certificate in a mutual benefit association, and the court regarded the assignment as practically a designation of the assignee as beneficiary of the certificate. It was said in *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336, that it seems to be a sound and reasonable proposition that an assignment of a life policy to one who has no insurable interest in the life insured is void as falling within the rule against wagering contracts. The policy in this case was an ordinary life policy, and it is possible that the court distinguishes this case from the *McFarland Case* on that ground. So, in *Mutual Life Ins. Co. v. Richards*, 99 Mo. App. 88, 72 S. W. 487, it was held that an assignment to one paying the premiums, but having no other insurable interest, gives the assignee an interest only to the extent of the payments made by him. In *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, it was held that the beneficiary and the insured may assign a policy as security.

The Supreme Court of Mississippi, construing a Missouri contract, held in *Rose v. Wilkins*, 78 Miss. 401, 29 South. 397, that under Rev. St. Mo. 1879, c. 21, art. 10, § 972, forming part of the charter of the Knights of Honor, and authorizing benevolent societies to provide for the relief and aid of their deceased members' families, widows, orphans, or other dependents from the proceeds of assessments on the members of the society, one who was neither dependent on nor one of the family of a deceased member of the order could take nothing by the assignment of a three-fourths interest in a benefit certificate of such society, stating that the benefit therein referred to was to be paid in accordance with the laws governing the order.

(i) Louisiana.

The decisions in Louisiana are conflicting. In *Succession of Risley*, 11 Rob. 298, it was held that one may insure his own life, or the life of another in which he has an interest, and assign the policy to one having an interest. A similar rule was announced in *Succession of Richardson*, 14 La. Ann. 1. In *Succession of Hearing*, 26 La. Ann. 326, however, it was held that one may assign a policy to any one, irrespective of the question of interest. The same principle was asserted in *Stuart v. Sutcliffe*, 46 La. Ann. 240, 14 South. 912, after a full discussion of the question. But in *Hays v. Lapeyre*, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647, the court took the opposite view, saying that, if a policy is invalid when taken out by one who has no interest in the life insured, the assign-

ment of such policy to one without interest is equally invalid. Judge Watkins, in his dissenting opinion, indorsed the principles laid down by the New York decisions, calling attention to the fact that prior decisions in Louisiana upheld the right of assignment. He regarded the cases of *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, and *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, which are usually considered as leading cases to support the proposition announced in the majority opinion, as not applicable to the case at bar, as the circumstances showed the transfers to be speculative in their character.

(4) Federal cases.

The leading case in opposition to the doctrine of the New York and Massachusetts cases is *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, where the court took the position that the assignment of a policy to one having no insurable interest is as objectionable as the taking out of a policy in his name. The court criticised the New York doctrine on the ground that, if there is any sound reason for holding a policy invalid when taken out by one having no interest, it is difficult to see why that reason is not as operative against a party taking an assignment of a policy on a life in which he has no interest. It is to be observed, however, that the policy in this case was assigned, on the same day that the application was made, to an association which agreed to pay the cost and premiums for the insurance. This has led other courts to refuse to follow this decision, and to distinguish it on the ground, as stated in *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478, that the transaction involved in the *Warnock Case* was plainly a speculative one, and that consequently the rule laid down cannot apply if the assignment is not by way of cover for a wager policy. The same criticism was made by Judge Watkins in his dissenting opinion in *Hays v. Lapeyre*, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647. A doctrine similar to that of the *Warnock Case* was announced in *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244. But, as pointed out by Judge Watkins in his dissenting opinion in the *Hays Case* and by other courts, this transaction was plainly a speculative one; the policy, which was for \$3,000, being assigned to secure a debt of only \$70, and the assignee paying the premiums. In *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550, it was held that an assignment without interest was

void, and in *Langdon v. Union Mut. Life Ins. Co.* (C. C.) 14 Fed. 272, the court regarded it as well settled in the federal courts that a party cannot take out insurance on his own life and assign the policy, either contemporaneously with its execution or subsequently, to a person having no legal interest in his life. However, in *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, and *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56, it would seem that the court took a more liberal view and regarded assignments to one without interest as valid, if not made to cover a speculative risk and thus avoid the rule against wager policies. So, in a late case, the Circuit Court of Appeals for the Eighth Circuit has held (*Gordon v. Ware Nat. Bank*, 132 Fed. 444), that an insurable interest in an assignee is not requisite to the validity of the assignment of a policy of life insurance lawfully issued to one who had such an interest, if made in good faith.

(k) Pennsylvania.

Though it was said, in *Cunningham v. Smith's Adm'r*, 70 Pa. 450, that one may insure his own life and assign the policy to another, it would appear that the assignee in that case had an interest. The rule now recognized in Pennsylvania is undoubtedly that one having no interest in the preservation of the life of the insured can acquire no title to the policy by an assignment. This rule was established by the leading case of *Gilbert v. Moose's Adm'rs*, 104 Pa. 74, 49 Am. Rep. 570.

This rule is approved in *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Ruth v. Katterman*, 3 Atl. 833, 112 Pa. 251; *Keystone Mut. Ben. Ass'n v. Norris*, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572; *Hoffman v. Hoke*, 122 Pa. 377, 15 Atl. 437, 1 L. R. A. 229; *Lenig v. Eisenhart*, 127 Pa. 59, 17 Atl. 684; *Brennan v. Franey*, 142 Pa. 301, 21 Atl. 803; *Vanormer v. Hornberger*, 142 Pa. 575, 21 Atl. 887; *Ulrich v. Rejnoehl*, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966; *Cooper v. Shaeffer*, 11 Atl. 549; *Stambaugh v. Blake*, 15 Atl. 705; *Hendricks v. Reeves*, 2 Pa. Super. Ct. 545; *Wegman v. Smith*, 16 Wkly. Notes Cas. 186; *Melly v. Hershberger*, 16 Wkly. Notes Cas. 186; *Stoner v. Line*, 16 Wkly. Notes Cas. 187.⁴

⁴ See P. & L. Dig. p. 2380, par. 79, where it is provided that a policy or certificate issued by any corporation or association amenable to this act shall be

invalid when the assignee thereof is solely and only interested in the death of the insured.

(l) Kansas.

In *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761, the court held that an assignment to one without interest was void, basing the decision on the opinion of Mr. May to the effect that all objections that exist against issuing a policy to one having no interest in the life insured exist against such persons holding a policy by purchase or assignment.⁵ In *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537, the court goes further, and holds that an assignment to one without interest is in fact a fraud on the company. The rule thus prevailing in Kansas was given effect in Illinois, though the courts of that state took the opposite view. In *Groff v. Mutual Life Ins. Co.*, 92 Ill. App. 207, the Appellate Court of Illinois held that, where the assignment was prohibited by the laws of the state where it was made—in this instance Kansas—it cannot be enforced in the courts of Illinois.

(m) Texas.

In *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633, the court, after referring to the general principle that if one effects insurance on his own life, and in pursuance of a previous agreement immediately transfers the policy to one who has no interest in his life, but who agrees to pay the premiums, such transfer will be void, expressed the opinion that there is no difference between the principles on which such assignments are declared void and those applicable to the sale of a policy already procured to an assignee who has no interest.

The doctrine of this case was subsequently approved in *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Cawthon v. Perry*, 76 Tex. 383, 18 S. W. 268; *Lewy v. Gilliard*, 13 S. W. 304, 76 Tex. 400; *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Hatch v. Hatch* (Civ. App.) 80 S. W. 411; *Dugger v. Mutual Life Ins. Co. of N. Y.* (Civ. App.) 81 S. W. 335. The general rule was also approved in *Wilton v. New York Life Ins. Co.* (Civ. App.) 78 S. W. 403, and *Coleman v. Anderson* (Civ. App.) 82 S. W. 1057. But the validity of assignments as collateral security was recognized.

⁵ See May, *Ins.* vol. 2, § 398. But it is interesting to note that Mr. May, in section 398a, says that the doctrine that the assignment of a policy to one with-

out interest in the life is as objectionable as the taking out of a policy without insurable interest does not seem good sense.

(n) Other states holding interest to be necessary.

The principle that the assignee of a life policy must have an insurable interest in the life insured has also been held in Alabama, Kentucky, Michigan, North Carolina, and Virginia.

It is supported by the following decisions: *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Sands v. Hammell*, 106 Ala. 624, 18 South. 489; *Basye v. Adams*, 81 Ky. 368; *Hotopp v. Hotopp*, 9 Ky. Law Rep. 649; *Burnam v. White (Ky.)* 22 S. W. 555; *National Exchange Bank v. Bright (Ky.)* 38 S. W. 135; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057; *Barbour's Adm'r v. Larue's Assignee*, 51 S. W. 5, 106 Ky. 546; *Schlamp v. Berner's Adm'r*, 21 Ky. Law Rep. 324, 51 S. W. 312; *McDonald v. Birss*, 99 Mich. 329, 58 N. W. 359; *Powell v. Dewey*, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818; *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770.*

In *Stoelker v. Thornton*, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140, where the rules of the association did not forbid assignment of the certificate, it was held that the objection of want of insurable interest might be waived by the association and that no one else could raise it. In *Adams' Adm'r v. Reed (Ky.)* 36 S. W. 568, the principle was approved, but on rehearing (reported in 38 S. W. 420, 35 L. R. A. 692) the former opinion was withdrawn, and, it being shown that the assignee had an insurable interest, the assignment was declared valid.

(o) Good faith—Payment of premiums.

Even in those cases which hold without question that a policy of life insurance is assignable to one having no insurable interest, it is generally said that the transaction must be in good faith, and not merely colorable, and intended to evade the law against wager contracts. This qualification was made in the leading case of *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, where the court also regards *Stevens v. Warren*, 101 Mass. 564, an authority for the same principle.

The principle is also stated in *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550; *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39

* See, also, Ky. St. 1899, § 678, and *Mills' Ann. St. Colo.* 1891, § 2245, providing that an assignment to one without interest is void.

C. C. A. 56; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288; *Bowen v. National Life Ass'n*, 63 Conn. 460, 27 Atl. 1060; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429; *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908; *McFarland v. Creath*, 35 Mo. App. 112; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; *Steinback v. Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424, affirming 1 App. Div. 417, 37 N. Y. Supp. 279; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 48 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650.

The decision in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, has been regarded in many courts as really based on the fact that the transaction was obviously meant to evade the law against speculative contracts and not in good faith. The same might be said of *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, and *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633. On the other hand, in *Hendricks v. Reeves*, 2 Pa. Super. Ct. 545, and *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655, it is not regarded as sufficient that an assignment to one without interest is made in good faith; the transaction being considered as contrary to public policy, and therefore void in any event.

In some cases it has been regarded as important, in determining the character of the transaction, whether the premiums were paid by the insured or by the assignee. Such was the fact in *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, where the policy was taken out at the solicitation of the assignee, who agreed to pay the premiums, and in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, where also there was an agreement that the assignee should pay the premiums. But in the *Lewis Case* the transaction was obviously a wager, in that a policy for \$3,000 was assigned to secure a debt of only \$70.

The fact that the assignee paid the premiums would seem to have been regarded as an important factor in *Gilbert v. Moose's Adm'rs*, 104 Pa. 74, 49 Am. Rep. 570; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Ruth v. Katterman*, 112 Pa. 251, 3 Atl. 833; *Quinn v. Supreme Council Catholic Knights of America*, 99 Tenn. 80, 41 S. W. 343; *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633.

In *Stoner v. Line*, 16 Wkly. Notes Cas. (Pa.) 187, it was held that even payment of premiums by the insured would not relieve

the transaction from objection as a wagering contract. On the other hand, in *Cunningham v. Smith's Adm'r*, 70 Pa. 450, it was said that one may take out insurance on his own life and assign immediately to another, who pays the premiums; but it is to be observed that in this case the assignee probably had an insurable interest.

It was said in *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429, that, if the transaction is in good faith, the fact that the assignee pays the premiums does not necessarily render it void.

This rule is also supported by *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550, *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066, *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, and *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908. In the last case the court said that there cannot be an objection to a third person taking an assignment of a life insurance policy, where the insured has covenanted to pay the premiums, and it is not contemplated that such third person will pay them. "There may also be cases where an assignment would be valid that is not within these limitations. It is not our duty to anticipate what transactions of this character would be upheld by this court, but it is not presumptuous to state that it will not uphold such an assignment, if it appears that it was a mere cover for a stipulating risk contravening the general policy of the law."

(p) Public policy—Incentive to crime.

As in the instance of insurance without interest, the courts holding assignments without interest void have generally based their objection on the grounds that such transactions are contrary to public policy and incentive to crime, in that the assignee is interested in the death of the person insured without a counterbalancing interest in the life.⁷ This consideration was strongly urged in *Price v. Supreme Lodge, Knights of Honor*, 68 Tex. 361, 4 S. W. 633, where, referring to the argument that insurance without interest leads to a temptation to bring about the death of the insured, it was said that the temptation to bring about the death of the insured presents itself as strongly to an assignee without interest as to a person who originally effects insurance for his own benefit on the life of another.

It has also been urged in *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13

⁷ See *Greenhood, Public Policy*, p. 288, where the rule (ccvii) is stated to be that the assignment of an insurance policy or any portion thereof to one who could not have taken such policy himself is void. In view of the conflict of authorities, Mr. Greenhood's statement is, to say the least, much too positive.

Am. Rep. 313; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 *Am. Rep.* 761; *Same v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 *Am. Rep.* 537; *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, 38 S. W. 420, 35 L. R. A. 692.⁸

The court, in *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 *Am. St. Rep.* 478, regarded this reasoning as essentially fallacious and insufficient to support a condemnation of such assignments on the ground of public policy. The court said that, while public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of distinct demarkation, and may readily lend its aid to a court anxious to make a good case, rather than a safe precedent. For that reason, before a case is decided on that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability.

The reasoning that assignments without interest are incentives to crime is also condemned in *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 *Am. St. Rep.* 288; *Bowen v. National Life Ass'n*, 63 Conn. 460, 27 Atl. 1060; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 *Am. Rep.* 245; *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 *Am. Rep.* 68; *Reed v. Provident Savings Life Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292.

It has been urged that the owner of a life policy should be free to sell it in the open market on the most advantageous terms, and to limit that right is to impair the value and utility of the policy as an article of property.

St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 *Am. Dec.* 529; *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 *Am. Rep.* 68; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 *Am. St. Rep.* 288; *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893 (dissenting opinion); *Clark v. Allen*, 11 R. I. 439, 23 *Am. Rep.* 496.

As said in *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 *Am. St. Rep.* 478, the modern tendency is to regard as assignable all choses in action, and the reasons should be exceedingly strong before a court, where the question is yet unsettled,

⁸ See, also, *May, Ins.* vol. 2, § 398. But see section 398a, where Mr. May characterizes the argument in the preceding section as not good sense. In this connection reference may also be

made to the authorities dealing with death produced by a beneficiary or assignee as an excepted risk, post, vol. 4, p. 3153.

should adopt a rule contrary to such tendency in any given case. Courts of justice, it was said in *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496, should be cautious about making their own notions of public policy the criterion of legality, lest, under semblance of declaring the law, they in fact usurp the functions of legislation.

(q) Special provisions of the contract, rules, or statutes.

Where the statute, rules of the company, or the contract limits the beneficiaries to certain classes of persons, one not within such classes cannot take as assignee.

National Exchange Bank v. Bright (Ky.) 38 S. W. 10; *Metropolitan Life Insurance Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012; *Michigan Mut. Ben. Ass'n v. Rolfe*, 76 Mich. 146, 42 N. W. 1094.

Where the policy provides that an assignee must show interest, an assignee without interest takes no title.

Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Talbert v. Storum*, 7 App. Div. 456, 39 N. Y. Supp. 1047.

Provisions of the policy forbidding an assignment to one not having an insurable interest may be waived by the company, being inserted for its benefit (*Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191). Proof of interest was regarded as waived in *Bank of Oil City v. Guardian Mut. Life Ins. Co.*, 6 Leg. Gaz. 348, 5 Bigelow, Ins. Cas. 478, where the insurer denied liability solely on the ground that the insured had committed suicide. In *Moore v. Chicago Guaranty Fund Life Soc.*, 178 Ill. 202, 52 N. E. 882, affirming 76 Ill. App. 433, it was held that, where a policy provided that insurable interest must be shown by all claimants, the provision did not refer to absolute assignments, but only to assignments for security. Under a similar provision, however, it was held in *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114, that the requirement did not apply where the assignment was as collateral security only. In *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650, where the policy contained a provision that it should be incontestable after one year, it was held that such provision did not prevent the insurer from raising the defense that the transferees of the policy had no insurable interest in the life insured. In *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, where it was held that a policy of life insurance may be assigned by the concurrent act

of the assured and the beneficiary, though the assignee has no insurable interest, the decision was evidently governed to some extent by the holding that Rev. St. 1889, § 5866, prohibiting life insurance in favor of a person who has no insurable interest, relates only to insurance in assessment companies. So it has been held that the Indiana statute (Burns' Ann. St. 1901, § 4914h) relating to insurance companies organized under the laws of the state, and which declares that the assignment of a life policy to a person having no insurable interest in the insured's life, except as security for debt, with remainder over to the beneficiary or the estate of the insured, shall render the policy void, is inapplicable to an assignment of a policy issued by a New York corporation (*Davis v. Brown*, 65 N. E. 908, 159 Ind. 644). Statutes limiting or denying the right to assign to one without interest cannot operate retroactively.

Moore v. Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882; *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267; *Strike v. Wisconsin Odd Fellows Mut. Life Ins. Co.*, 95 Wis. 583, 70 N. W. 819.

Civ. Code Cal. § 2764, provides that policies of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered (*Widaman v. Hubbard* [C. C.] 88 Fed. 806).

3. WHAT CONSTITUTES AN INSURABLE INTEREST IN HUMAN LIFE OR HEALTH.

- (a) General principles.
- (b) Interest based on relationship—Pecuniary interest not necessary.
- (c) Relationship insufficient—Pecuniary interest necessary.
- (d) Same—Nature of pecuniary interest.
- (e) Same—Modification of doctrine that relationship is sufficient.
- (f) Husband and wife.
- (g) Same—Illegal marriage.
- (h) Parent and child.
- (i) Grandparent and grandchild.
- (j) Brothers and sisters.
- (k) Other relationships.
- (l) Third persons other than relatives or creditors.
- (m) Same—Persons under engagement to marry.
- (n) Business connections—Creditors.
- (o) Same—Partners.
- (p) Same—Sureties and other business relations.
- (q) Conclusion.

(a) General principles.

While it is the established rule that one taking out a policy of insurance on the life of another must have an insurable interest in such life, what constitutes such an interest as will support the policy can scarcely be regarded as settled. In the comparatively early case of *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.) 396, decided in 1856, Chief Justice Shaw called attention to the difficulty in laying down any general rule as to the nature and amount of interest the assured must have. The same difficulty exists today, and, though a few fundamental principles have been fairly well settled, the definitions of insurable interest are generally unsatisfactory.

This has been commented on in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.) 249, 77 Am. Dec. 360; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429.¹

Possibly the general principle underlying insurable interest in life or health is best stated in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, where it is said that though it is not easy to define with precision what will, in all cases, constitute an insurable interest, it may be stated, generally, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the insured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.

This general rule has also been stated in *Re McKinney* (D. C.) 15 Fed. 535; *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225; *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; *Hinton v. Mutual Reserve Fund Life Ass'n*, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161.

(b) Interest based on relationship—Pecuniary interest not necessary.

There are cases which apparently hold that mere relationship within certain degrees is sufficient to give an insurable interest.

¹ See *Biddle, Ins.* vol. 1, § 187. Mr. Biddle says the definitions are, for the most part, dicta.

Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38, a case that is of interest as the first American case to deal with this question, has been regarded as supporting this proposition. Such an interpretation is, however, scarcely justified, as it has also been cited in support of the proposition that mere relationship is not sufficient. The policy in this case was written on the life of the plaintiff's brother; the contention being that a sister had no insurable interest in the life insured. It appeared, however, that the brother had educated plaintiff and supported her for a certain number of years. The court held that the sister had a pecuniary interest in the life of her brother, aside from that resulting from natural affection, which would support the policy. It would seem, from the argument of the court, that while they make quite a feature of the relationship and affection resulting therefrom, they also lean towards the position that her interest was based largely on the pecuniary interest resulting from the duty the brother had assumed in regard to her education and support.

The leading case, however, is *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, affirming *France v. Ætna Life Ins. Co.*, 9 Fed. Cas. 657, where it was held that the mere relationship of brother and sister is sufficient to give the sister an insurable interest in the life of the brother. *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, is also regarded as a leading case. Mr. Justice Clifford says that the decided cases which proceed on the ground that the assured must necessarily have some pecuniary interest in the life of the person insured are founded on an erroneous view of the nature of the contract. If it appear that the relation, whether of consanguinity or affinity, is such as warrants the conclusion that the beneficiary had an interest, either pecuniary or arising from dependence or natural affection, it is sufficient.

What relationship must exist between the parties to create in one of them an insurable interest in the life of the other? This is a question upon which the authorities are not definite, but it seems to be settled that, when such interest is dependent alone upon consanguinity, the parties must be related as closely as the second degree (*Wilton v. New York Life Ins. Co.* [Tex. Civ. App.] 78 S. W. 403). Such interest will only be presumed in favor of the husband, wife, father, mother, child, brother, or sister of the insured.

The principle that, within certain degrees, mere relationship is sufficient seems to be supported by *Supreme Assembly Royal Society of Good Fellows v. Adams* (C. C.) 107 Fed. 335; *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; *Hilliard v.*

Sanford, 6 Ohio Dec. 449, 4 Ohio N. P. 363; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 17 Am. St. Rep. 288; *Equitable Life Ins. Soc. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200; *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74. The question was raised, but not decided, in *Ingersoll v. Knights of the Golden Rule* (C. C.) 47 Fed. 272, and in *Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570, 40 Atl. 497, where the court, though apparently regarding kinship as sufficient, may have regarded some expectation of advantage also necessary.

In *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74, and *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200, the reasoning of the court is based largely on the rule that a life policy is not a contract of indemnity. In the *Crosswel* Case, the court, referring to the reason often advanced to show the necessity of insurable interest, viz., that in the absence of interest there is an incentive to bring about the death of the insured, says: "Close ties of blood or affinity, as parent, child, brother, sister, husband, and wife, with the natural affection and moral forces which generally prompt one such to serve and protect the other, rendering it highly improbable that for money one would take the life of another, afford a surer guaranty to society against the dangers of betting on the duration of human life than any mere pecuniary interest in the life insured, often more imaginary than real."

(c) Relationship insufficient—Pecuniary interest necessary.

As was said in the preceding subdivision, *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38, has been regarded, in view of the facts in the case, as supporting the principle that there must be some expectation of benefit or advantage from the relationship, in order that it may form a basis for insurable interest. The leading case supporting the proposition that insurable interest cannot be founded on mere relationship, without some pecuniary basis, is *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, where the question involved was whether a daughter had an insurable interest in her mother's life. The court held that the mere relationship did not give such an interest, but that an insurable interest in the life must be a pecuniary interest, citing, with approval, *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180.

The doctrine that mere relationship is insufficient, but must be accompanied by a pecuniary interest, is supported by *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225; *Helme-*

tag's *Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *Cisna v. Sheibley*, 88 Ill. App. 385; *Chicago Guaranty Fund Life Society v. Dyon*, 79 Ill. App. 100; *Continental Life Ins. Co. v. Tullidge (Ind.)* 17 Am. Law Rev. 1020; *Elkhart Mut. Aid Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 181, 36 N. E. 429; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228; *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Masonic Benefit Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25; *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 10 Misc. Rep. 405, 31 N. Y. Supp. 130; *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134.

In *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244, the question was raised, but not decided. In *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328, it was held that at common law the interest must be direct and pecuniary. In *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321, where it was urged that according to the decision in *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414, insurance may be effected where there is no pecuniary interest, the court regarded the statements in the opinion supporting such contention as pure dicta. *Seigrist v. Schmoltz*, 113 Pa. 328, 6 Atl. 47, and *Carpenter v. U. S. Life Ins. Co.*, 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880, would seem to support the rule that interest must be pecuniary; but in view of the decision in *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, possibly the rule should be qualified.

(d) Same—Nature of pecuniary interest.

As to what must be the nature of the pecuniary interest necessary to support the policy, the principles laid down in *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, may fairly be regarded as sustained by the weight of authority. The court said that an insurable interest is not necessarily a definite pecuniary interest, such as is recognized and protected by law. It may be contingent, restricted as to time, or indeterminate in amount; but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent on the life insured, so that the purpose of the person effecting the insurance may be to secure that advantage, and not merely to put a wager on human life.

These views are supported by *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 493, 2 Sup. Ct. 949, 27 L. Ed. 800; *Life Ins. Clearing Co.*

v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225; Chisholm v. National Capitol Life Ins. Co., 52 Mo. 213, 14 Am. Rep. 414; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Selgrist v. Schmoltz, 113 Pa. 326, 6 Atl. 47; Carpenter v. United States Life Ins. Co., 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880.

The interest may be based on a claim for support, furnished or to be furnished. *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, 38 S. W. 420, 35 L. R. A. 692; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288; *Batdorf v. Fehler* (Pa.) 9 Atl. 468; *Selgrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47; *Prudential Life Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Miller v. Eagle Life Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *McGraw v. Metropolitan Life Ins. Co.*, 5 Pa. Super. Ct. 488; *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185.

It may be based on an executory contract, as in *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268, and *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576, or on a claim for services, as in *Summers v. United States Ins. Annuity & Trust Co.*, 13 La. Ann. 504, *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239, *Miller v. Eagle Life Ins. Co.*, 2 E. D. Smith (N. Y.) 268, *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 8 App. Div. 186, 40 N. Y. Supp. 450, *Woodfin v. Asheville Mut. Ins. Co.*, 51 N. C. 558, *Hilliard v. Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363, and *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185.

(e) Same—Modification of doctrine that relationship is sufficient.

✓ The general rule that sentiment or affection is not in itself sufficient to give an insurable interest, but must be accompanied by a reasonable expectation of benefit or advantage to accrue from a continuance of the life insured, is well stated in *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.

This general rule is supported by *Cisna v. Shelbley*, 88 Ill. App. 385, *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228, *Rombach v. Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239, and *Mayher v. Manhattan Life Ins. Co.*, 87 Tex. 169, 27 S. W. 124.

But, according to *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, by benefit or advantage, in this connection, is to be understood that it must be a material or physical benefit or advantage; that is to say, the mere sentimental benefit, arising from the gratification of the affections by

the prolongation of the life insured, will not suffice. This is equivalent to saying that it must be a pecuniary benefit, as distinguished from a mere sentimental or moral gratification. In *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, it is stated that in one relation only, the relation of husband and wife, is the actual existence of pecuniary interest unimportant; the reason being that a real pecuniary interest is found in so great a majority of cases that the courts conclusively presume it to exist in every case.

The doctrine in those cases which professedly reject the test of pecuniary interest is not substantially different from that held in the cases just cited. Certainly the leading cases which have been cited as supporting the proposition that relationship is a sufficient basis for insurable interest have modified the proposition to this extent, as shown by *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, and *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924: and in *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, the court interpreted the opinion in *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, as holding, in effect, that it is the well-founded expectation of advantage to be derived from the continuance of the life insured which makes the insurable interest in it, and not the mere relationship, under any and all circumstances.

This modification of the general statement seems to be the doctrine in *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040, *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291, and *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185.²

(f) Husband and Wife.

Applying the general principles discussed in the preceding paragraphs to specific relationships, the relation of husband and wife is recognized as the most important. In *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328, it was held that at common law a person had not an insurable interest in the life of his wife merely through the relationship of husband and wife, but that the right of a wife to insure the life of her husband or of a husband to effect insurance for the benefit of his wife depended wholly on statute. This was, however, repudiated in *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44, where in the course of the discus-

² See note to *Morrell v. Insurance Co.* (10 Cush. [Mass.] 282) in 57 Am. Dec. 92.

sion the court said that both at common law and under the statute a wife had an insurable interest in the life of her husband, based on her right to support.

That the wife had an insurable interest at common law, irrespective of statute, was also held in *De Ronge v. Elliott*, 23 N. J. Eq. 486, *Thompson v. American Tontine Life & Savings Ins. Co.*, 48 N. Y. 674, *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503, and *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; and in *Goodrich v. Treat*, 3 Colo. 408, it was held that at common law the husband had an insurable interest in the life of his wife.

The general rule that, as between husband and wife, there is, reciprocally, an insurable interest, is supported by *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Sheets v. Sheets*, 4 Colo. App. 450, 36 Pac. 310; *Succession of Richardson*, 14 La. Ann. 1; *Succession of Hearing*, 26 La. Ann. 326; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44; *Packard v. Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *St. John v. American Mut. Life Ins. Co.*, 9 N. Y. Super. Ct. 419, affirmed in 13 N. Y. 31, 64 Am. Dec. 529; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *Appeal of Corson*, 118 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355. A divorced wife has no insurable interest in the life of her former husband (*Schonfeld v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189).

It was said, in *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, that, since real pecuniary interest is found in a great majority of cases involving the relation of husband and wife, it would be conclusively presumed to exist in every case. This, too, would seem to be the doctrine of *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47. On the other hand, it would appear that in Vermont the presumption that such an interest exists is rebuttable (*Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134). The court, admitting the rule that the interest to support a contract of life insurance must be a pecuniary one, holds that, where no facts are shown in relation to the wife, the presumption is that the husband has an insurable pecuniary interest in her life. Apparently this holding is based on the fact that the husband is entitled to the wife's services, and that unless she is an

invalid, or a hopeless maniac, or otherwise prevented from being in fact a helpmate, he has an absolute pecuniary interest in her life.²

(g) Same—Illegal marriage.

In *Equitable Life Assur. Soc. v. Patterson*, 41 Ga. 338, 5 Am. Rep. 535, where the policy was paid to one alleged to be the wife of the person insured, the court held that, though the marriage was illegal, yet the woman had an interest in the continuance of the life of the husband, since he had treated her as his wife, supported her as such, and she was dependent on him for support. As a matter of fact, however, it was the husband in this case who took out the policy. So, in *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040, it was held that a woman illegally married, because the husband had a lawful wife living, or who is living unlawfully with a man as his wife, nevertheless has an insurable interest in his life. Both the alleged wife and her children were dependent on the insured for support, and she must be considered as having an insurable interest, though she was not in fact his wife. This decision was apparently based on the broad rule that when, from personal relations between the parties, one has a reasonable right to expect some pecuniary advantage from a continuance of the life of the other, or to fear loss from his death, an insurable interest exists.

A similar principle governed *Watson v. Centennial Mut. Life Ass'n* (C. C.) 21 Fed. 608; *Scott's Adm'r v. Scott*, 77 S. W. 1122, 25 Ky. Law Rep. 1356; *Barker v. Valentine*, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578; *Supreme Tent K. of M. of the World v. McAllister*, 132 Mich. 69, 92 N. W. 770; *Ruoff v. John Hancock Mut. Life Ins. Co.*, 83 N. Y. Supp. 758, 86 App. Div. 447; *Estate of Mueller*, 32 Pittsb. Leg. J. O. S. (Pa.) 328. *Holabird v. Atlantic Mut. Life Ins. Co.*, 12 Fed. Cas. 315, since it put the burden on the wife to show the marriage, must be regarded as holding a contrary view. But see *West v. Grand Lodge A. O. U. W.*, 14 Tex. Civ. App. 471, 37 S. W. 966. In *Vivar v. Supreme Lodge Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36, *Van Cleave v. Union Casualty & Surety Co.*, 82 Mo. App. 668, *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638, and *Supreme Lodge A. O. U. W. v.*

² See, also, *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463, affirming (Sup.) 18 N. Y. Supp. 56, where it was held that the insurable interest which a wife has in the life of her husband cannot be considered as property, or as re-

sembling property, or that it is capable of being contributed by the wife to a contract of insurance or being commingled with the premiums paid, so that the proceeds of the policy can be regarded as the joint product of such interest and premiums.

Hutchinson, 6 Ind. App. 399, 33 N. E. 816, where the illegal wife was made beneficiary and the policy was taken out by the alleged husband, the cases fall within the rule that insurance taken by the insured for the benefit of another is valid, irrespective of interest.

(b) Parent and child.

In *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.) 396, where the policy was taken out by a father on the life of his minor son, the court held that he had an insurable interest, independent of the fact that the son was a minor and that he had a pecuniary interest in his earnings. A parent has an interest in the life of a child, and a child in the life of a parent, not merely because they are mutually liable to support each other, but on considerations of strong morals and the force of natural affection between near kindred, operating more efficaciously than positive law.

The rule that an insurable interest exists between parent and child is also supported by *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Farmers' & Traders' Bank v. Johnson*, 91 N. W. 1074, 118 Iowa, 282; *Hoffman v. Hoke*, 122 Pa. 377, 15 Atl. 437, 1 L. R. A. 229; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Voorhels v. People's Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109; *Standard Life & Accident Ins. Co. v. Catlin*, 106 Mich. 138, 63 N. W. 897; *Geoffroy v. Gilbert*, 38 N. Y. Supp. 644, 5 App. Div. 98; *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74; *Ryan v. Rothweller*, 50 Ohio St. 595, 35 N. E. 679; *Hillard v. Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363; *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355; *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 112, 28 S. E. 200; *Kane v. Reserve Mut. Life Ins. Co.*, 31 Leg. Int. (Pa.) 196; *Reserve Mut. Life Ins. Co. v. Kane*, 81 Pa. 155, 22 Am. Rep. 741; *Metropolitan Life Ins. Co. v. Quandt*, 69 Ill. App. 649; *Farmers' & Traders' Bank v. Johnson*, 91 N. W. 1074, 118 Iowa, 282; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057.

In *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 155, 22 Am. Rep. 741, the decision seems to be based on the provision of the poor law of June 13, 1876, by the twenty-eighth section of which parents and children are made mutually liable to maintain each other. This case was commented on in *Life Ins. Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, and the court regarded the decision in the Kane Case as erroneous, in that there was nothing to show that the son had spent any money for his father's support. The court held that an adult son, married and with a family of his own, who is not supported by and does not support his father, has no insurable

interest in the father's life, even under the poor law of Pennsylvania. That a father as such, and from the relation merely, has no insurable interest in the life of a son of full age, was held in *Mitchell v. Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529. The rule laid down in the Kane Case was disapproved in *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809, where the policy was taken out by a son on the life of his mother; she being 76 years of age when the policy was issued. The poor laws of Illinois, where the parties lived, provide that there is a legal liability resting on a son for the maintenance of his mother, as well as on the mother for the maintenance of the son, in the event that one is unable to earn a livelihood. The contention was that, as the son was providing for the mother's maintenance, he was entitled to insure her life. The court, however, refused to recognize the rule laid down in the Kane Case, and held that the son had no interest, as there was nothing to justify an expectation of any benefit from the mother, in the way of service, maintenance, or the like.

In *Hogle v. Guardian Life Ins. Co.*, 4 Abb. Prac. N. S. (N. Y.) 346, and *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410, where the policy was payable to a daughter of the insured, the question of insurable interest did not arise, as the policy was taken out by the insured, and was therefore valid under the rule that a policy issued to the insured for the benefit of another is valid, irrespective of interest.

On the other hand, in the leading case of *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, it was held, following the general rule in Indiana that mere relationship in itself is insufficient as a basis for insurable interest, that a daughter as such has not an interest in her mother's life. So, in *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380, it was held that the mere fact of relationship is insufficient to give a mother an insurable interest in the life of her son.

The general principle that mere relationship of parent and child will not support insurable interest is also held in *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 10 Misc. Rep. 405, 31 N. Y. Supp. 130.

(1) Grandparent and grandchild.

In *Hilliard v. Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363, the question whether the relationship between grandparent and grand-

child is a sufficient basis for insurable interest was raised. The court said that, though there are no authorities as to the insurable interest of a grandparent in the life of his grandchild, yet under the rule laid down in *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, that, where the relation is such that it constitutes a good and valid consideration in law for a gift or grant, the policy will be free from any imputation of a wager, a grandfather has an insurable interest in the life of his grandchild, because the relationship is such that it is good consideration for, and will support, a deed, gift, or grant. From *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644, involving the same policy, it would appear that the question of insurable interest did not necessarily arise, as the policy was payable to the grandson.

That such relationship will support insurable interest was held in *Corbett v. Metropolitan Life Ins. Co.*, 37 App. Div. 152, 55 N. Y. Supp. 775, and *Burke v. Prudential Ins. Co.*, 155 Pa. 295, 26 Atl. 445; but the principle is denied in *Elkhart Mutual Aid Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514, and *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405.

(J) Brothers and sisters.

In the early case of *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38, it was held that a sister has an interest in the life of her brother, on whom she is dependent for support. In the leading case of *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, affirming *France v. Ætna Life Ins. Co.*, 9 Fed. Cas. 657, it was held that a sister, by virtue of the relationship alone, has an insurable interest in the life of her brother. In *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, the court said that the exact degree of relationship that must exist between two persons, to give one an insurable interest in the life of another on account of the relationship alone, is not clearly defined. Brothers and sisters seem to be on the dividing line. Whether that degree of relationship can be included has been disputed. The case of *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, is an authority in support of the proposition that it may be included, and the court is unwilling to hold that it ought to be excluded.

The principle is supported in *Hosmer v. Welch*, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; *Williams v. Fletcher*, 62 S. W. 1082, 26 Tex. Civ.

B.B.INS.—19

App. 85; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Supreme Assembly Royal Society of Good Fellows v. Adams* (C. C.) 107 Fed. 335; *Lane v. Lane*, 99 Tenn. 639, 42 S. W. 1058; *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480; *Keystone Mut. Ass'n v. Beaverson*, 16 Wkly. Notes Cas. (Pa.) 188; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893.

The question was raised, but not decided, in *Fidelity Mut. Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, *Ingersoll v. Knights of the Golden Rule* (C. C.) 47 Fed. 272, and *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236, as the policies in those cases were taken out by the insured.

The sufficiency of the relationship to support an insurable interest was denied in *Lewis v. Phoenix Mut. Life Ins. Co.*, 89 Conn. 100, *Masonic Benev. Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25, and *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679; but in *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438, it was held that under Rev. St. 1889, § 5833, providing that an unmarried woman may insure the life of her brother for her benefit, a widow has an insurable interest in the life of her brother.

(k) Other relationships.

The relationships of uncle or aunt and nephew or niece will not support an insurable interest.

Singleton v. St. Louis Mut. Ins. Co., 66 Mo. 66, 27 Am. Rep. 321; *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228; *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Wilton v. New York Life Ins. Co.* (Tex. Civ. App.) 78 S. W. 403. The question was also involved in *Mowry v. Home Life Ins. Co.*, 9 R. I. 346, and *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; but it appeared that the nephew had an insurable interest as creditor, irrespective of the relationship.

So, in *Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570, 40 Atl. 497, where the policy was taken out by an aunt on the life of her niece, and it appeared that the niece had lived with the aunt from early childhood, that their relations were those of mother and daughter, and that the aunt had supported the niece, so that there might be considered to exist a debt both of affection and money due the aunt, the court held that there was an insurable interest sufficient to support the policy. In *McGraw v. Metropolitan Life Ins. Co.*, 5 Pa. Super. Ct. 488, a niece, who had lived with her uncle until her marriage, and since marriage had lived near him, helping to support him and his sisters, with whom he resided, was regarded as having an insurable interest in the uncle's life. In

Prudential Ins. Co. v. Leyden's Adm'x, 20 Ky. Law Rep. 881, 47 S. W. 767, the question was raised, but not decided, as the policy was taken out, not for the benefit of the niece, but for the benefit of the aunt's estate. In *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51, the policy was taken out by the uncle, payable to his nephew, and it was held valid, without proof of interest, under the general rule.

A cousin has no insurable interest, according to *Whitmore v. Supreme Lodge Knights and Ladies of Honor*, 100 Mo. 36, 13 S. W. 495; *Mace v. Provident Life Ass'n*, 101 N. C. 122, 7 S. E. 674; *Brett v. Warnick*, 44 Or. 511, 75 Pac. 1061; *Brady v. Prudential Life Ins. Co.*, 5 Kulp (Pa.) 505; *Price v. Supreme Lodge, Knights of Honor*, 68 Tex. 361, 4 S. W. 638; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 638, 15 S. W. 478.

A stepson or stepdaughter has no insurable interest in the life of the stepparent, according to *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111, and *Albert v. Mut. Life Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 698, though in the latter case the policy was, in fact, taken out by the insured. But see *Simcoke v. Grand Lodge A. O. U. W.*, 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114, where it was held that under Acts 21st Gen. Assem. Iowa, c. 65, § 7, providing that no certificate or policy shall be issued unless the beneficiary thereunder shall be the husband, wife, relative, legal representative, heir, or legatee of the insured member, a stepfather was a relative by affinity, so as to be legally made a beneficiary.

Relationship by affinity merely, as that of brother-in-law, mother-in-law, son-in-law, daughter-in-law, etc., will not give an insurable interest, according to *Lyon v. Rolfe*, 76 Mich. 146, 42 N. W. 1094; *Adams' Adm'r v. Reed* (Ky.) 36 S. W. 568, reaffirmed on rehearing in 38 S. W. 420, 35 L. R. A. 692; *Rombach v. Insurance Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *King v. Cram*, 185 Mass. 103, 69 N. E. 1049; *Smith v. Pinch*, 80 Mich. 335, 45 N. W. 183; *Stambaugh v. Blake* (Pa.) 15 Atl. 705; *Ramsay v. Myers*, 6 Pa. Dist. R. 468; *Stoner v. Line* (Pa. Sup. Ct.) 16 Wkly. Notes Cas. 187; *Hotopp v. Hotopp*, 9 Ky. Law Rep. 649; *Langdon v. Union Mut. Life Ins. Co.* (C. C.) 14 Fed. 272. In *Souder v. Home Friendly Soc.*, 72 Md. 511, 20 Atl. 137, the son-in-law was a creditor, and consequently had an insurable interest as such.

According to *Silvers v. Michigan Mut. Ben. Ass'n*, 94 Mich. 39, 58 N. W. 935, heirs have not, as such, strictly speaking, an insurable interest.

(C) Third persons other than relatives or creditors.

In *Carpenter v. United States Life Ins. Co.*, 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880, there was no kinship,

but the insured had for some years practically stood in loco parentis to the plaintiff, and had supported her and educated her. The court held that, as it appeared from the facts in the case that the benefit to plaintiff from the care and aid given by the insured would in a few years more than equal the amount of the policy, so that from a severance of their relations she would sustain a great pecuniary loss, there was an interest sufficient to support the policy. So, in *Berdan v. Milwaukee Mut. Life Ins. Co.* (Mich.) 99 N. W. 411, it was held that where a woman and her husband recognize a child as their own, under an arrangement with its real mother, such child, after the wife's death being dependent for support on a sister of the wife, who has recognized him as her nephew, has an insurable interest in the latter's life. One acting as trustee for another, having an insurable interest in another life, is said to have an insurable interest sufficient to support a policy on such life for the benefit of the cestui que trust, in *American Life & Health Ins. Co. v. Robertshaw*, 26 Pa. 189.

The doctrine seems to be supported by *Olmsted v. Keyes*, 85 N. Y. 593, and *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.) 249, 77 Am. Dec. 360.

A religious society has no insurable interest in the life of one of its members who is not indebted to the society, according to *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291. In *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, it was held that a building association, as such, has no insurable interest in the life of a stockholder not indebted to it. In *Hummer v. Roseville Council*, No. 680, Jr. Order United American Mechanics, 7 Pa. Dist. R. 258, it appeared that the council was a member of an affiliated association known as the "Funeral Benefit Association" of the order. On the death in good standing of a member of the council, the affiliated association paid to the council, to be used as a funeral benefit, a certain sum from the fund established for that purpose. If the member was not in good standing, the sum so paid belonged to the council. On the death of a member not in good standing, his widow brought suit to recover from the council the amount so paid, claiming that the council had no insurable interest in her husband's life, and therefore could not retain the money. The court granted a nonsuit, but it does not appear that the question of insurable interest was passed upon.

An assignee in bankruptcy has no insurable interest in the life of the bankrupt, according to *In re McKinney* (D. C.) 15 Fed. 535; and in *Barbour's Adm'r v. Larue's Assignee*, 106 Ky. 546, 51 S. W. 5, it was held that an assignee for the benefit of creditors has no interest in the life of the insolvent.

A master may insure a servant in whose services he has an interest for a definite period.

Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268;
Hilliard v. Sanford, 6 Ohio Dec. 449, 4 Ohio N. P. 363.

In *Embler v. Hartford Steam Boiler Inspection & Insurance Co.*, 8 App. Div. 186, 40 N. Y. Supp. 450, it was said that an employer's liability policy is not an insurance on the life of the employé, as the employer could have no insurable interest in such life, unless at the time the policy was made the employé was under contract with the employer for a definite and unexpired term, so that the employer would have a legal right to or interest in his services.

A master might insure his slave, either under a contract of life insurance or one of property insurance. See *Woodfin v. Asheville Mut. Ins. Co.*, 51 N. C. 558; *Summers v. United States Ins. Annuity & Trust Co.*, 13 La. Ann. 504; *Murphy v. Mutual Ben. Life & Fire Ins. Co.*, 6 La. Ann. 518; *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 202, 43 Am. Dec. 180.

(m) Same—Persons under engagement to marry.

In *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414, the court held that a woman engaged to be married to a man has an insurable interest in his life. Such interest, apparently, is based on the fact that, had the insured lived and violated his contract, she would have had her action for damages. Had he fulfilled the contract, then, as his wife, she would have been entitled to support. In *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185, the court, referring to the general principle that, where the personal relation gives rise to a reasonable expectation of advantage in the continuance of the life, an insurable interest exists, held that, as a woman has a reasonable right to expect pecuniary advantage in the continuance of the life of him to whom she is engaged to be married, she has an insurable interest in such life.

The principle is also approved in *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 622, *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R.

A. 982, 99 Am. St. Rep. 1004, and *Kinney v. Dodd*, 41 Ill. App. 49. In *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294, and *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105, the principle was approved, but not clearly decided, as the policies were held valid under the rule that one may insure his own life for the benefit of another, irrespective of interest. So, in *Johnson v. Van Epps*, 14 Ill. App. 201, affirmed in 110 Ill. 551, where the beneficiary was a married woman living apart from her husband, but it had been agreed between her and the insured that, if a divorce could be obtained, they would marry, she was regarded as having an insurable interest in his life.

Supreme Council American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634, has often been cited in opposition to the principle announced above, but it appears that the laws governing the association limited beneficiaries to the widows, orphans and other dependents of the member, and it was held that a woman affianced to the member was not a dependent, within the meaning of the laws.

This was also the fact in *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Parke v. Welch*, 33 Ill. App. 188; *Alexander v. Parker*, 42 Ill. App. 455; *McCarthy v. New Eng. Order of Protection*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637.

(n) Business connections—Creditors.

It is a well-recognized principle that a creditor has an insurable interest in the life of his debtor, and so far as the present discussion is concerned the only cases that require special notice are those in which the existence of the relation is called in question.

The main proposition is supported by numerous decisions, and a citation of the following is deemed sufficient: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566; *McKenty v. Universal Life Ins. Co.*, 16 Fed. Cas. 196; *Swick v. Home Ins. Co.*, 23 Fed. Cas. 550; *Brockway v. Mut. Benefit Life Ins. Co. (C. C.)* 9 Fed. 249; *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625; *Gordon v. Ware Nat. Bank (C. C. A.)* 132 Fed. 444; *Sands v. Hammell*, 108 Ala. 624, 18 South. 489; *Sheets v. Sheets*, 4 Colo. App. 450, 36 Pac. 310; *Hodge v. Ellis*, 76 Ga. 272; *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; *Belknap v. Johnston*, 114 Iowa, 265, 86 N. W. 267; *Van Bibber's Adm'r v. Van Bibber*, 82 Ky. 347; *Succession of Risley*, 11 Rob. (La.) 298; *Succession of Hearing*, 26 La. Ann. 326; *Mitchell v. Union Life Ins. Co.*, 45 Me.

104, 71 Am. Dec. 529; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Souder v. Home Friendly Soc.*, 72 Md. 511, 20 Atl. 187; *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 78 N. Y. 480; *Freeman v. National Ben. Soc.*, 42 Hun (N. Y.) 252; *Talbert v. Storum*, 39 N. Y. Supp. 1047, 7 App. Div. 456; *Reed v. Provident Savings Life Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292; *Mace v. Provident Life Ass'n*, 101 N. C. 122, 7 S. E. 674; *Hilliard v. Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363; *Appeal of Corson*, 118 Pa. 438, 6 Atl. 218, 57 Am. Rep. 479; *Ulrich v. Reinoehl*, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; *Keystone Mut. Ass'n v. Beaverson*, 16 Wkly. Notes Cas. (Pa.) 188; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

In *Hale v. Life Indemnity & Investment Co.*, 65 Minn. 548, 68 N. W. 182, the plaintiff held a note indorsed by the insured, which was subsequently surrendered and the insured's own notes for the amount taken in lieu thereof. As the evidence showed that there was merely a substitution, the court held that the plaintiff was a creditor with an insurable interest, notwithstanding the fact that some of the notes were not due.

A mere moral claim is not sufficient to support an insurable interest as creditor (*Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180). But it was said, in *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 32 Hun (N. Y.) 306, affirmed without opinion in 102 N. Y. 647, that after the discharge of a debtor in bankruptcy a creditor still has an interest, and in *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625, it was said that a creditor has an insurable interest, though he has accepted the benefits of a general assignment for the benefit of creditors.

Where the certificate of membership in a mutual benefit association organized for the purpose of assisting the widows, orphans, and other dependents of deceased members provided that it might be assigned to any person having an insurable interest, the court held (*National Exchange Bank v. Bright* [Ky.] 36 S. W. 10) that a simple creditor did not have an insurable interest within the meaning of the provision; the idea being, apparently that the assignee must belong to one of the classes designated in the laws of the order. In *Wheeland v. Atwood*, 42 Wkly. Notes Cas. (Pa.) 178, it was held that a creditor of a husband has no insurable interest in the life of the wife, but the judgment in this case was reversed in 192 Pa. 237, 43 Atl. 946, 73 Am. St. Rep. 803. So, too, in *Cameron v. Barcus*, 31 Tex. Civ. App. 46, 71 S. W. 423, it was held that a claim against the community estate is not a personal

liability of the wife, so as to give the creditor an insurable interest in her life.

There is a line of early cases in which, to secure advances made to persons going to California to engage in mining or other pursuits, the one making the advances to share in the profits, policies taken on the lives of the persons to whom the advances were made are considered. It was held that by reason of such transactions and agreements the persons making the advances had an insurable interest in the lives of those to whom the advances were made, whether the relation between them was that of debtor and creditor, or in the nature of a partnership.

This is the doctrine in *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529; *Morrell v. Trenton Mut. Life & Fire Ins. Co.*, 10 Cush. (Mass.) 282, 57 Am. Dec. 92; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *Hoyt v. New York Life Ins. Co.*, 16 N. Y. Super. Ct. 440.

In the leading case of *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 357, affirmed in 27 N. Y. 282, 84 Am. Dec. 280, it was held that it did not affect the insurable interest of a creditor that the debt was due him as a member of the partnership, and from another partnership of which the person insured was a member, since the person insured was liable individually for the whole debt, and plaintiff as a partner in his firm was interested in the whole debt. So, in *Morrell v. Trenton Mut. Life & Fire Ins. Co.*, 10 Cush. (Mass.) 282, 57 Am. Dec. 92, the court held that the creditor of a firm has an insurable interest in the life of one of the partners, though the other partner may be entirely able to pay the debt and the estate of the insured is perfectly solvent. In *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809, where plaintiff was the surviving partner of K. & F., and the insured was a member of the firm of M. & P., which firm was indebted to K. & F. in a sum somewhat larger than the policy, it was held that plaintiff had an insurable interest in the insured to the extent of one-half of the amount due K. & F.

(c) Same—Partners.

In the early case of *Valton v. National Loan Fund Life Assur. Soc.*, 22 Barb. (N. Y.) 9, it was held that a partner may insure his own life in order to indemnify his copartners. The leading case is

Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800, where it was held that a partner has an insurable interest in the life of his copartner, who at the time of taking out the policy is in default in the payment of his promised proportion of the capital of the firm. The court held that in such case there was a pecuniary interest arising from the relationship as partners, and also because the person insured was really a debtor of his partner.

That a partner has an insurable interest in the life of his copartner is also supported by **Mutual Life Ins. Co. v. Armstrong**, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; **Hilliard v. Sanford**, 6 Ohio Dec. 449, 4 Ohio N. P. 363; **Cheeves v. Anders** (Tex. Civ. App.) 25 S. W. 324; *Id.*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107.

But it was held in **Metropolitan Life Ins. Co. v. O'Brien**, 92 Mich. 584, 52 N. W. 1012, that the wife of a partner has no insurable interest in the life of the copartner. In **Powell v. Dewey**, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818, it was said that a partner as such had no insurable interest in his copartner's life.

(p) Same—Sureties and other business relations.

In the leading case of **Scott v. Dickson**, 108 Pa. 6, 56 Am. Rep. 192, it was held that a surety on an official bond has an insurable interest in the life of the principal, and the fact that no breach of the bond ever occurred, so that the sureties were never called on for payment, does not affect his interest. The same principle was announced in **Embry's Adm'r v. Harris**, 107 Ky. 61, 52 S. W. 958. In **Sides v. Knickerbocker Life Ins. Co.** (C. C.) 16 Fed. 650, it was said that the tenant of a landlord, who has only a life interest in the premises demised, may insure the landlord's life for the full term of his life. In **Tate v. Commercial Bldg. Ass'n**, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, it was held that a corporation has no insurable interest in the life of a stockholder as such. But it was said in **Mechanics' Nat. Bank v. Comins**, 72 N. H. 12, 55 Atl. 191, that it cannot be held as a matter of law that persons who advance funds to conduct the business of a corporation have no insurable interest in the life of the manager and promoter of such corporation.

(q) Conclusion.

Though what constitutes an insurable interest in life is not well defined, an interest may be said to exist where there is a direct

pecuniary claim as creditor, partner, or surety, or where, from the relationship existing between the parties, there is a reasonable expectation of some benefit or advantage to accrue to one from the continuance of the life of the other. Under this rule, the relationships of husband and wife, parent and child, grandparent and grandchild, brother and sister, are regarded as of such close character as to form a basis for insurable interest. But other relationships are excluded. The rule also justifies the conclusion that a woman under engagement to marry has an insurable interest in the life of the intended husband, and so, too, a woman living with a man as his wife has an insurable interest in his life, though the marriage is in fact illegal. The right to support, or to services, also furnishes a basis for insurable interest.

4. WAGER POLICIES AND RIGHTS DEPENDENT ON EXTENT OF INTEREST.

- (a) Scope of discussion.
- (b) Wager policies in general.
- (c) Same—Rights of parties.
- (d) Creditors' policies.
- (e) Same—Pennsylvania rule.
- (f) Same—Rights of parties.
- (g) Assignment without interest or as security.
- (h) Same—Rights of parties.

(a) Scope of discussion.

The general principle that a policy taken out by one who has no interest in the life insured is a wagering contract has already been discussed in treating of the necessity of insurable interest. As was shown, also, in the same discussion, the general rule is that one may take out insurance on his own life and make the policy payable to whom he will, irrespective of the question of insurable interest. Similarly the general rule is that one may assign a policy valid in its inception to one who has no interest. But these rules are in some instances modified by requiring that the transaction be in good faith and not a cover for a wager contract. Under what circumstances, then, will policies taken out for the benefit of or assigned to third persons be regarded as wagering contracts, and, if so regarded, what are the rights of the parties thereunder?

(b) Wager policies in general.

In *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473, 9 N. W. 497, it was held that a policy taken out, payable to a mere friend or acquaintance, with whom the insured sometimes stayed, and who had at irregular intervals supplied the assured with small sums of money and clothing, was in fact a mere wager, and void. In *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, the insurance was effected by the insured on her own life for the benefit of defendant, a priest. The court said that, while the evidence may justify a finding that defendant was present when the policy was issued, in any event he was immediately informed of it, and adopted her act in procuring the insurance and making him the principal beneficiary. The transaction, therefore, in its legal aspect, did not differ from what it would have been had he himself procured the insurance with the consent of the insured. In *People ex rel. Swigert v. Golden Rule*, 114 Ill. 34, 28 N. E. 383, and *Golden Rule v. People*, 118 Ill. 492, 9 N. E. 342, it was held that a contract by which the association, on the death of a member, was to pay a certain amount to the beneficiary and also to persons holding certificates of membership numbered next before and next after that of the deceased member, was a wager policy. So it was held, in *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4, that a contract whereby the surrender value of lapsed policies was made a fund for the benefit of surviving policy holders was a wager contract. But it was held, in *McCann v. Metropolitan Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026, that where one procures a policy of insurance on the life of another for the benefit of a daughter of the insured it is not a wager policy, in the absence of evidence to show that the one procuring the insurance was to receive any benefit, direct or indirect, from the transaction.

Policies taken out or payable to trustees for the benefit of those having an interest are regarded as valid in *American Life & Health Ins. Co. v. Robertshaw*, 26 Pa. 189, *Olmsted v. Keyes*, 85 N. Y. 593, and *Forbes v. American Mutual Life Ins. Co.*, 15 Gray (Mass.) 249, 77 Am. Dec. 380.

In *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, a policy payable in part to one having an insurable interest and in part to one having no interest is void only as to the latter.

Agreements to procure insurance in evasion of the rule against speculative insurance, or collateral thereto, are in the nature of wager contracts, according to *Tate v. Commercial Building Ass'n*,

97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, where a stockholder in a building association agreed to take out insurance for the benefit of the association. Such, too, is the decision in *West v. Sanders*, 104 Ga. 727, 31 S. E. 619, where the agreement was that B. should take out two policies of insurance on his life, one payable to his wife and the other to A., who had no insurable interest in B.'s life, and that A. should pay the premiums on both policies and should receive the entire insurance on the policy in which he was the beneficiary and one-half of the insurance collected on the wife's policy. So, in *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, where the policy was taken out by one who had no interest in the life insured, it was held that a promise to pay a certain sum to the wife of the insured in consideration of his permitting the promisor to insure his life cannot be enforced.

(c) Same—Rights of parties.

In *Weigelman v. Bronger*, 96 Ky. 132, 28 S. W. 334, where the policy payable to one without interest was declared void as a wager policy, it was held that the fund derived therefrom belonged to the widow of the insured, and not the beneficiary without interest. In *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47, where the beneficiary had entered into an agreement for the maintenance of the insured, it was held that his interest was limited to the expenditures for that purpose, and he could recover only such charges and what he had disbursed in taking out and keeping up the policy, with interest. In *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, where the policy was declared void as a wager, the beneficiary being without interest, it was held that the administrator of the insured could recover from such beneficiary the amount of the policy, less his disbursements and lawful charges. In *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, a beneficiary without interest was held to be entitled only to such portion of the proceeds as would pay his advances in keeping up the policy. The same rule was laid down in *Supreme Lodge Knights of Honor v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893. It was said, in *Rines v. Rines*, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693, that where the beneficiary of a life policy who has no insurable interest collects the money due on the policy he is liable to the representatives of the insured for the amount. However, after the proceeds of a speculative life policy have been received and distributed by the executor or administra-

tor of the beneficiary without interest, the legal representatives of the insured cannot recover the amount, according to *Blake v. Metzgar*, 150 Pa. 291, 24 Atl. 755.

The courts of Texas have established the rule that, while a person whose interest is not commensurate with the policy, or who in fact has no interest, may recover as against the company, such right does not determine his title to the proceeds as against the heirs or representatives of the insured. This is the rule announced in *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; and in *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286, it was held that a beneficiary without interest must be regarded as a trustee appointed to collect the policy for the benefit of those legally entitled thereunder, and that such beneficiary was entitled only to his own disbursements.

This rule has been approved in *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Lewy v. Gillard*, 18 S. W. 804, 76 Tex. 400; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Mayher v. Manhattan Life Ins. Co.*, 27 S. W. 124, 87 Tex. 169; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107.

(d) Creditors' policies.

In *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674, it was held that in determining the interest of a creditor regard should be had not only to the actual debt, but he was to be regarded as having an additional interest where the insured had agreed to embark in a business enterprise with the creditor requiring considerable capital and depending for its success on the knowledge and business skill of the insured. In *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114, the amount of the policy was \$10,000. It appeared that shortly before the policy was issued the debtor had made an admission of existing indebtedness of between \$5,000 and \$6,000, with a written request for further advances, and the creditor had promised to make advances up to \$10,000. The court held that there was an insurable interest sufficient to sustain a policy for \$10,000, though at the date of the policy the creditor's interest did not in fact amount to that sum. In *Talbert v. Storum*, 7 App. Div. 456, 39 N. Y. Supp. 1047, where a policy for \$1,000 was assigned to a creditor to whom was owing \$350, and it appeared that the creditor

paid the expenses of keeping up the policy to the extent of \$350, besides giving the insured certain supplies, it was held that the amount of the debt was so nearly equal the amount of the policy that it was not a wager contract. Though a creditor's interest extends only to the amount of his debt (*Morris v. Georgia Loan, Sav. & Banking Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506), yet the mere fact that a creditor insured his debtor's life, with the latter's consent, in excess of the indebtedness, does not make the policy void as a wager contract, but the creditor is bound to account to the debtor's estate as trustee for the excess (*Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S. W. 379).

An interesting case is *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, where the creditor took out certificates in mutual benefit societies, amounting to \$6,500, on the life of a debtor who owed him \$1,000. The amount actually realized on the certificates was \$2,124. After deducting the debt and interest and the expenses of obtaining and carrying the insurance, paid by the creditor, there remained a balance of \$474. The court held that there was not such a disproportion between the amount of the policies and the amount of the creditor's claims as to render the policies void as wager contracts, but it was intimated that if the disproportion had been great the policies would have been void. So in a partner's policy it was held, in *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800, that it was not a wager policy if the estimate made by the creditor of the value of his insurable interest was in good faith. On the other hand, in *Equitable Life Ins. Soc. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, a policy for \$15,000 issued to secure a debt of \$1,200 was regarded as a wager policy.

(c) Same—Pennsylvania rule.

In *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, the court intimates that a creditor who insures the life of his debtor for the exact amount of his debt and pays the premiums, is not really indemnified for the loss of the debt. In *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, the rule was laid down that the amount of insurance placed on the life of a debtor need not be the exact amount of the debt, so long as it is not grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life. The policy in this

case was for \$2,000. The amount of the indebtedness was undetermined and uncertain. It was subsequently ascertained to have been between \$500 and \$750. The court said that, considering the unsettled condition of affairs, the age of the insured, and the probable amount of premiums that would be paid, it could not be said that the transaction carried with it any inherent evidence of bad faith. In *Grant's Adm'rs v. Kline*, 115 Pa. 618, 9 Atl. 150, which is regarded as a leading case, a policy for \$3,000 was taken out to secure a debt of \$217 and the amount paid on former policies in lieu of which the present policy was taken, amounting to \$526, making the total debt \$743. Justice Paxson, speaking for himself, says: "It may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life as shown by the Carlisle Tables." In view of the fact that the debtor might have lived long enough for the debt, premiums, and interest to have exceeded the amount of the policy, the court held that it could not be said as a matter of law that the disproportion in this case was so great as to make the contract a wager policy. The rule thus announced by Justice Paxson, subsequently approved in *Cooper v. Shaeffer* (Pa.) 11 Atl. 548, may be regarded as fully established by *Ulrich v. Reinoehl*, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534, where the principles laid down by Justice Paxson in *Grant's Adm'rs v. Kline* were adopted for the purposes of determining the insurable interest of an assignee. In *Shaffer v. Spangler*, 144 Pa. 223, 22 Atl. 865, where policies to the amount of \$4,000 were taken out to secure an indebtedness amounting to nearly \$1,000, the court held that whether the amount of the insurance was so disproportionate to the debt as to make the policies speculative or wagering transactions must be determined according to the rule laid down in the *Reinoehl* Case.

The rule is approved in *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966, and *Wheeland v. Atwood*, 192 Pa. 237, 43 Atl. 946, 73 Am. St. Rep. 803, where assignments to secure creditors were involved. It would seem, too, from *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, and *Givens v. Veeder*, 9 N. M. 256, 50 Pac. 316, that the rule has been adopted in Maryland and New Mexico.

The Pennsylvania rule is criticised in *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, where the court takes the position, contrary to the weight of authority, that a contract

of life insurance is a contract of indemnity, whence it follows that an insurable interest which a creditor has in the life of the debtor cannot exceed in amount that of the indebtedness to be secured. By indebtedness, however, the court means to be understood as embracing, not only the debt or debts actually existing when the insurance is taken out, but also additional indebtedness to arise on making further loans or advances, as, for instance, cash for premiums to be paid in obtaining the policy or keeping it alive. If the expenses thus incurred by the creditor are made a charge against the debtor, the creditor may, by agreement, hold the policy as security therefor. So, too, if such expenses, though not made a debt against the creditor, are made a charge to be realized from the policy, the policy may be regarded as security therefor. But a creditor cannot rightfully appropriate the proceeds of a policy held by him as collateral security to the repayment to himself of sums voluntarily paid by him for premiums, for which the debtor was in no way liable, and which could not be lawfully made a demand against the estate. If the creditor desires protection by way of insurance on his debtor's life, and chooses to pay for it, this is proper enough; but the insurance is available to the creditor to no greater extent than the amount of his insurable interest at the time the insurance is effected, namely, the amount of the then existing indebtedness. Justice Little, though concurring in the result, dissented from the reasoning of the court that a creditor's insurable interest must be made up of the amount of the debt and the expense of taking out and keeping up the insurance, holding that the creditor was entitled to the whole proceeds of the policy.

(2) Same—Rights of parties.

In *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480, where the beneficiary was a sister, as well as a creditor, of the insured, it was held that her recovery could not be limited to the amount of her claim against the insured. In *Sides v. Knickerbocker Life Ins. Co.* (C. C.) 16 Fed. 650, where a policy for \$2,000 was taken out by a tenant on the life of his landlord, who had only a life interest in the leased premises, and the tenant paid premiums amounting to \$1,400, the value of his lease at the death of the life tenant being \$660, the court held that he was entitled to recover the full amount of the policy. In *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354, where suit was brought by a company against the creditor to recover a portion of the amount the company had paid on the

policy, it was held that, where a creditor obtains insurance to secure himself for prior and subsequent advances to the person insured and so notifies the agent at the time, he is entitled to the amount of the policy on the death of the insured. In the note to this case in 1 Big. Ins. Cas. 483, it is remarked that it is difficult to see how the fact of notice could affect the case, as the creditor was entitled to the whole sum of the insurance in any event. If the policy provides that it shall be payable to the creditor as his interest may appear (*Elsberg v. Sowards*, 66 Hun, 28, 21 N. Y. Supp. 10), the creditor can, of course, recover only to the extent of his debt.

From the reasoning in the Pennsylvania cases, cited above, it may readily be deduced that under the rule in that state a creditor is entitled in any event to his debt and disbursements, and, if the amount of insurance is not so disproportionate to the debt as to show bad faith in the inception of the contract, he is entitled to the full amount of the insurance, though it exceeds his debt. On the other hand, *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, would seem to approve the principle that the creditor is entitled only to indemnity.

The rule prevailing in Texas regarding wager policies generally apparently controls the decisions in *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564, and *Andrews v. Union Central Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572, where it was held that a creditor is entitled out of the proceeds of the policy only to the amount of his debt and disbursements.

Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722, is regarded as a leading case in support of the principle that, where a creditor insures the life of his debtor or a debtor insures his life for the benefit of his creditor, the creditor paying the expense of maintaining the insurance is entitled to the whole proceeds of the policy. The policy in this case was for \$2,000, and there was actually realized on it \$1,963. The debt amounted to \$600 and the premiums paid by the creditor, to \$104, making a total indebtedness of \$704. The court held that the creditor was entitled to the whole of the proceeds of the policy. This has been criticised by Mr. May,¹ who says that, while the court felt sure in this case that there was no intent to speculate, the law should go further and prevent the fact of speculative profit.

¹ See May, Ins. vol. 2, § 459A.

The whole subject of the rights of creditors to the proceeds of policies taken out to secure their claims is ably discussed in *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372. The court holds that effecting an insurance for the purpose of securing an indebtedness is a contract of indemnity against the loss of a debt and nothing more. A creditor secured by a policy of marine or fire insurance can collect thereon for his own benefit only so much as will save him from actual loss. The interest of the creditor holding as security a life insurance policy can be as readily computed in dollars and cents, being properly measured by the amount of the debt, which constitutes the sole basis of his insurable interest. How, then, can it be said that it would be against public policy to allow a creditor to speculate on the mere chances of property being destroyed by the dangers of sea or by fire, and not equally repugnant to public policy for him to speculate on the life of a fellow creature? If the creditor protected by a life policy could lawfully stipulate for anything more than indemnity, what prevents the transaction from being a speculation pure and simple? The court does not perceive any distinction between life and fire or marine insurance, in so far as the supposed right of the creditor to effect insurance beyond the extent of his insurable interest is concerned.

(g) Assignment without interest or as security.

In *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, where the policy was assigned on the same day the application was made to an association which agreed to pay the costs and premiums, but had no other interest, it was held that the transaction was clearly a speculative one. In *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, it was conceded that circumstances might show the transaction to be a wager. In *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, it was said that a policy purchased for a specific sum may be considered a wager for the amount realized on it over and above the purchase money. So, in *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136, it was said that to the extent to which an assignee stipulates for the proceeds of the policy beyond the sums advanced by him he stands in the position of one holding a wager policy. The same rule was asserted in *Mutual Life Ins. Co. v. Richards*, 99 Mo. App. 88, 72 S. W. 487; and it was said in *Widaman v. Hubbard* (C. C.) 88 Fed. 806, that the assignee will be accountable for the proceeds above his advances.

In *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, often cited as the leading case supporting the principle that an assignment to one without interest is invalid, the policy was taken out at the solicitation of the creditor and immediately assigned to him. The policy was for \$3,000, and at the time of the assignment the insured was indebted to the creditor to the amount of only \$70. The court held that the disproportion between the debt and the amount of the policy was such as to show that it was merely a wagering contract. In *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313, also cited to the same effect as *Cammack v. Lewis*, the policy was for \$3,000 and was assigned for the consideration of \$20; the assignee paying but one year's premiums. The transaction was held to be a wagering one. In *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189, the assignment of the policy for \$2,000 to secure only \$50 was regarded as invalid. In *Hays v. Lapeyre*, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647, where a policy for \$50,000 was assigned to secure notes of the face value of \$19,472, and for which the holder had paid only \$11,175, the court held the transaction to be a wager, though Judge Watkins, dissenting, regarded the debt as commensurate with the amount of the insurance.

The principles applicable to creditors' policies established in Pennsylvania are also applied in determining the status of assignments of policies to secure creditors. In the leading case of *Ulrich v. Reinoehl*, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534, a policy for \$3,000 was taken out and assigned to the creditor to whom was owing \$110. The creditor paid the costs and assessments. The debtor was about 42 years of age, and his expectation of life according to the Carlisle Tables was 26 years. Had he lived out his expectancy, the debt, interest, and dues and assessments would have amounted to \$4,336. It was held, therefore, that the policy was not a wager contract. In *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966, where a policy for \$2,000 was assigned for the consideration of \$700, the court held that, as there was no evidence as to the expectancy of life of the insured, there was not such a disproportion between the amount of the policy and the consideration paid as to bar a recovery on the ground that the assignment was a wagering contract. In *Wheeland v. Atwood*, 192 Pa. 237, 43 Atl. 946, 73 Am. St. Rep. 803, where a policy for \$5,000 was assigned absolutely in payment of a debt of \$1,900 at a time when, if the insured had lived out her

expectancy, the premiums to be paid, with interest, would have amounted to \$4,500, the court held that the policy was not a wagering policy. On the other hand, where a policy for \$3,000 was taken out and assigned to secure a debt of \$100, it was held, in *Cooper v. Shaeffer* (Pa.) 11 Atl. 549, that the disproportion was so great as to require the court to say as a matter of law that the transaction was a wager. In *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655, a policy for \$2,000 was purchased for \$65, and the assessments and expenses paid by the assignee made the total amount of his claim at the death of the insured \$715. The court held that the policy was a wager policy. In *Wegman v. Smith*, 16 Wkly. Notes Cas. (Pa.) 186, where a policy for \$700 was, as soon as issued, assigned for \$5, the court held the transaction invalid. Apparently the Pennsylvania rule was applied in *Givens v. Veeder*, 9 N. M. 256, 50 Pac. 316, where a policy of \$5,000 was assigned in cancellation of a debt of \$2,011. The court held that this was not a speculative transaction, as the premiums and interest, with costs and expenses, amounted to \$4,500 at the time of the death of the insured.

(h) Same—Rights of parties.

In *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, it was held that, where an assignment as security is a wager, the representatives of the deceased are entitled to the proceeds over and above the actual amount due the assignee, who will be held to account, thus apparently foreshadowing the Texas rule. Similarly, in *Quinn v. Supreme Council Catholic Knights of America*, 41 S. W. 343, 99 Tenn. 80, it was held that a certificate assigned in a speculative transaction is payable to the family of the insured, and not to the assignee. In *Wegman v. Smith*, 16 Wkly. Notes Cas. (Pa.) 186, the assignor of a policy on his wife's life was entitled to recover from the assignee without interest the amount of the policy, less the sum paid by the assignee to keep up the policy. It was said, in *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305, that a policy, if taken out without intent to assign at once, is not void at its inception.

Under a similar rule it was held in *Gilbert v. Moose's Adm'rs*, 104 Pa. 74, 49 Am. Rep. 570; *Melly v. Hershberger*, 16 Wkly. Notes Cas. (Pa.) 186, and *Stoner v. Line*, Id. 187, that, where a policy has been assigned to one without interest, the administrator of the insured can recover the amount from such assignee.

On the other hand, in *Powell v. Dewey*, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818, it was held that the personal representatives of the assignor cannot recover the amount paid on the policy, as the foundation of such an action is a void contract. This seems to be opposed to the Texas doctrine. The same rule was applied in *Mutual Ben. Ass'n v. Hoyt*, 46 Mich. 473, 9 N. W. 497, and it was held that, as the transaction was absolutely void, the objection might be raised even by the insurer; the defense being in fact that of the public, and not of the insurer. An interesting case is *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537, where it was held that a transfer of a policy by the beneficiaries, during the life of the insured, to one who had no insurable interest, was a fraud on the insurance company, and that though, after the death of the insured, the assignee retransferred the policy to the beneficiaries, they could not collect, as the whole contract was tainted with fraud and contravened public policy, so that the law would leave the parties as it found them.

In the leading case of *Warnock v. Davis* it was held that an assignee having no interest is entitled only to be reimbursed for the amount he had paid on the policy, and in *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, the court held that, whether the transaction was valid or not, the assignee was entitled to recover the amount he had paid out to keep the policy alive.

The general rule that, where the transaction is speculative, the assignee can recover only the amount of his debt and the amount paid out to keep the policy alive, is supported by *Burnam v. White*, 16 Ky. Law Rep. 241, 22 S. W. 555; *Barbour's Adm'r v. Larue's Assignee*, 51 S. W. 5, 106 Ky. 546; *Hays v. Lapeyre*, 48 La. Ann. 749, 19 South. 821, 35 L. R. A. 647; *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012; *McDonald v. Birss*, 99 Mich. 329, 58 N. W. 359; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; *Gilbert v. Moose's Adm'rs*, 104 Pa. 74, 49 Am. Rep. 570; *Ruth v. Katterman*, 112 Pa. 251, 8 Atl. 833; *Brennan v. Franey*, 142 Pa. 301, 21 Atl. 803; *Cooper v. Shaeffer* (Pa.) 11 Atl. 549; *Wegman v. Smith*, 16 Wkly. Notes Cas. (Pa.) 186; *Hendricks v. Reeves*, 2 Pa. Super. Ct. 545; *Quinn v. Supreme Council Knights of America*, 99 Tenn. 80, 41 S. W. 343; *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Cawthon v. Perry*, 76 Tex. 383, 13 S. W. 268; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Connecticut Mut. Life Ins. Co.*

v. Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

But in *Connecticut Mut. Life Ins. Co. v. Fisher* (C. C.) 30 Fed. 662, where there were several assignees without interest, the court held that a defense as to the want of insurable interest could not be raised as between them. The insurer having waived the question, the assignee, having a superior equity, would be entitled to the proceeds of the policy. In *Diffenbach v. New York Life Ins. Co.*, 61 Md. 370, the extent of the insurable interest of several assignees was recognized for the purpose of determining their shares in the proceeds of the policy. As held in *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200, and *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268, where the contract provides that the assignee must show interest, he can recover only to the extent of the interest shown. In *Light v. Lauser*, 174 Pa. 608, 34 Atl. 350, where a policy was assigned with a condition that, at maturity, \$1,500 of the proceeds should be paid to the assignor, and the assignee paid assessments amounting to \$2,800, the court held that he was entitled only to the proceeds of the policy less the \$1,500, though the amount received on the policy at its maturity was only \$2,774.

5. EXTINGUISHMENT OF INSURABLE INTEREST IN HUMAN LIFE.

- (a) General principles.
- (b) Policy payable to wife—Effect of divorce.
- (c) Creditors' policies—Payment of debt.
- (d) Same—Discharge other than by payment.
- (e) Policies assigned to creditors.
- (f) Particular applications of the rule.

(a) General principles.

As has been pointed out in a preceding brief, the extinguishment of the interest of the insured in a fire or marine policy bars his recovery thereunder, the rule being based on the principle that such policies are strictly contracts of indemnity. It has also been shown that, though there are strong reasons for regarding policies of life insurance as contracts of indemnity, the weight of authority is otherwise. This view of the policy of life insurance had led the courts generally to declare that the termination of the

beneficiary's insurable interest in the life insured will not bar a recovery on the policy; the rule being based largely on the reasoning of the English cases already referred to in discussing the question whether a life policy is one of indemnity.¹ The decision of the Dalby Case is based on the construction given to the English statute (14 Geo. III, c. 48) relating to insurable interest. This statute, after declaring the necessity of insurable interest to support a policy, provides that "where the insured hath interest in such life or lives * * * no greater sum shall be recovered * * * than the amount or value of the interest," etc. The court construed the word "hath" as referring to the time of the inception of the policy only, and not to the time of recovery, regarding the only effect of the statute to be to require a correct valuation of the interest at the inception of the risk. The rule, stated in general terms, may then be said to be that if the policy is valid at its inception, because based on an adequate insurable interest, the existence of such an interest at the maturity of the policy is unnecessary. While it has not been approved by all American courts, it has been indorsed by a large majority of them.

In addition to the specific applications of the rule discussed in the following paragraphs, it has been approved in general terms in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Sides v. Knickerbocker Life Ins. Co. (C. C.)* 16 Fed. 650; *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Rawls v. American Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, affirming 36 Barb. 357; *Olmsted v. Keyes*, 85 N. Y. 593; *Wright v. Mutual Ben. Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Grattan v. Nat. Life Ins. Co.*, 15 Hun (N. Y.) 74; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

The rule is, however, opposed in *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107, where it was said that the dangers arising from the speculative character of the contract, which have been urged against allowing the issuance of a policy to

¹ *Dalby v. Insurance Co.*, 15 C. B. 365, 2 Big. Ins. Cas. 371; *Law v. Insurance Co.*, 1 K. & J. 223, 2 Big. Ins. Cas. 404. See, also, *Godsall v. Boldero*, 9 East, 49, where the contrary doctrine was adhered to. This case was overruled by the Dalby Case.

one without interest, apply as strongly where the interest has ceased before the policy becomes payable.

(b) Policy payable to wife—Effect of divorce.

One of the most important and interesting questions arising under the rule as to termination of interest is its application where the policy is payable to the wife of the insured and the marital relation has been dissolved by divorce. In the early case of *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129, decided in 1859, the court said: "We will not undertake to say that the wife by suing for and obtaining a divorce from her husband, ceased to have such an interest in his life as would render an assurance of it by her illegal. Why should not a mother, who has four children by a man from whom she has been divorced, be permitted to insure the life of that father, to whom her children may look for support. If the care and custody of the children have by the decree of a divorce been entrusted to the mother, that will not extinguish the obligation of the father to provide for them. There may be a provision decreed the wife for her support, to be paid by the husband. This would, in effect, make her the creditor of her husband, and, being so, she would, without controversy, have a right to insure his life." The decision in this case appears to have been based largely on general principles of justice, rather than principles peculiar to the contract of insurance.

The leading case, however, is *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, where the policy was issued on the joint lives of husband and wife, payable to the survivor on the death of either. It was contended that there had been an entire termination of the insurable interest of the wife by reason of a divorce, and that she could not recover on the death of the husband. The court, however, while admitting that if, at the inception of the policy, there had been a mere colorable or temporary interest, the termination of such an interest would bar a recovery, applies the general rule that a policy valid at its inception is not terminated by a cessation of interest, in the absence of a provision to that effect in the policy itself, and held that the right of the wife was not terminated by the divorce. In *Grego v. Grego*, 78 Miss. 443, 28 South. 817, it was held that, where a husband insures his life for the benefit of his wife, it creates a vested and irrevocable right in her, which is not divested on the granting of a divorce to the husband; nothing being said, however, about the effect of the

divorce on insurable interest. In *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354, it was held that a divorced wife was entitled to the proceeds of the insurance policy, though it is to be noted that in this case there had been a division of property at the time of the separation, and by such division the policy was given to the wife.

The question has several times arisen in cases involving certificates of membership in mutual benefit associations, and the decisions in such cases are conflicting. In *Supreme Council American Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770, it was held that, as a divorce from bed and board only does not dissolve the marriage bond, it would not terminate the wife's interest in a policy of insurance on the life of her husband. In *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75, where, both prior and subsequent to the divorce, the wife had paid assessments and dues on the certificate, and there was no change of beneficiary after the divorce, it was held that she could recover. On the other hand, in *Massachusetts (Tyler v. Odd-Fellows' Mut. Relief Ass'n)*, 145 Mass. 134, 13 N. E. 360 and *Texas (Schonfield v. Turner)*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189, it was held that a divorced wife lost her right to the proceeds of the policy. In a recent case (*Hatch v. Hatch* [Tex. Civ. App.] 80 S. W. 411) it was held that a wife's insurable interest as assignee of a policy on her husband's life ceases on the divorce of the parties, except so far as she has paid the premiums on such policy.

An interesting case is *Order of Railway Conductors v. Koster*, 55 Mo. App. 186, where the certificate had originally been made payable to the member's wife, and it appeared that the rules of the association provided that no benefit should be made payable to one not having an insurable interest in the life of the member. The certificate provided that the benefit should be paid to H., who bore the relationship of wife. The court held that the benefit certificate differed from an ordinary policy, in that it had reference to conditions existing at the death of the member. If the status of the beneficiary, which was considered the main, if not the sole, inducement to the insurance, is changed or does not exist at the time of the death of the insured, the rights of such beneficiary will lapse. Consequently, as the wife had secured a divorce and married again, she had forfeited her rights under the certificate and was not entitled to the benefits. On the other hand, in *Supreme Commandery Knights of the Golden Rule v. Everding*, 20 Ohio Cir. Ct. R. 689, 11 O. C. D. 419, where the certificate was payable to the

wife of the member, and, the member having disappeared, the wife obtained a divorce and married again, the court, relying on *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, held that the termination of her interest by her divorce did not affect her right to recover on the policy.

(c) Creditors' policies—Payment of debt.

In *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, the court, relying on *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, held that a creditor's interest in the life of his debtor did not terminate, so as to bar the right of recovery on the policy, by the payment of the debt. Attention was called to the fact that if one as the creditor of another insures his life for the exact amount of the debt, and maintains the policy, and the policy ceased as soon as the debt was paid, the creditor would lose all he had paid for the maintenance of the policy, though he had received his debt in full. So, in *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, the court, while admitting that a mere temporary interest at the inception of the contract would render the policy invalid, held that, if the policy was taken in good faith and supported by an adequate interest, based on the relation of debtor and creditor, the termination of that relation would not bar a recovery by the creditor. In *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 32 Hun, 306, affirmed without opinion 102 N. Y. 647, it was said that where a creditor, acting in his own behalf, and not under an agreement with or as agent of the debtor, procures a policy of insurance on the life of the latter to an amount not exceeding the debt, and pays the premiums up to the time of the debtor's death, his right to recover is not affected by the fact that the debt has, prior to that time, been partially or fully paid. The court regarded the existence of the debt at the time the policy was issued as sufficient to support it, in the absence of any condition referring to the continuance of the indebtedness.

The principle of the cases just cited is also approved in *Central National Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625; *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372 (concurring opinion); *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *Olmsted v. Keyes*, 85 N. Y. 593; *Wright v. Mutual Ben. Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749.

In *Central National Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, attention was called to the distinction where the policy is taken out by a debtor and made payable to a creditor. In such case the court says that, if the debt is extinguished before the insurance matures, then the proceeds should go to the estate of the debtor. So, in *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, where the policy was taken out by a debtor himself and made payable to the creditor, the court says: "How far a policy taken out by a creditor on the life of his debtor is affected by a change in the relations between debtor and creditor, prior to the maturity of the policy, it is unnecessary to discuss; for here the contract was between the insured and the company. If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, the general doctrine is that, on payment of the debt, the creditor loses all interest therein, and the policy becomes one for the benefit of the insured."

(d) Same—Discharge other than by payment.

In the early case of *Rawls v. American Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, affirming 36 Barb. 357, the question was raised whether the insurable interest of a creditor was affected by the fact that the statute of limitations had run against the debt since the insurance was effected. The court held that as the running of the statute of limitations does not necessarily extinguish the debt, and it may be renewed by a new promise, the fact that the statute has run does not terminate the creditor's interest. Apparently the court relied on the general rule that, when a policy is valid at its inception, an insurable interest need not necessarily exist at the time of maturity. So, in *Mowry v. Home Life Ins. Co.*, 9 R. I. 346, it was held that the fact that the creditor's claim was barred by the statute of limitations did not affect his right of recovery on the policy. In *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 22 Hun (N. Y.) 320, the discharge of the debtor in bankruptcy was held not to affect the right of the creditor.

(e) Policies assigned to creditors.

In the leading case of *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, where the policy was assigned to a creditor in consideration of a certain sum and the discharge of the debts, it was held that, though the interest ceased when the assignee ceased to be a creditor by accepting the assignment in satisfaction of the

debt, yet it was not necessary to the continuance of the insurance that the interest should also continue; the value and permanency of the interest being material only as bearing on the question whether the policy was taken out in good faith and not as a wagering transaction. So, in *Clogg v. McDaniel*, 89 Md. 419, 43 Atl. 795, where a certificate of membership in a mutual benefit association was assigned to a creditor in cancellation of a debt, the court held that, even though thereafter the assignee had no insurable interest, the transfer was not a violation of the law as to wager transactions. In *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625, it was held that it was sufficient to entitle an assignee to recover on the policy that he had an insurable interest at the time the assignment was made, though it may have ceased prior to the death of the person insured, but that a creditor to whom the debtor has assigned a policy of insurance as collateral does not cease to have an insurable interest by reason of accepting benefits of a general assignment for the benefit of creditors made by such debtor, and conditioned that all creditors participating shall accept the dividends paid in full satisfaction of their debts, if as a matter of fact the claim is not paid in full. Even if such a transaction operates as a legal discharge of the debt, the moral and equitable obligation to pay still rests on the debtor, and is sufficient to give the creditor an insurable interest. In the concurring opinion in *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, Justice Little said that a distinction must be drawn between a contract of insurance on his own life, made by one who is indebted to another and who transfers the policy to his creditor for the security of his debt, and a contract made directly by the creditor. In the first case the creditor has no rights, except such as may be given him by the assignment, and, if the debt is paid prior to the death of the debtor, the assignment has no force or effect. But in *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114, it was said that the insurer cannot object that the debt for which the policy was assigned has been paid; that such a question could only arise between the assignee and the assignor, or his representatives.

(f) Particular applications of the rule.

In *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, where a policy had been taken out payable to a surety on the official bond of the insured, it was held that there was no termination of the interest

of the beneficiary by the fact that no breach of the bond had ever occurred. In *Sides v. Knickerbocker Life Ins. Co.* (C. C.) 16 Fed. 650, it was held that the tenant of a landlord who has only a life interest in the leased premises, having insured the landlord's life for the full term of life, is entitled to recover the proceeds of the policy, regardless of the expiration of the lease. In *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107, where the policy was taken out by a member of a partnership on the life of his copartner, it was held that on the dissolution of the partnership before the death of the insured the insurable interest ceased, so that the beneficiary could recover on the policy only enough to cover his disbursements.

6. PLEADING AND PRACTICE IN RELATION TO INSURABLE INTEREST IN LIFE.

- (a) Pleading insurable interest.
- (b) Who may plead lack of insurable interest.
- (c) Estoppel to deny interest.
- (d) Same—Estoppel of beneficiary.
- (e) Pleading lack of insurable interest.
- (f) Evidence—Presumptions and burden of proof.
- (g) Same—Admissibility and sufficiency.
- (h) Questions for jury and instructions.

(a) Pleading insurable interest.

It is undoubtedly the rule that, in a suit by the beneficiary on a policy taken out by the insured himself, it is not necessary for the plaintiff to allege insurable interest.

This is stated in *Robinson v. U. S. Mut. Acc. Ass'n* (C. C.) 68 Fed. 825; *Massachusetts Mut. Life Ins. Co. v. Kellogg*, 82 Ill. 614; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 390; *Masonic Ben. Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180. It is the duty of the insurer to plead the lack of insurable interest, if it relies on such a defense (*Foresters of America v. Hollis* [Kan.] 78 Pac. 160).

So, where the action is by a creditor claiming as assignee, and the insurer does not dispute its liability, the creditor need not, as to the other claimants, plead his insurable interest (*Robinson v. Hurst*, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266). A different rule prevails where one procures insurance on the life

of another (*Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180). In such case the plaintiff must aver in his declaration that he had an insurable interest in the life insured.

This is also the rule in *Continental Life Ins. Co. v. Tullidge* (Ind.) 17 Am. Law Rev. 1020; *Elkhart Mut. Aid, Ben. & Relief Ass'n v. Houghton*, 98 Ind. 149; *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380.

In *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561, it was held that, where the policy provides that the claims of assignees shall be subject to proof of interest, the assignee must allege interest; but, as said in *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908, a complaint by an assignee need not negative the defense that the assignment is void as a wager.

In alleging insurable interest, the facts must be stated from which, as a matter of law, the court can infer the existence of such an interest (*Elkhart v. Mut. Aid Ass'n v. Houghton*, 98 Ind. 149). If it is alleged in general terms that plaintiff had an insurable interest in the life insured, it is merely the statement of a conclusion of law, to which demurrer will lie.

This is also the rule laid down in *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, and *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380.

But these cases also hold that a mere statement of relationship is not sufficient. Such, too, is the doctrine in *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321. On the other hand, a mere statement of relationship of parent and child is held to be sufficient in *Valley Mut. Life Ins. Co. v. Teewalt*, 79 Va. 421.

In *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684, a complaint alleging that the insured was indebted to plaintiff in a certain sum on judgments against him sufficiently alleges insurable interest. In *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42, where it was contended that plaintiff must aver a perfect insurable interest, and it appeared that plaintiff had pleaded that the policy was not taken from any speculative motive, but in good faith and without fraud, it was held that this practically alleged an insurable interest, and would be held to be sufficient after verdict and on motion in arrest. In *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, where the

policy was issued directly to the plaintiff on the life of her grandfather, the court held that plaintiff could not go back of the policy, and allege that in fact the policy was taken out by the grandfather for her benefit, and that he had paid the premiums.

(b) Who may plead lack of insurable interest.

In *Farmers' & Traders' Bank v. Johnson*, 118 Iowa, 282, 91 N. W. 1074, it was said that it is doubtful if any one but the insurer can take advantage of the fact that a beneficiary has no insurable interest.

In the following cases the principle was asserted definitely: *Johnson v. Van Epps*, 110 Ill. 551; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Robinson v. Hurst*, 78 Md. 67, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266; *Groff v. Mutual Life Ins. Co.*, 92 Ill. App. 207.

An objection of lack of insurable interest cannot be raised by the heirs of the insured, where the insurance was taken out by the insured himself for the benefit of a third person (*Johnson v. Van Epps*, 110 Ill. 551); nor as against an assignee, where the policy provides that insurable interest must be shown by all claimants (*Robinson v. Hurst*, 78 Md. 67, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266). The objection cannot be raised by other beneficiaries, where a portion of the certificate is payable to one who has no interest (*Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125). In *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746, where the insured, after procuring insurance on her life payable to plaintiff, had the policy changed so as to make it payable to defendant, the latter agreeing to receive the proceeds in trust for plaintiff, it was held that defendant, after receiving the proceeds, could not refuse to pay it over to plaintiff, on the ground that the latter had no insurable interest. In *Groff v. Mut. Life Ins. Co.*, 92 Ill. App. 207, the fact that an assignment of a policy of life insurance to one having no insurable interest is prohibited by the laws of the state where the assignment was made, though available as a defense by the insurer, cannot be pleaded by the assignor. In *Elsberg v. Sowards*, 66 Hun, 28, 21 N. Y. Supp. 10, where the policy provided that claims of a creditor should not exceed the amount of actual indebtedness, and that as to the excess the certificate should be void, such provision cannot be pleaded by the creditor, in an action by the executrix of the insured, to defeat the right of plaintiff to such excess.

It was held, in *Connecticut Mut. Life Ins. Co. v. Fisher* (C. C.) 30 Fed. 662, that, where the lack of insurable interest has been waived by the insurer, the defense cannot be raised between parties equally without interest; and in *New York Life Ins. Co. v. Rosenheim*, 56 Mo. App. 27, it was said that, **where the company does not plead lack of insurable interest, it cannot be pleaded by a contestant for the fund.**

The same principle seems to be supported by *Widaman v. Hubbard* (C. C.) 88 Fed. 806; *Diffenbach v. New York Life Ins. Co.*, 61 Md. 370; *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066; *Standard Life & Accident Ins. Co. v. Catlin*, 106 Mich. 138, 63 N. W. 897; *Hosmer v. Welch*, 107 Mich. 470, 65 N. W. 280; *Langford v. Freeman*, 60 Ind. 46; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191.

In *Kohr v. Wolf*, 16 Wkly. Notes Cas. (Pa.) 189, where the administrator of the insured brought action against the beneficiary to recover the proceeds of the policy, the court held that as the insurance company was not a party to the record, and its rights were not involved, the speculative nature of the transaction could not be pleaded by the defendant.

In *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114, where a policy taken out by a creditor on the life of his debtor was assigned by the creditor as collateral security for his own debt, it was held that the company could not raise the question as to the insurable interest of the assignee; that such an issue could be raised only between the assignee and the heirs of the creditor. In *Brennan v. Prudential Life Ins. Co.*, 148 Pa. 199, 23 Atl. 901, it was said that the defense of lack of insurable interest in the beneficiary could not be raised in defense to an action on a policy of life insurance brought by the administrator of the insured, though it might have been raised if the suit had been brought by the beneficiary.¹

(c) Estoppel to deny interest.

In *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. (N. Y.) 556, it was held that, where the plaintiff in his application stated that he had an interest to the full amount of the insurance and the company accepted such application, it could not afterwards deny the insurable interest of plaintiff; but the Court of Appeals, in 23 N. Y.

¹ See, also, *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770.

516, apparently took a different view. However, in the leading case of *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244, where plaintiff had declared in his application that he had an interest in the life insured to a certain amount and the company received this declaration as true, making it the basis of the insurance and the premiums, the court held that it would be against good faith to allow the insurer to deny the insurable interest of plaintiff. In *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354, where the company brought an action to recover from the beneficiary the proceeds of the policy which had been paid to the beneficiary, it was held that where one obtained insurance to secure himself for prior and subsequent advances to the person insured, and so notified the agent at the time, he was entitled to recover. In the note to this case in 1 Big. Ins. Cas. 483, it is remarked that it is difficult to see how the fact of notice could affect the case, because, if the company, with full knowledge that the insurance was effected to secure advances, took the risk at the sum named in the policy, it bound itself to pay the sum expressed without question.

In *Provident Life & Investment Co. v. Baum*, 29 Ind. 236, where the policy was taken out by the insured payable to a third person, the court said that it was not for the company, after executing such a contract and agreeing to the appointment of the beneficiary, to question the right of such appointee. In the leading case of *Bloomington Mut. Life Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518, the court said that where a company issues a policy to one on his own life payable to a third person, and the insured pays the premiums which are accepted by the company, it cannot, after the death of the insured, resist payment on the ground that the beneficiary has no insurable interest. Nor does it affect the result that the policy contained a clause that "all claims under this policy shall be subject to proof of interest," where the company had knowledge of the lack of insurable interest from the beginning (*Foster v. Preferred Acc. Ins. Co.* [C. C.] 125 Fed. 536). The ruling in the leading case of *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, seems also to be based to some extent on the idea of estoppel, as the company received the premiums.

Similar principles rule the decisions in *Lamont v. Hotel Men's Mut. Ben. Ass'n* (C. C.) 30 Fed. 817; *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51; *Kane v. Reserve Mut. Life Ins. Co.*, 31 Leg. Int. (Pa.) 196, 4 Bigelow, Ins. Cas. 455; *Keystone Mut. Ass'n v. Beaverson*, 16 Wkly. Notes Cas. (Pa.) 188.

B. B. Ins.—21

On the other hand, in *Mutual Ben. Ass'n v. Hoyt*, 46 Mich. 473, 9 N. W. 497, where the policy was made payable to a stranger, the court held that the association, though it knew perfectly, at the time the policy was issued, the circumstances of the case, could nevertheless raise the defense that the beneficiary had no insurable interest; such defense being that of the public, and not merely that of the company.

Attention has already been called to the rule prevailing in Texas.* While it does not satisfactorily appear whether the doctrine of the Texas cases is based on the idea of estoppel, it is undoubtedly the rule in that state that the defense of lack of interest cannot be raised by the insurance company.

This rule is upheld in *Price v. Supreme Lodge Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Lewy v. Gilliard*, 13 S. W. 304, 76 Tex. 400; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Mayher v. Manhattan Life Ins. Co.*, 27 S. W. 124, 87 Tex. 169; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286.

In *People's Mut. Ben. Soc. v. McKay*, 141 Ind. 415, 39 N. E. 231, it was held that where, in an action on a life policy, the company admits on the trial the validity of plaintiff's claim, except as to the amount he is entitled to recover, and stipulates that it will confine its defense wholly to that question, it cannot raise the defense that plaintiff had no insurable interest in the life insured. In *Brady v. Prudential Ins. Co.*, 5 Kulp (Pa.) 505, it was held that a clause in a policy that it shall be incontestable after three years does not estop the company from setting up the defense of want of insurable interest. So, in *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650, the court held that a provision that a policy should be incontestable after one year did not prevent the company from raising the defense that the transferee of the policy had no insurable interest in the life insured, but procured it to be transferred for speculative purposes. On the other hand, it was held, in *Wright v. Mutual Ben. Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749, that a clause in a certificate providing that "no

* See *ante*, p. 301.

question as to the validity of an application or certificate of membership shall be raised, unless within two years" from the date thereof and during the life of the insured, precludes the defense of lack of insurable interest in the beneficiary; the provision being in the nature of a statute of limitation and repose.

(d) Same—Estoppel of beneficiary.

An interesting case is *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100. The policy was made payable to plaintiff who was the brother of the person insured. The action was brought to recover the amount of premiums paid on the policy by plaintiff, who contended that the policy was never an operative instrument, for the reason that he had no insurable interest. The court, while admitting that the mere relationship as brother did not give plaintiff an insurable interest, yet, as he might have had an insurable interest as creditor, held that the policy was not void on its face, and, as in his application he had stated unequivocally that he had an insurable interest, he was now estopped from denying such interest. In *Farmers' & Traders' Bank v. Johnson*, 118 Iowa, 282, 91 N. W. 1074, where a daughter, designated as beneficiary in a policy on the life of her father, assigned the policy to secure a loan to herself and her husband, the court held that she was estopped in an action by the assignee to contend that the policy was void because she had no insurable interest.

(e) Pleading lack of insurable interest.

In *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, the question was raised, but not decided, whether an insurable interest is put in issue by a general denial. In *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.) 249, 77 Am. Dec. 360, it was held, however, that, to be available, the defense of lack of insurable interest must be specially pleaded.

This principle has been approved in *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32, *Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475, *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480, *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809, and *Katheman v. General Mut. Ins. Co.*, 12 La. Ann. 35; but in the last case one justice dissented, holding that a general denial is sufficient, on the ground that the contract of insurance is a conditional one.

In *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809, already cited, the court said that perhaps, in an action of *assumpsit* at com-

mon law, under the general issue it would be necessary to show an interest in the life insured, because in the action of *assumpsit* that plea puts everything at issue necessary to show that there was an indebtedness on the part of defendant. But under the Louisiana law every contract which does not appear illegal or immoral on its face is presumed to be made for a valid cause. If one is not permitted under the Louisiana law to recover on a life policy in which he has no interest, it is because it is a wager, and as such contrary to the policy of law. Therefore it is the rule that defendant, to avail of the defense, must plead it. In *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32, it was said that the fact that the answer did not set up the defense made it unavailable as a ground of nonsuit. It has also been held in New York (*Taylor v. Security Mut. Life Ins. Co.*, 73 App. Div. 319, 76 N. Y. Supp. 671) that, where the answer sets up that the policy is a wager and speculative in character, defendant may be required to specify in what respect this is so. But, where the policy provides that claims arising thereunder by an assignee should be subject to proof of interest (*Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561), it is necessary that the want of interest should have been specially pleaded in defense. In *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 22 Hun (N. Y.) 320, it was held that, where the defense of want of insurable interest was specially set up in the answer, it was in issue. The defense is an affirmative one (*Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480), and must be presented at the trial, and not afterwards. It comes too late when raised for the first time in the appellate court (*Metropolitan Life Ins. Co. v. Quandt*, 69 Ill. App. 649).

In *Curtiss v. Ætna Life Ins. Co.*, 90 Cal. 245, 26 Pac. 211, 25 Am. St. Rep. 114, it was held that a defense that the creditor beneficiary had no insurable interest, because the debt was barred by the statute of limitations, must be raised by plea, and not by demurrer, since the averment of indebtedness is not inconsistent with the fact of a promise to pay within the period of limitation. In *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, the action was brought by an administrator on a policy on the life of his decedent. The answer of the company alleged that the insured in his lifetime had assigned the policy and that the company had consented to the assignment. Plaintiff replied that the assignee had no insurable interest in the life insured. The court held that such a reply was merely a conclusion of law, and therefore bad on demurrer.

(2) Evidence—Presumptions and burden of proof.

If the matter of insurable interest is put in issue, the plaintiff has the burden of proof (*Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516). If the policy is taken out on the life of another, plaintiff must show his insurable interest (*Reed v. Provident Savings Life Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292). But it has been held in Ohio (*Manhattan Life Ins. Co. v. Burke*, 23 Ohio Cir. Ct. R. 39) that in an action by an assignee the burden is on the defendant to show that the policy is a wager; and it was said in *Crosswel v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200, that there is no presumption that a policy is taken out by one having no interest. In *Fairchild v. Northeastern Mut. Life Ass'n*, 51 Vt. 613, where the application was ostensibly made by N. and the policy apparently issued to N., it was held that, as it did not appear that the policy had been procured to be issued by the beneficiary, it would be presumed, after verdict, that N. did procure it to be issued, so as to avoid the question whether the beneficiary had an insurable interest or not. In *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134, it was held that it was the presumption that a husband had an insurable interest in the life of his wife. The court, apparently, also regarded such presumption rebuttable. So, in *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, it was held that, by reason of the fact that a pecuniary interest is found to exist in a majority of cases where the marital relation is involved, the courts would conclusively presume it to exist in every case. The court remarks, however, that the Supreme Court of Vermont alone seems disposed to hold the presumption rebuttable. As to other relationships there is no presumption of interest. In *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47, the court said, however, that between husband and wife and parent and child the relationship is so close and intimate as to give rise to the presumption of an insurable interest. But, in *Holabird v. Atlantic Mut. Life Ins. Co.*, 12 Fed. Cas. 315, it was held that, in an action on a policy purporting to be issued in favor of the wife on the life of her husband, the burden is on the wife to prove the marriage, and thus show her insurable interest. Where the relationship is not such as to afford a presumption of interest, the burden is on plaintiff to show the interest.

Brady v. Prudential Life Ins. Co., 5 Kulp (Pa.) 505; *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47.

In *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100, it was held that the mere relationship of a brother is not sufficient to support an insurable interest, yet, in the absence of anything on the face of the policy to show that the brother had no pecuniary interest, the policy must be held *prima facie* valid, thus putting the burden on one alleging a want of such interest.

In *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, where the policy was payable to a creditor, it was held that the indebtedness, if it existed, was a matter peculiarly within the knowledge of the beneficiary, and, if essential to his right of recovery, he must show both the fact and the amount by affirmative testimony. In *Elsberg v. Sowards*, 66 Hun, 28, 21 N. Y. Supp. 10, it was held that, where the policy is payable to a creditor as his interest may appear, the burden is on such creditor to show the extent of his insurable interest. So, in *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561, where the policy provided that the claim of an assignee should be subject to proof of interest, it was held that the burden was on the assignee to show his interest, and that the rule that special defenses must be specially pleaded did not relieve him from the burden of proof. But, in *Andrews v. Union Cent. Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572, the court held, in an action by the administrator of the insured on a policy payable to a creditor as his interest may appear, that the burden is on the company to show that the insured was indebted to the creditor and the amount of the debt, when it attempts to defend on the ground of payment of the amount of the policy to the creditor. In *Lenig v. Eisenhart*, 127 Pa. 59, 17 Atl. 684, a life policy was assigned to defendant, who was not a relative of the insured, and on the death of the insured the company paid him the amount of the policy. In an action by the administrator of the insured to recover the amount, the burden is on the plaintiff to show that defendant was not a creditor of the insured, so as to have an insurable interest; the presumption being that he had such an interest.

(g) Same—Admissibility and sufficiency.

In *Stambaugh v. Blake* (Pa.) 15 Atl. 705, where a son-in-law had taken out a policy on the life of his mother-in-law and assigned it to a stranger, it was held that, in an action by the administrator of the insured to recover the amount paid to the assignee, the latter could not introduce in evidence testimony to show that the

original beneficiary, with his wife, had lived with the insured and supported her, that she had no other means of support, and that the wife of the beneficiary, who was the only child and person interested in the estate, knew of the insurance and made no demand for it. In *Vanormer v. Hornberger*, 142 Pa. 575, 21 Atl. 887, the action was brought by the husband of the insured, who was the nominal beneficiary, against the executor of the assignee of the policy; such assignee having no insurable interest. It was held that evidence that the company's agent took out a large amount of insurance on the life of the insured for the nominal benefit of plaintiff, that the policy in suit was assigned in blank by him and the assignee's name inserted without plaintiff's knowledge, that the assignee paid no consideration for the assignment, and that he was not a relative or creditor of the insured, was admissible to show that the assignment was a mere speculation on the life of the insured. In *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, where the company alleged that the policy was a wager, the agent of the company was allowed to testify that he urged the parties to apply; that the insured paid the premiums, and thought at first to make plaintiff's minor children beneficiaries, but finally made plaintiff beneficiary, in order that in the event of his marriage, the policy might be changed more easily. In *Hale v. Life Indemnity & Investment Co.*, 65 Minn. 548, 68 N. W. 182, where the plaintiff claimed as creditor, the proofs of death and the notes of the insured, payable to the plaintiff, were properly received in evidence as tending to establish the fact that plaintiff had an insurable interest as creditor. In *Supreme Lodge v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, where the plaintiff claimed as assignee of the policy, it was held that the trial court erred in refusing to permit the company to show the age of the insured at the time of the transfer, on the ground that this was a material factor in determining the character of the transaction, whether it was a wager or a bona fide transaction.

In *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. (N. Y.) 556, the court regarded plaintiff's application, wherein he stated that he had an interest in the life of the insured to the full amount of the insurance, as a sufficient proof of interest; the application having been accepted by the company. In *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, where the policy was taken out by the son on the life of his father, and the court held that the

mere relationship did not give an insurable interest, it appeared that the son resided with the father for several years after he became of age and worked for him; that he received no compensation, but made valuable improvements on the land, on a well-grounded expectation that his father would give him the land. The father, however, disposed of the property without paying him for the improvements. The court regarded these facts as evidence tending to show an insurable interest on the part of the son, but not such as could be declared by the court to constitute an insurable interest.

In *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, where the plaintiff claimed as creditor, the court held that, in view of the fact that wagering contracts are denounced by public policy, proof of indebtedness to the creditor should be distinct and satisfactory, and the mere statement in the proof of death that plaintiff is a creditor is not sufficient to establish his interest.

The sufficiency of the evidence was also considered in *Globe Mut. Life Ins. Ass'n v. Wagner*, 90 Ill. App. 444, *Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S. W. 379, and *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372.

(h) Questions for jury and instructions.

The general rule is that whether a policy is a wagering contract is a question for the jury.

This rule is laid down in *Brockway v. Mutual Ben. Life Ins. Co. (C. C.)* 9 Fed. 249; *Bloomington Mut. Ben. Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518; *Johnson v. Van Epps*, 14 Ill. App. 201; *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187.

On the other hand, it has been held, in *Brett v. Warnick*, 44 Or. 511, 75 Pac. 1061, to be a question of fact for the court whether an agreement, sought to be enforced in equity, by which the interest in a benefit certificate is to belong to a person not having an insurable interest in the life of the insured, falls under the ban of the law as a wagering contract. Similarly, it was held, in *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380, that the question whether a person to whom a policy is issued on the life of another has an insurable interest is a question of law, though it would seem that in *Supreme Lodge v. Metcalf*, 15 Ind. App. 143, 43 N. E. 893, a question as to the insurable interest of

an assignee was regarded as for the jury. Generally the insurable interest of a creditor is a question for the jury.

Fox v. Penn Mut. Life Ins. Co., 4 Bigelow, Ins. Cas. (Pa.) 458; **Brockway v. Mutual Ben. Life Ins. Co.** (C. C.) 9 Fed. 249.

The amount of the indebtedness which measures the beneficial interest of the creditor is a question for the jury (**Morris v. Georgia Loan Savings & Banking Co.**, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506). Where the facts are not in dispute, the question whether a policy taken out by a creditor on the life of his debtor is so excessive in amount as to be a wagering policy is a question for the court (**Ulrich v. Reinoehl**, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534). So, in **Cooper v. Shaeffer** (Pa.) 11 Atl. 549, it was held that, where a policy for \$3,000 is taken out and assigned to secure a debt of \$100, the court may say, as a matter of law, that the transaction is a wager. In **Seigrist v. Schmoltz**, 113 Pa. 326, 6 Atl. 47, the court, holding that the rule of law respecting insurable interest is founded on considerations of public policy, said that an instruction to the effect that, under the facts in the case, the question whether the transaction was speculative or in good faith on benevolent motives was entirely one of fact, was erroneous.

IV. FORM AND REQUISITES OF THE CONTRACT.

1. Agreements to procure insurance and liabilities thereunder.
 - (a) Scope of discussion.
 - (b) Nature, requisites, and validity of agreement.
 - (c) Duties assumed under agreement.
 - (d) Same—Amount of insurance.
 - (e) Nonperformance and excuses therefor.
 - (f) Same—Inability to procure insurance.
 - (g) Nature and extent of liability.
 - (h) Rights of person contracting to procure insurance—Subrogation.
 - (i) Pleading and practice.
2. General powers and liabilities of agents in respect of the contract.
 - (a) Scope of discussion.
 - (b) Powers of agents in general.
 - (c) Same—Delegation of powers.
 - (d) Same—Distribution of risk.
 - (e) Same—Agency for both parties.
 - (f) Same—To issue policy to himself.
 - (g) Limitations on powers of agents.
 - (h) Same—Limitations as to character of risk.
 - (i) Same—Territorial limitations.
 - (j) Liabilities of agents.
 - (k) Same—Writing insurance in unauthorized or insolvent company.
3. Executory agreements to insure.
 - (a) Validity of agreement.
 - (b) Contract may be oral.
 - (c) Nature and requisites of executory contract.
 - (d) Presumption as to usual conditions of policy.
 - (e) Payment of premium.
 - (f) Commencement of risk.
 - (g) Merger of executory agreement in policy.
 - (h) Powers of agents—In general.
 - (i) Same—Subagents—Life insurance.
 - (j) Same—Soliciting agents.
 - (k) Same—Statutes.
 - (l) Same—Limitations on agents' powers.
 - (m) Action on agreement—Remedies—Jurisdiction.
 - (n) Same—Pleading.
 - (o) Same—Evidence.
 - (p) Same—Damages—Trial—Appeal.
4. Validity of oral contracts of insurance.
 - (a) Scope of discussion.
 - (b) Nature and requisites of the oral contract.
 - (c) Validity of oral contract—Common-law doctrine.
 - (d) Same—Present doctrine.

4. Validity of oral contracts of insurance—(Cont'd).
 - (e) Same—Life and accident insurance.
 - (f) Same—Renewal.
 - (g) Statutory and charter provisions.
 - (h) Mutual companies.
 - (i) Statute of frauds.
 - (j) Powers of agents.
 - (k) Presumption as to terms.
 - (l) Pleading and practice.
5. Completion of contract—Application or offer and acceptance.
 - (a) Application and necessity therefor in general.
 - (b) Necessity of mutuality.
 - (c) Necessity of acceptance or approval.
 - (d) Withdrawal of application.
 - (e) Power of agent to accept or prove application.
 - (f) What constitutes acceptance or approval.
 - (g) Same—Necessity of notice of acceptance.
 - (h) Same—Effect of delay in acceptance or failure to give notice of rejection.
 - (i) Effect of acceptance or approval.
 - (j) Rejection and notice thereof.
 - (k) Offer to insure and acceptance thereof.
 - (l) Matters peculiar to mutual benefit associations.
6. Completion of contract—Execution of policy.
 - (a) Necessity and sufficiency of execution.
 - (b) Necessity of seal.
 - (c) Countersigning by agent.
7. Completion of contract—Delivery and acceptance of policy.
 - (a) Necessity of delivery of policy.
 - (b) Sufficiency and effect of delivery.
 - (c) Same—Conditional delivery.
 - (d) Same—Delivery to and possession by agent.
 - (e) Same—Mutual benefit certificates.
 - (f) Same—Condition requiring delivery while insured is in good health.
 - (g) Same—Effect of death of insured or destruction of property before delivery.
 - (h) Same—Questions of practice.
 - (i) Necessity of acceptance.
 - (j) Sufficiency and effect of acceptance.
8. Completion of contract—Payment of first premium.
 - (a) Necessity of payment of premium to bind company.
 - (b) Same—Conditions requiring prepayment of premium.
 - (c) Same—Deposit of premium note required by mutual companies.
 - (d) Same—Payment of dues and advance assessments in mutual benefit associations.
 - (e) Same—Payment before loss or during lifetime or good health of the insured.
 - (f) What constitutes payment.
 - (g) Effect of part payment—Time of payment.

8. **Completion of contract—Payment of first premium—(Cont'd)**
 - (h) **Payment to agent or broker.**
 - (i) **Giving credit for premium.**
 - (j) **Payment by agent or broker.**
 - (k) **Payment by note.**
 - (l) **Same—Effect of failure to pay note at maturity.**
 - (m) **Effect of payment.**
 - (n) **Effect of receipt for premium.**
 - (o) **Pleading and practice.**
9. **Estoppel and waiver as to payment of first premium.**
 - (a) **Estoppel and waiver in general.**
 - (b) **Powers of officers and agents to waive payment.**
 - (c) **Same—Conditions limiting the powers of agents.**
 - (d) **Waiver by custom and course of dealing.**
 - (e) **Waiver implied from acts, conduct, or statements of insured.**
 - (f) **Waiver by delivery of policy.**
 - (g) **Effect of acknowledgment in policy of receipt of premium.**
 - (h) **Pleading and practice.**
10. **Matters relating to the form and contents of the policy in general.**
 - (a) **Requisites of the contract in general.**
 - (b) **Policy defined.**
 - (c) **Kinds of policies.**
 - (d) **Same—Valued and open policies.**
 - (e) **Same—Running policies.**
 - (f) **Same—Blanket, floating, and specific policies.**
 - (g) **Same—Voyage and time policies.**
 - (h) **Same—Life policies.**
 - (i) **Form and contents of policy.**
 - (j) **Standard policies.**
 - (k) **Size and style of type used in policies.**
 - (l) **Contracts of mutual benefit associations and changes therein.**
11. **Binding slips, receipts, or memoranda.**
 - (a) **Validity of binding slips, receipts, or memoranda.**
 - (b) **Nature and requisites.**
 - (c) **Conditions embraced in contract—Payment of premium.**
 - (d) **Powers of agents.**
 - (e) **Pleading and practice.**

1. AGREEMENTS TO PROCURE INSURANCE AND LIABILITIES THEREUNDER.

- (a) Scope of discussion.
- (b) Nature, requisites, and validity of agreement.
- (c) Duties assumed under agreement.
- (d) Same—Amount of insurance.
- (e) Nonperformance and excuses therefor.
- (f) Same—Inability to procure insurance.
- (g) Nature and extent of liability.
- (h) Rights of person contracting to procure insurance—Subrogation.
- (i) Pleading and practice.

(a) Scope of discussion.

It sometimes happens that a person, not himself an insurer, enters into an agreement to procure, or to procure and keep in force, insurance on property. It is, of course, obvious, as said in *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901, that one may recover damages for a breach of a contract to procure insurance as for the breach of any valid contract. But the exact nature and extent of the liability incurred is not so apparent, and it is this question that is to be discussed in the following paragraphs. It must be remembered, however, that the ordinary liabilities arising under covenants to insure in leases, mortgages, etc., or from the duty of lessees, mortgagors, warehousemen, etc., to insure, are not included in this discussion.¹

(b) Nature, requisites, and validity of agreement.

In the majority of the cases no question seems to have been raised whether the contract involved constituted an agreement to insure. It is only in a few instances that it has been necessary, first, to determine the nature of the contract. In *Marquardt v. French* (D. C.) 53 Fed. 603, a carrier, on receiving goods for shipment, delivered to the consignors a bill of lading stamped "Insured, B. to M., \$5,400; premium paid." As the carrier was not in the insurance business, and the indorsement on the bill was a

¹ Duty to insure: Bailees, see Cent. Dig. vol. 6, "Bailement," cols. 30, 31, § 34; lessees, see Cent. Dig. vol. 32, "Landlord and Tenant," cols. 633, 634, §§ 567-570; life tenants, see Cent. Dig. vol. 33, "Life Estates," col. 62, § 40; mortgagors, see Cent. Dig. vol. 35, "Mortgages," cols. 1019-1021, §§ 532, 533; warehousemen, see Cent. Dig. vol. 48, "Warehousemen," col. 2029, § 17.

form commonly used by carriers to designate that insurance would be procured, it was held that such indorsement constituted merely a contract to procure insurance, and not a contract of insurance. Similarly in *The City of Clarksville* (D. C.) 94 Fed. 201, an indorsement by the master of the vessel that the goods were insured in consignee's open policy was held to constitute merely an undertaking to procure insurance. On the other hand, it has been held that a mere recital in a warehouse receipt, "All cotton stored with us fully insured," does not, by itself, constitute a contract requiring the warehouseman to insure cotton for his customer, so as to render him liable for the value, if the cotton is destroyed (*Atwater v. Hannah*, 116 Ga. 745, 42 S. E. 1007). In *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390, the liability incurred by a carrier under an agreement to procure insurance was held not to be a liability as carrier or warehousemen, which would warrant a recovery on a policy insuring such carrier on its liability as a warehouseman.

In *Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266, the defendant interposed a counterclaim based on a breach of plaintiff's contract to procure insurance on the property, which was claimed under a chattel mortgage. The evidence showed that plaintiff, by its agent, required defendant to insure the property for the purpose of increasing the security; that defendant signed an application for insurance, and delivered it, together with a note for the premium, to the plaintiff. The application was on a printed blank, addressed to plaintiff, requiring it to procure insurance on the property, with a direction that the policy should be written payable to plaintiff as its interest might appear. It was held that, under such evidence, it was properly left to the jury to determine whether there was an implied contract on the part of plaintiff to procure insurance. Where defendant leased certain premises of plaintiff, agreeing in the lease to keep in force insurance on the property for the benefit of plaintiff, as in *National Mahaiwe Bank v. Hand*, 80 Hun, 584, 30 N. Y. Supp. 508, the court held that the contract was merely one of lease, and not one for insurance under which the defendant could be held as an insurer. A similar view seems to have been taken on a second appeal reported in 89 Hun, 329, 35 N. Y. Supp. 449. So, in *Southern Building & Loan Ass'n v. Miller*, 110 Fed. 35, 49 C. C. A. 21, where a mortgage contained an agreement by the mortgagors to insure for the protection of the mortgagee, and a further provision that, if they failed to in-

sure, the mortgagee might insure and charge the premium to them, it was held that the provision in the mortgage was not an agreement on the part of the mortgagee to procure insurance, but merely an option. Where a will creating life estates provided that insurance on the property should be a charge on the estate itself, it was held, in *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. 615, that this did not mean merely that the life tenant should procure insurance on his own interest, but that the life tenant should, at the risk of the consequences of committing waste, if neglected, insure for the benefit of the whole property.

In *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453, the question seems to have been raised as to the power of a building society to make an agreement to insure. The court held, however, that, as the company was expressly authorized to provide for the security of its loans, no reason could be perceived why, as incident to such security, it should not be within its powers to contract for insurance. So, in *Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515, it was said that, as a railway company has power to lease and maintain a hotel on the line of its road, it also has power to agree to procure and maintain insurance on such property.

Since one cannot be agent for both the insurer and the insured,² an insurance agent cannot be held liable on an agreement to procure insurance; such agreement, according to *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197, being contrary to public policy.

That the agreement to procure insurance must be supported by a consideration was laid down in *Thorne v. Deas*, 4 Johns. (N. Y.) 84, where such an agreement was held void for want of a consideration. Yet, where the promisor actually procures insurance under his agreement, thus lulling the promisee into security, he will be liable for his negligence or malfeasance, though there was no consideration.

Such, at least, would seem to be the doctrine of *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *French v. Reed*, 6 Bin. (Pa.) 308, and *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 482.

Where a railway company agreed to keep insured a hotel which it had leased, as in *Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515, it was said that the

² See Cent. Dig. vol. 28, "Insurance," cols. 638, 639, § 123.

obligation of the lessor to rebuild and repair in case of fire, and the stipulation that the rent should be suspended so long as the premises were uninhabitable, formed a sufficient consideration to support the agreement to insure.

(c) Duties assumed under agreement.

The general rule that a contract made in one state to obtain insurance upon property situated in another state imports the procuring of a policy enforceable in either state was asserted in *Landusky v. Beirne*, 80 App. Div. 272, 80 N. Y. Supp. 238, affirmed in 178 N. Y. 551, 70 N. E. 1101; and in the same case it was said that a contract to obtain a good policy of insurance implied the procuring of insurance from a company able and willing to pay the loss.

▲ similar rule seems to have been laid down in *Shepard v. Davis*, 42 App. Div. 462, 59 N. Y. Supp. 456, and *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432; *Id.*, 82 Mo. App. 546.

But it was said, in *Vann v. Downing*, 48 Leg. Int. (Pa.) 264, that one will not be liable under a contract to procure insurance, if he places insurance in a company which turns out to be insolvent, unless he knew or had reason to believe it to be insolvent. It was said, in *Gettins v. Scudder*, 71 Ill. 86, where a trustee under a trust deed was to select the companies in which insurance on the property should be placed, that the trustee was bound to exercise due care in the selection of good and solvent companies; but he did not become a guarantor of their continued solvency, and if the companies were solvent, or were generally considered solvent and so dealt with, the trustee would be justified in his selection, though the companies were afterwards proved to be insolvent. A similar doctrine was asserted in *Winans v. Manning*, 62 Kan. 865, 61 Pac. 393, where a mortgagee attempted to assist the mortgagor in procuring the insurance according to his agreement. The mortgagee negotiated with several companies, one of which finally accepted the risk. It was discovered that the company was worthless, but it was held that the mortgagee could not be held liable. So, in *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390, it was said that one who, in the performance of an agreement to procure insurance, in the exercise of ordinary diligence, procures a policy in a company which afterwards proves to be insolvent, is not liable therefor; and such, too, seems to be the doctrine of *Sawyer v. Mayhew*,

51 Me. 398. If a broker furnishes what purports to be a policy, but in fact there is no such company in existence, he is liable, according to *Vann v. Downing*, 48 Leg. Int. (Pa.) 264, as he had represented such company to be in existence, and is therefore responsible.

In line with this decision are *Burges v. Jackson*, 18 App. Div. 296, 46 N. Y. Supp. 828, and *Shepard v. Davis*, 42 App. Div. 462, 59 N. Y. Supp. 456, where it was said that brokers, agreeing to procure insurance, will be presumed to have the requisite knowledge, information, ability, and skill to accomplish such purpose, and, if they place the insurance in a company which has not been authorized to do business in the state, they are chargeable with negligence and liable for the consequent injury.

Under agreements to procure and keep in force insurance on property, it is the duty of the promisor not to allow insurance to lapse at the expiration thereof, but to renew it from time to time.

This principle may, apparently, be deduced from *Rhone v. Gale*, 12 Minn. 54 (Gil. 25); *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312; *Wood v. Prussian Nat. Ins. Co.*, 75 N. W. 173, 99 Wis. 497; *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432; *Id.*, 82 Mo. App. 546. In this connection, see *Stadler v. Trever*, 86 Wis. 42, 56 N. W. 187.

But the contract cannot be enforced against the executrix of the broker, where the only cause of action is the mere failure to replace lapsed policies (*Backus v. Ames*, 79 Minn. 145, 81 N. W. 766). Where such an agreement is made by an agent of the company, the latter cannot be held liable thereon.

Sargent v. National Fire Ins. Co., 86 N. Y. 626; *Shank v. Glens Falls Ins. Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14; *Brown v. Dutchess County Mut. Ins. Co.*, 64 App. Div. 9, 71 N. Y. Supp. 670; *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497, 75 N. W. 173.

Yet, according to *Stewart v. Helvetia Swiss Fire Ins. Co.*, 102 Cal. 218, 36 Pac. 410, the owner might make the agent liable for the damages sustained on account of his negligence. A different rule, however, seems to have been laid down in *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197, on the ground that such an agreement by the agent of the company is against public policy.

(d) Same—Amount of insurance.

In the leading case of *Beardsley v. Davis*, 52 Barb. (N. Y.) 159, it was said that where the agreement to insure is general, and there

is no difficulty in procuring full insurance, it must be regarded as the duty of the promisor to obtain insurance to the full value of the property.³ A similar rule was laid down in *Ela v. French*, 11 N. H. 356, another leading case on the subject, and in *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586. As indicated in *Cleaves v. Lord*, 3 Gray (Mass.) 66, the question as to the amount for which insurance is to be made is one of construction or evidence. A contract by a carrier to insure goods shipped was construed in *Scranton Steel Co. v. Ward's Detroit & Lake Superior Line (C. C.)* 40 Fed. 866. The court said that, as a promise by a carrier to insure goods is fulfilled by the procurement of a policy in a responsible company to the full insurable value of the property, it follows that, where a carrier agreed to insure a certain cargo, the obligation was substantially complied with by causing the cargo to be insured to the full amount of the loss subsequently sustained, though such insurance did not extend to the full value of the cargo.

(e) Nonperformance and excuses therefor.

In a general way it may be said, as in *Manny v. Dunlap*, 16 Fed. Cas. 658, that where one agrees to procure insurance, and without good reason neglects to do so, he is liable for all loss that may occur that would have been covered by such insurance; and if he has undertaken to effect insurance, but has done it in a manner so negligent and unskillful that the loss which occurs is not covered by the policy, he is liable therefor. As has been already shown, procuring insurance in a company not authorized to do business in the state, or which is insolvent, to the knowledge of the agent, is not a performance of the contract. The rule on which this principle is based seems to be, as stated in *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432, that, though there is no consideration for the promise, if the promisor enters upon the performance of the agreement, he would be liable for misfeasance, though not for nonfeasance. This rule was laid down in the early case of *French v. Reed*, 6 Bin. (Pa.) 308, where the court said that though, in the absence of a consideration, the promisor was not liable for not insuring, if he undertook to insure and executed it badly, he was answerable for the consequences. So, in *Thorne v. Deas*, 4 Johns. (N. Y.) 84, where there was no consideration for the agreement,

³ See Sutherland, *Damages* (2d Ed., 1893) vol. 3, § 772.

the court distinguished between nonfeasance and misfeasance, holding that, as the agreement was a voluntary executory contract or mandate, the mandatary was not answerable for nonfeasance, but only for misfeasance, if he had in fact attempted to procure the insurance; calling attention, at the same time, to the distinction between mandate at common law and mandatum in the civil law. Under the civil law, the mandatary would be liable for nonfeasance, as well as for misfeasance.

Where the promisor procured the insurance, but failed to pay the premium therefor, by reason of which the policy became void, it was a breach for which he was liable (*Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814). A similar doctrine may be inferred from *Haight v. Kremer*, 9 Phila. (Pa.) 50, though in this case the company compromised the claim on the policy, and it was held that the property owner, by accepting the compromise, waived his claim against the promisor. Where a mortgagee agreed to maintain insurance on the life of the mortgagor, his failure to pay the premiums, by reason of which the policy lapsed, was held to be a breach of his agreement (*Soule v. Union Bank*, 45 Barb. [N. Y.] 111). In an early case (*Alsop v. Coit*, 12 Mass. 40) a property owner, in arranging the terms of the contract, made misrepresentations as to certain facts material to the risk. It was held, therefore, that as the policy, if procured, would have been void by reason of such misrepresentations, the defendant, who had agreed to procure the insurance, was not liable for his failure to perform. But it was said, in *Sawyer v. Mayhew*, 51 Me. 398, where the policy taken out was not in the name of the owner, but in the name of the promisor, who had no interest,⁴ and was therefore void, that the owner could not raise the objection and seek to hold the promisor liable, if the insurance company did not seek to avoid the policy on that account.

In *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586, an agreement between the cotton press company and a railroad company provided that the railroad should deposit all cotton received by it for shipment with the cotton press company to be compressed, and that the latter should procure insurance on such cotton while in its possession. It was held that the cotton press company was bound to insure the cotton for its full value, and that its liability to the shippers to insure

⁴ Insurable interest under contract to procure insurance, see ante, p. 170.

did not terminate with the issuance of a bill of lading and the surrender of the drayage tickets to the railroad company, if the cotton press company continued to hold the cotton in its warehouse after the issuance of such bill of lading. On the other hand, if the owner does not rely on the obligation of a warehouseman to procure insurance on goods intrusted to his care, but himself effects other insurance in good and solvent companies (*Deming v. Merchants' Cotton Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518), the owner cannot be heard to say that he has been injured by the failure of the warehouseman to procure insurance according to the agreement. A similar doctrine was asserted in *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638, where it was held that, if one who has agreed to insure neglects to do so, the act of the owner in assuming the duty of insuring for part of the time terminates the agreement and releases the promisor from the duty of insuring after that time. In *Prichard v. Deering Harvester Co.*, 117 Wis. 97, 93 N. W. 827, it appeared that plaintiff had entered into an agency contract with defendant in 1898, under which he agreed to keep insured the property of defendant under his control. In the latter part of the year the accounts between plaintiff and defendant were checked up, and a new contract was signed in the season of 1899, which, however, was not binding until accepted by defendant. Subsequently, and before the new contract was accepted, the property of defendant in plaintiff's possession was destroyed. It was held that the contract of 1898 was still in force at the time of the fire, so that plaintiff was liable for a failure to procure insurance.

(2) Same—Inability to procure insurance.

It is the general rule that the person agreeing to procure insurance must use diligence in performing his obligation, and must notify the property owner of his inability to procure a policy (*Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266). In *Jacksonville, M., P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515, where a railroad company had agreed to keep insured certain leased premises, the company attempted to excuse its negligence on the ground of inability to procure insurance. The court held, however, that the mere fact that the company had been told by two or three agents to whom it had applied for insurance that the property was not insurable did not show such an impossibility of performance as to excuse the non-

performance. But, as said in *Backus v. Ames*, 79 Minn. 145, 81 N. W. 766, where one undertakes to procure insurance for another, it is his duty, if he is unable to do so, to seasonably notify his principal; but such duty does not arise until after the lapse of a reasonable time in which to make due effort to place the insurance, and if such time has not expired, and the property is destroyed by fire, he is not bound thereafter to give notice. If the owner is notified in sufficient time (*Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638) that the property is inadequately insured, it is his duty to effect additional insurance, if he deems it necessary, and, failing to do so, he cannot recover of the person agreeing to procure the insurance.⁵

(g) Nature and extent of liability.

In the leading case of *De Taslet v. Crousellat*, 7 Fed. Cas. 542 (No. 3,827), it was said that one who enters into an agreement to procure insurance and neglects to fulfill his obligation becomes himself the insurer and liable as such. This doctrine was reasserted on a subsequent trial of the case, reported in 7 Fed. Cas. 542 (No. 3,828).

A similar rule is asserted in *Shoenfeld v. Fleisher*, 73 Ill. 404, *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726, and *Morris v. Summerl*, 17 Fed. Cas. 829. See, also, *Gross v. New York & T. S. S. Co.* (D. C.) 107 Fed. 516.

So, in *Soule v. Union Bank*, 45 Barb. (N. Y.) 111, where a mortgagee agreed to procure and maintain a policy of insurance on the life of the mortgagor, but failed to pay the premiums and allowed the policy to lapse, it was held that the mortgagee must be considered as an insurer and liable to the same extent as the insurance company would have been if the policy had been maintained.

In view of the principle that, on the breach of the contract, the person agreeing to procure the insurance becomes the insurer, it has been laid down in numerous cases that the measure of damages, in the absence of any limitation as to the amount of the insurance to be procured, is the full value of the property. This is based on the principle, asserted in *Beardsley v. Davis*, 52 Barb. (N. Y.) 159, that where the agreement to procure insurance is general, and there is no difficulty in procuring the full insurance,

⁵ See *Sutherland, Damages* (2d Ed., 1893) vol. 3, § 772.

the fair and reasonable construction of the agreement is that the party undertakes to procure a contract for full indemnity.

This rule is also asserted in *French v. Reed*, 6 Bin. (Pa.) 308; *Bissel v. Terrell*, 18 La. Ann. 45; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Smith American Organ Co. v. Abbott*, 11 Pa. Co. Ct. R. 319; *Ela v. French*, 11 N. H. 356; *Cleaves v. Lord*, 3 Gray (Mass.) 66; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814.*

He is, however, entitled to credit for the amount of the premiums, according to *De Taslet v. Crousellat*, 7 Fed. Cas. 542; *Shoenfeld v. Fleisher*, 73 Ill. 404, and *Storer v. Eaton*, 50 Me. 219, 79 Am. Dec. 611.

If there is a partial insurance on the property, the measure of damages, as stated in *Beardsley v. Davis*, 52 Barb. (N. Y.) 159, is the value of the property destroyed, reduced by the amount received under such partial insurance.

If the agreement to procure insurance specifies a certain amount to be procured, the measure of damages is the amount of the loss, not exceeding the amount of insurance to be procured.

This is the rule laid down in *Criswell v. Riley*, 30 N. E. 1101, 32 N. E. 814, 5 Ind. App. 496; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Everett v. O'Leary*, 95 N. W. 901, 90 Minn. 154; *Landusky v. Beirne*, 80 N. Y. Supp. 238, 80 App. Div. 272; *Vann v. Downing*, 48 Leg. Int. (Pa.) 264; *Land Mortgage Investment & Agency Co. of America v. Gillam*, 49 S. C. 345, 26 S. E. 990; *Morris v. Summerl*, 17 Fed. Cas. 829.

This rule was applied in an early case to an agreement to procure insurance on the life of another. Thus, in *Gray v. Murry*, 3 Johns. Ch. (N. Y.) 167, where one undertook to procure and maintain insurance on the life of a person about to start on a sea voyage, and after the expiration of one year had the policy canceled and another issued for a smaller amount, it was held that the person undertaking to procure the insurance was liable to the legal representatives of the insured for the amount of the original policy, which he had caused to be canceled, less the premium thereon.

An interesting case is *Miner v. Tagert*, 3 Bin. (Pa.) 204. The action was brought against defendants for neglect to insure \$3,000 on a brig pursuant to agreement. Defendants admitted their liability, but contended that there was an overvaluation, which released them under a stipulation that they might avail themselves of any defense which the underwriters might have urged in case the policy had been issued. In the letter directing the procuring

* See *Sutherland, Damages* (2d Ed., 1893) vol. 3, § 772; *Mechem, Agency*, § 475.

of the insurance, the owner stated that the brig was valued at a certain sum and wished insurance on three-fourths thereof. The court held that, if a policy had been effected, it would have been a valued policy, under which the underwriters could not have urged misrepresentation as to value, and, consequently, defendants' liability was to be measured in the same manner as though a valued policy had been written. In *City of Detroit v. Grummond*, 121 Fed. 963, 58 C. C. A. 301, where a vessel was hired by a city for hospital purposes, with an agreement to procure insurance on the vessel, the court held that the measure of damages for the failure to procure insurance against fire would be the extent to which the property had been depreciated in value, not exceeding the amount of insurance agreed to be procured, and that the full value of the boat could not be recovered by the owner by abandoning, under the rules of marine insurance, as the contract was not one of marine insurance, but of fire insurance merely. Where, by virtue of an option to purchase lumber, the buyer advanced \$2,000 in cash, and the seller agreed to insure the lumber (*Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471), it was held that on the destruction of the property the buyer was entitled to recover only the amount advanced; the lumber not having been separated from other lumber belonging to the seller. Under a building contract the owners agreed to insure the building for the protection of both parties according to their respective interests pending work. In violation of the agreement the owners took out insurance in their own names only, the amount being \$15,000. On this state of facts it was held, in *McAlpine v. Trustees of St. Clara Female Academy*, 101 Wis. 468, 78 N. W. 173, that the owners were liable to the contractor for breach of their contract to insure for such part of the \$15,000 as his proportion of the value of the building when destroyed bore to its entire value. Where the agreement was to insure property conveyed in trust in such sums and amounts as the mortgagee should deem proper (*Keith v. Crump*, 22 Ind. App. 364, 53 N. E. 839), the amount was so far discretionary with the mortgagee as to present no basis for damages on his failure to take out insurance, and at best he was liable only for nominal damages.

(b) Rights of person contracting to procure insurance—Subrogation.

One contracting to procure insurance has a lien on policies in his hands for premiums paid by him (*McKenzie v. Nevius*, 22 Me.

138, 38 Am. Dec. 291). But his lien is gone if he part with the policy (*Cranston v. Philadelphia Ins. Co.*, 5 Bin. [Pa.] 538). On the failure of the property owner to take the insurance procured by his agent under the contract, the agent may recover such damages as he may be able to show himself entitled to.

Tanenbaum v. Greenwald, 73 N. Y. Supp. 873, 67 App. Div. 473; *Same v. Freundlich*, 81 N. Y. Supp. 292, 39 Misc. Rep. 819; *Same v. Simon*, 82 N. Y. Supp. 1116, 84 App. Div. 642, affirming 81 N. Y. Supp. 655, 40 Misc. Rep. 174.

Where one who has agreed to procure insurance makes merely a verbal contract for insurance, so that he becomes liable to the property owner for the amount of the loss, he is nevertheless, according to *Manny v. Dunlap*, 16 Fed. Cas. 658, entitled to an assignment of the owner's right of action on such contract against the company, and may sue thereon.

(1) Pleading and practice.

A contract to procure insurance on a vessel is not a maritime contract, of which admiralty has jurisdiction.

Marquardt v. French (D. C.) 53 Fed. 603; *The City of Clarksville* (D. C.) 94 Fed. 201; *Reliance Lumber Co. v. Rothschild* (D. C.) 127 Fed. 745.

The question whether a contract to procure insurance exists is for the jury under the facts (*Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266); and in the same case it was said that the question whether the person agreeing to procure insurance uses diligence or is guilty of negligence in failing to notify the owner of his inability to procure insurance is a question for the jury. So, in *Cleaves v. Lord*, 3 Gray (Mass.) 66, it was held that it was a question for the jury whether the promise was to procure insurance for the full value of the property or for a specific sum. In *Brant v. Gallup*, 5 Ill. App. 262, the trial court charged the jury that, to establish an oral contract to procure insurance, it is necessary to prove that both parties understood the terms thereof alike and that there was a meeting of minds in relation thereto, and to show by a preponderance of evidence that defendant, as well as plaintiff, understood at the time of the conversation that he was binding himself to keep the property fully insured. This instruction was regarded as erroneous, as throwing upon the party seeking to establish the contract the burden, not only of proving its terms, but also of making affirmative proof that there

was no difference of understanding as to the meaning of the language employed, thus manifestly shifting the burden to the party upon whom it did not properly rest.

2. GENERAL POWERS AND LIABILITIES OF AGENTS IN RESPECT OF THE CONTRACT.

- (a) Scope of discussion.
- (b) Powers of agents in general.
- (c) Same—Delegation of powers.
- (d) Same—Distribution of risk.
- (e) Same—Agency for both parties.
- (f) Same—To issue policy to himself.
- (g) Limitations on powers of agents.
- (h) Same—Limitations as to character of risk.
- (i) Same—Territorial limitations.
- (j) Liabilities of agents.
- (k) Same—Writing insurance in unauthorized or insolvent company.

(a) Scope of discussion.

The present discussion is intended to treat of the general powers and liabilities of the insurance agent only so far as they relate to the contract of insurance and the rights of the insured thereunder. The powers and liabilities of the agent so far as they relate to the insurer and those dependent on the relation of principal and agent existing between the company and the agent do not come within the scope of the discussion, except in so far as they affect directly the rights of the insured under the contract.¹

(b) Powers of agents in general.

Though the powers of an agent may be limited by definite restrictions on his authority and by the nature of his agency, the determination of his powers, and consequently the rights of the insured, must rest in the first instance on the general principle that the powers of an agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. The real question is, not what power the agent has, but what power the company has held him out as having.

The principle is asserted in *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Bauble v. Aetna Ins. Co.*, 2 Fed. Cas.

¹ Creation of agency for insurer, and see Cent. Dig. vol. 28, "Insurance," rights and duties of agents in general, cols. 583-628, §§ 90-125.

1038; *Potter v. Phenix Ins. Co.* (C. O.) 63 Fed. 382; *Insurance Company of North America v. Forwood Cotton Co.*, 12 Ky. Law Rep. 846; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Hicks v. British America Assur. Co.*, 18 App. Div. 444, 43 N. Y. Supp. 623; *McCullough v. Hartford Fire Ins. Co.*, 2 Pa. Super. Ct. 233.

Thus it was said in *Western Home Ins. Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641, that where it appears that an agent is a general agent, and is so held out to the community in which he does business, as to third parties transacting business with him as such agent in good faith, without knowledge of his limited authority, the acts of such an agent must bind the principal. A similar principle would seem to have governed *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310, 33 N. W. 690.

But, as said in *Rivara v. Queen's Insurance Company*, 62 Miss. 720, the powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers in this respect may be limited by the companies.

In *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83), it is said that, though the person may be the general agent of an insurance company, it does not follow that he has authority finally to bind it. His authority may extend only to making bargains subject to the insurer's approval. It would seem, too, that the agency must be a general one in fact, and not merely a nominally general agency. Thus, in *Whitcomb v. Phoenix Mutual Life Ins. Co.*, 29 Fed. Cas. 964, it was said that, though an agent for a foreign insurance company is a general agent under Gen. St. Mass. c. 58, § 68, which requires the appointment of a general agent to accept process, this has nothing to do with his power to bind the company as to insurance, but only his power to represent the company in securing the enforcement of contracts, and therefore an agent only having power to forward applications and to counter-sign and deliver policies and receive the first premium is not clothed with authority to bind the company as to contracts, though he is its representative under the statute. So, too, it was said, in *Baldwin v. Connecticut Mutual Life Ins. Co.*, 182 Mass. 389, 65 N. E. 837, that there is no inference that a general agent of an insurance company in one state, who has permission to solicit insurance in another state, has any more power to bind the company in such state than an ordinary soliciting agent.

Generally speaking, an agent to whom blank policies have been supplied, with power to issue and deliver policies, may bind the company by a contract of insurance in the absence of any notice to the insured of limitations on his authority.

Reference may be made to *Bauble v. Aetna Ins. Co.*, 2 Fed. Cas. 1038; *Weeks v. Lycoming Fire Ins. Co.*, 29 Fed. Cas. 581; *Hicks v. British America Assur. Co.*, 13 App. Div. 444, 43 N. Y. Supp. 623; *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444; *National Mut. Fire Ins. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 185.

It is in accordance with this rule that it was said, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, affirming 29 Ill. App. 404, that, though an agent has authority to represent his company within the limited territory, and is therefore in a sense a local agent, such agent is not necessarily limited as to his authority to issue policies, provided the risk is located within his particular territory, and if such agent is supplied with blank policies, which he is authorized to fill up and countersign and deliver, he is a general agent, and as such may bind the company. So, where a company has deposited with the agent blank policies, with authority to issue same, as in *Marshall v. Reading Fire Ins. Co.*, 78 Hun, 83, 29 N. Y. Supp. 334, a subsequent revocation of the agent's authority, the blank policies being still left in his hands, does not affect one who received a policy from the agent without notice of such revocation.

A "surveying agent," authorized only to receive and forward applications, cannot bind the company by a contract of insurance.

Reference may be made to *Perkins v. Washington Ins. Co.*, 6 Johns. Ch. (N. Y.) 485; *Fleming v. Hartford Ins. Co.*, 42 Wis. 616; *Insurance Co. v. Johnson*, 23 Pa. 72.

But, according to *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223, where the appointment is as "agent and surveyor," the word "surveyor" cannot be regarded as limiting "agent," so as to limit the authority of the agent.

An agent whose powers are limited to receiving and forwarding applications for insurance cannot make a contract binding on the company.

This rule is asserted in *Greenwich Ins. Co. v. Waterman*, 54 Fed. 839, 4 C. C. A. 600, 6 U. S. App. 549; *Winnesheik Ins. Co. v. Holzgrafe*,

53 Ill. 516, 5 Am. Rep. 64; *Phoenix Ins. Co. v. Wilkes & Co.*, 10 Ky. Law Rep. 283; *Haden v. Farmers' & Mechanics' Ass'n*, 80 Va. 683; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

In accord with the foregoing principle is the rule that, though a solicitor of risks is in a certain sense an agent of the company, no binding contract can be made with him.

Such is the rule announced in *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466, 23 N. W. 926; *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516, 51 N. W. 29; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 39 Am. Rep. 277; *Morse v. St. Paul Fire & Marine Ins. Co.*, 21 Minn. 407; *Trask v. German Ins. Co.*, 53 Mo. App. 625; *Embree v. German Ins. Co.*, 62 Mo. App. 132; and *Haskin v. Agricultural Fire Ins. Co.*, 73 Va. 700.

It was, however, conceded, in *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64, that, if the insurer by its acts or acquiescence has led the public to believe that a mere soliciting agent has power to make contracts, the company will of course be bound. So far as contracts of life insurance are concerned, as said in *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48, the usage is so general that an agent of a life insurance company has no authority to conclude an agreement for insurance that, if such authority is claimed in a particular case, there should be affirmative evidence of such authority, or of its repeated exercise with the knowledge of the company.

Where an agent has power to issue a policy in the first instance, it will generally be conceded that he has power also to renew such policies.

Bauble v. Aetna Ins. Co., 2 Fed. Cas. 1038; *Taylor v. Germania Ins. Co.*, 23 Fed. Cas. 772; *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608, 36 U. S. App. 277; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641; *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292, affirmed 1 Abb. Dec. 316; *Squier v. Hanover Fire Ins. Co.*, 46 N. Y. Supp. 30, 18 App. Div. 575; *Franklin Fire Ins. Co. v. Massey*, 33 Pa. 221; *McCullough v. Hartford Ins. Co.*, 2 Pa. Super. Ct. 233; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521, 44 N. W. 828.

But such authority does not carry with it the power to bind the company in the first instance by an agreement that the policy shall be a continuing one until notice is given to the contrary (*Shank v. Glens Falls Ins. Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14).

Where the agent's duties extend no further than to solicit risks

and deliver policies, and he has no authority to pass on applications or issue policies, he has no power to change the rate of premium fixed by the company for the class of risk solicited.

London Guarantee & Acc. Co. v. Missouri & I. Coal Co., 103 Mo. App. 530, 78 S. W. 306; *London Guarantee & Acc. Co. v. Scott Willson Coal Co.* (Mo. App.) 78 S. W. 1132.

(c) Same—Delegation of powers.

The decisions as to the power of an agent to delegate his powers to a subagent are by no means uniform. In *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148, the rule was laid down that the general agent of an insurance company, who has power to issue policies, the signing and delivery of which involves the passing on the character of the risk, and therefore discretion on his part, cannot delegate his authority. This rule was approved in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, affirming 29 Ill. App. 404; but the case was distinguished from *McClure v. Insurance Co.*, in that the clerk was not called upon to pass on the character of the risk. Consequently his act in issuing a policy should be regarded as the act of the agent, and binding on the company, which had accepted the premiums and raised no question as to the validity of the policy. The rule laid down in *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 78, is that it is not within the scope of the authority of a subagent to make contracts of insurance binding on the company, where he is only employed to receive applications, forward them to the company, and to deliver policies issued, and collect premiums thereon. In *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. 298, it was said that a subagent, appointed "to receive proposals for insurance and fix rates of premiums and to receive money for policies and certificates of insurance," cannot make a contract for insurance binding on the company; but it is to be noted that in this case the building to be insured was of a class on which the company would not take risks.

On the other hand, it was said, in *International Trust Co. v. Norwich Union Fire Ins. Society*, 71 Fed. 81, 17 C. C. A. 608, 36 U. S. App. 277, that agents having charge of important agencies can employ persons to perform clerical and other work in the office, and assist them generally in the discharge of the various duties which such agents have to perform, and the acts done by such subordinate employes in the line of their duty are binding on the companies which the agents represent.

So it was said, in *Grady v. American Cent. Ins. Co.*, 60 Mo. 116, that, where an agent has power to issue policies on his own signature, he may appoint a subagent and delegate to him the power of signing the policy and issuing the same. In *May v. Western Assur. Co. (C. C.)* 27 Fed. 260, it was said that a general agent located in a city has authority to employ subagents or clerks, and that the company is bound by their acts, if ratified by the general agent. So, in *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30, it was held that, where the authority of the agent is to receive proposals, fix rates, and issue policies, he may authorize subagents to receive applications, which will be binding until acted on by him.

In accordance with the rule laid down in *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148, it was held in that case that an agent cannot delegate to his partner authority to bind the company. But where a member of a firm of insurance agents was agent for a certain company (*United Life, Fire & Marine Ins. Co. v. Insurance Co. of North America*, 42 Ind. 588), and while absent from his office his partner, who was not the agent for this special company, wrote a policy therein, which act was afterwards ratified by the agent, the company was bound. Where the commission of agency runs to a firm and authorizes the issuing of policies (*Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180), a surviving partner of the firm cannot exercise the powers so granted, and, of course, a subagent acting under him is also without authority to bind the company.

(d) Same—Distribution of risk.

It may be stated as a general principle that an agent representing a number of companies may designate the company which shall take a particular risk, application for which is made to him.

As said in *Fire Ins. Co. v. Sinsabaugh*, 101 Ill. App. 55, if an insurance company makes a person agent for it, who at the same time holds commissions from other companies, it must be held to know, from general observation, that it is the practice of such agencies to make selection of the insurer who is to assume a particular risk, and after the loss they cannot be heard to deny that such agent had authority to do so.

The rule is asserted in *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, affirming 4 Lans. 433; *Connecticut Fire Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 Ohio Dec. 60; and *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

But according to *Fitton v. Phoenix Assur. Co.* (C. C.) 25 Fed. 880, agents acting for several insurance companies do not have authority to bind them by joint policies, but only by policies executed for each company. It is not within the scope or the authority of agents acting for several companies to substitute the policy in one company for that of another, without the knowledge and consent of the insured.

Reference may be made to *London & L. Fire Ins. Co. v. Turnbull*, 86 Ky. 230, 5 S. W. 542, and *Stebbins v. Insurance Co.*, 60 N. H. 65.

(e) Same—Agency for both parties.

In view of the general principle that a person cannot act as agent for persons having antagonistic interests,² it may be stated as an established rule that an agent representing two companies, who has insured a risk in one of them and receives orders from the insurer to reinsure, cannot reinsure in the other company of which he is agent, without the consent of such other company first obtained.

The rule is supported by *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. (N. Y.) 132; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Id.*, 14 N. Y. 85; *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200, affirming 64 Hun, 485, 19 N. Y. Supp. 504.

As shown by *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, reversing in this regard 20 Barb. 468, such a defense is available in law as well as in equity, and the fact that the defense was not pleaded cannot be raised for the first time on appeal. But, according to *Fiske v. Royal Exchange Assur. Co.*, 100 Mo. App. 545, 75 S. W. 382, a fire policy is not avoided, as to the owner of the property covered, by reason of the fact that the agent of the company, when obtaining the policy, was also, without the company's knowledge, acting as agent for the mortgagee, to whom the policy was payable.

(f) Same—To issue policy to himself.

In view of the principle discussed in the foregoing paragraph, and the further principle that an agent cannot, in any matter in

² See Cent. Dig. vol. 40, "Principal and Agent," col. 847, § 146; col. 1374, § 588.

which he himself has an adverse interest, bind his principal,* is the rule that an agent authorized to accept risks and issue policies cannot approve the risk, binding the company, by issuing a policy on his own property. As was said, in *Spare v. Home Mut. Ins. Co.* (C. C.) 19 Fed. 14, the agent of an insurance company to receive and transmit applications for insurance, in making an application for his own benefit on his own property, is acting for himself only and cannot be considered the agent of the insurance company.

The rule is supported by *Fireman's Fund Ins. Co. v. McGreevy*, 118 Fed. 415, 55 C. C. A. 543; *Zimmermann v. Dwelling House Ins. Co.*, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698; *Bentley v. Columbia Ins. Co.*, 19 Barb. (N. Y.) 595; *Id.*, 17 N. Y. 421.

In *Ritt v. Washington Mar. & Fire Ins. Co.*, 41 Barb. (N. Y.) 353, it was held that an agent authorized to effect insurance on vessels, procure policies from the company, and deliver them to the insured has no power to accept an application as agent on property of which he is one of the owners, and if he does so, and fails to disclose his interest to the company, the policy is void. The invalidity of the policy does not rest on the materiality of the relation of the agent to the risk, but because it is against public policy to allow such an agreement to stand. The rule was applied in *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 South. 83, where it was held that an insurance policy issued by an agent to a company of which he is a director and officer is invalid. Similarly it was said, in *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 17 South. 282, 28 L. R. A. 220, 48 Am. St. Rep. 558, that an insurance agent who has been appointed receiver of property cannot of his own motion, without the consent of his principal, issue, as such agent, to himself as such receiver, a policy of insurance valid as against his principal, because the duties of the two positions are inconsistent. An agent authorized to accept risks and countersign policies cannot accept a risk on property owned by a partnership of which he is a member, and a contract for such insurance, made between him as agent and the other partner, is not binding unless ratified by the company (*Glens Falls Insurance Company v. Hopkins*, 16 Ill. App. 220).

(g) Limitations on powers of agents.

Though the powers of insurance agents to bind their principals may be limited by the companies, yet, as said in *Rivara v. Queen's*

* See Cent. Dig. vol. 40, "Principal and Agent," cols. 817-836, §§ 130-139.

Insurance Company, 62 Miss. 720, parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations, unless they had notice of them. The rule is well stated in *Commercial Fire Ins. Co. v. Morris*, 18 South. 34, 105 Ala. 498, where it is said that an insured, dealing with the general agent, acting within the scope of his authority, is not bound by secret instructions to the agent, of which he has no knowledge.

The general rule that notice of limitations on the agent's authority must be brought home to the insured is supported by *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Bauble v. Aetna Ins. Co.*, 2 Fed. Cas. 1038; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641; *Ins. Co. of North America v. Forwood Cotton Co.*, 12 Ky. Law Rep. 846; *Howard Ins. Co. v. Owens*, 13 Ky. Law Rep. 287; *Halle v. New York Life Ins. Co.*, 22 Ky. Law Rep. 740, 58 S. W. 822; *Brown v. Franklin Mutual Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534; *Hicks v. British America Assur. Co.*, 13 App. Div. 444, 48 N. Y. Supp. 623; *McCullough v. Hartford Ins. Co.*, 2 Pa. Super. Ct. 233.

In accordance with the foregoing principles is *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166, where the agent took a risk in an amount in excess of his authority. The court held, however, that, unless the insured knew of the limitations on the agent's authority, the company could not shield itself behind the unauthorized act of the agent.

The converse of this rule is obviously true. As said in *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 South. 143, if direct notice of limitations on an agent's authority, or any notice which a prudent man is bound to regard, is brought home to the assured, he is bound by it, and relies upon acts of the agent in excess of such limited authority at his peril.

Reference may also be made to *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Manufacturers' & Merchants' Mut. Ins. Co. v. Gent*, 13 Ill. App. 308; *Greenwich Ins. Co. v. Waterman*, 54 Fed. 839, 4 C. C. A. 600, 6 U. S. App. 549; *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48.

According to *Zell v. Herman Farmers' Mut. Fire Ins. Co.*, 75 Wis. 521, 44 N. W. 828, a recital in an insurance policy that the company is not liable for contracts made by it before they have been approved and certified in writing by the secretary relates only to contracts made by the agent after the execution and delivery of the policy, and is not notice to the applicant that the agent has

no authority to make a contract of insurance. Where a partner of the agent issued the policy in the name of the actual agent, this was in itself sufficient notice to put the insured on inquiry as to the extent of the partner's power (*McClure v. Mississippi Val. Ins. Co.*, 4 Mo. App. 148).

(h) Same—Limitations as to character of risk.

In *Reynolds v. Continental Ins. Co.*, 36 Mich. 131, it was held that the single circumstance that a person is local agent in a certain place is not equivalent to a declaration that he has power to insure every kind of property, and to exercise unlimited authority as to risks, modes, and terms. By itself it could imply nothing more than authority to insure in the mode allowed by the company's charter, and to take such risks as the policies of the company, in common use by its agents, would warrant. So it was said, in *Smith v. State Ins. Co.*, 58 Iowa, 487, 12 N. W. 542, that the fact that an insurance agent has authority to take one kind of risk does not raise the presumption that he has authority to take all kinds of risks.

On the other hand, in *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674, affirming 1 N. Y. St. Rep. 572, the court said: "A general agent may bind his principals by an act within the scope of his authority, although it may be contrary to his special instructions. The manner of conducting the business of insurance is so well known that a person may reasonably assume that one having the apparent power of a general agent is not limited by his instructions as to the class of risks he may insure." It may, however, be regarded as elementary that an agent has no authority to insure goods which he knows to have already been destroyed by fire (*Mead v. Phenix Ins. Co.*, 158 Mass. 124, 32 N. E. 945).

Generally speaking, it is probably true, as said in *Howard Ins. Co. v. Owens*, 13 Ky. Law Rep. 237, that a limitation on the powers of agents to the effect that they should not entertain or forward applications for insurance on a certain class of buildings must be regarded as applying only to soliciting agents, and not to one having plenary power to issue policies. So it was held, in *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. 298, that a subagent, authorized to receive proposals and collect premiums only, cannot bind the insurer, where the building is of a class not insured by the company. The rights of the insured cannot, however, be affected

by private instructions to agents prohibiting them from insuring certain classes of property, where the authority of the agent is apparently general, and notice of the restriction is not brought home to the insured.

The principle is supported by *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Howard Ins. Co. v. Owens*, 13 Ky. Law Rep. 237; *Howard Ins. Co. v. Owens' Adm'r*, 94 Ky. 197, 21 S. W. 1037; *Miller v. Scottish Union & Nat. Ins. Co.*, 101 Mich. 49, 59 N. W. 439, 45 Am. St. Rep. 389; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674, affirming 1 N. Y. St. Rep. 572; *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770; and *Johnson v. Scottish Union & Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. 416. And the limitation on the power of the agent must indicate clearly an intention to prohibit the risk. *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185, affirming 25 Hun, 563.

If the insured has notice that the agent is prohibited from insuring a certain kind of property, as in *Fleming v. Hartford Ins. Co.*, 42 Wis. 616, a policy covering such property is not binding on the company. The question then is as to what constitutes notice of the limitations on the agent's authority. In *Hartford Fire Ins. Co. v. Trimble*, 25 Ky. Law Rep. 1497, 78 S. W. 462, where an insurance agent had attempted to secure insurance for the applicant on a house tenanted by negroes, but failed because the company prohibited him from taking risks on such houses, it was held that the attempt and failure was notice to the applicant of the limitation of the agent's authority in that respect, so that a subsequent contract made by the agent, covering other property so inhabited, was not binding on the company. In *Smith v. State Ins. Co.*, 58 Iowa, 487, 12 N. W. 542, it was held that the fact that the agent, on an application for insurance on a blacksmith shop, did not deliver a policy, but merely received the application and forwarded it to the company, had a tendency to show a limitation on his power to insure all kinds of risks, and to rebut any presumption that might arise from his general authority. Where a special agent's instructions prohibited him from taking a risk on distilleries and steam sawmills, and the policy also contained such a prohibition (*Ætna Ins. Co. v. Maguire*, 51 Ill. 342), it was held that distilleries and steam sawmills in operation were meant, and that it did not apply to the buildings when not in use.

In *Consumers' Match Co. v. German Ins. Co.* (N. J.) 12 Ins. Law J. (N. S.) 180, it was said that, in view of the general rule that an agent has no power to insure a risk prohibited by his company, the fact that a policy purporting to insure such risk, duly signed, is in the agent's office, but has never been issued or delivered, is not available to support an alleged parol agreement to insure such a prohibited risk. But the company is estopped to assert that the policy was unauthorized, because issued to a mortgagee, when the agent who issued the policy had general power to insure, and received and paid over to the company the premium, which it still retains (*Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443). The agent of an accident insurance company, authorized to solicit risks, and permitted to be the sole judge as to whether a risk would be accepted, has power to waive a provision in a policy which he issued to a cripple that the policy did not insure any crippled person (*Standard Life & Accident Ins. Co. v. Holloway*, 72 S. W. 796, 24 Ky. Law Rep. 1856).

(1) Same—Territorial limitations.

It was said, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, affirming 29 Ill. App. 404, that though an agent has authority to represent his company within limited territory, and is therefore in a sense a local agent, he is not necessarily limited as to his authority to issue policies, provided the risk is located within his particular territory; and if he is supplied with blank policies, which he is authorized to fill up and countersign and deliver, he is a general agent, and as such may bind the company. Similarly it was held, in *St. Paul Fire & Marine Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240, that the authority conferred on an agent to fix rates of premiums, countersign insurance, renew and consent to the transfer of policies, to make indorsements on the same, or to vary the risk, at a certain place "and vicinity" embraces risks in the vicinity of the place for which he is appointed, which have previously been taken by an agent of a neighboring town, who had power to act at such place "and vicinity." In *Brownfield v. Phoenix Ins. Co.*, 26 Mo. App. 390, it was held that, as defendant's agents were constituted general agents by it for a certain locality, the fact that their authority was restricted as to extrahazardous risks beyond designated limits, was not binding upon insured, unless notice thereof was given him. But, as it appeared that the in-

sured had notice of the restriction, it was held that he could not recover.

The question has, however, been raised in several cases whether an agent for a certain locality has authority to bind the company by contracts covering property situated outside of the designated territory. In a comparatively early case (*Lightbody v. North American Ins. Co.*, 23 Wend. [N. Y.] 18), where the defense was that the agent had no authority to take risks outside of a certain territory, the court held that, as he was a general agent acting within the apparent scope of his authority, the defense was not available, in the absence of anything to show that the insured had knowledge of any limitation on his authority.

This rule has also been approved in *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Hahn v. Guardian Assur. Co.*, 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

In the last case it was said, also, that the mere fact that, in the introductory portion of his commission, the person appointed was designated as "of" a certain city did not indicate that his authority as agent was limited to that city.

The Supreme Court of Alabama has taken the opposite view of this limitation on the power of the agent. In *Insurance Company of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30, it was held that, where defendant's agent was empowered to issue policies within certain designated territory only, defendant was not liable for a loss under a policy issued on property without such territory. The court said: "While there may be a case or two which seems to hold that an agent under such commission may bind his principal beyond the territorial limits of his agency, upon the bare consideration that within such limits he is the general agent, we cannot subscribe to the doctrine. It would be, in effect, to deprive the principal of all power to circumscribe the territory to be covered by the agent. * * * To the contrary, we hold that under such appointment the authority of the agent, though he be a general agent within the broadest sense, within the prescribed area, cannot be exercised by himself or by subagents outside of the territorial limits set down in his commission." In accordance with this view of the case, the court held that where the contract was made with a subagent appointed by a general agent, and there is a question as to whether or not the property was situated within the territory given to the general agent, acts and

declarations of such general agent, tending to show the limits of the territory embraced in his agency, are admissible in evidence. Justice Tyson dissented on the theory that, though the agent's commission was not in evidence, it would be presumed that he had complied with the laws of the state relating to agents of foreign insurance companies, and that he was therefore authorized to transact business anywhere in the state. Consequently secret limitations on his authority, imposed by the company, could not be enforced against one who had no knowledge thereof.

The general right of the company to limit territorially the authority of its agents is recognized in *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* (C. C.) 13 Fed. 74, where the court said that, if the agency is confined to a certain territory, the fact that the agent is a general agent will not authorize him to take risks outside of such territory. But the court said that contracts on property outside of such territory were not absolutely void. If ratified by the company, they were binding, though the agent had exceeded his authority. So, too, it was held in *Fireman's Fund Ins. Co. v. Rogers*, 108 Ga. 191, 33 S. E. 954, that the contract would not be binding on the company, if the local agent had no authority to insure property, except within certain territorial limits, and this instruction was known to the applicant. The statute of Kansas requires foreign companies doing business in the state to have agents established therein who must comply with certain conditions, and also requires such companies to prevent other agents from making insurance in the state. Application was made to an agent in Kansas City, Missouri, of a company having an established agent in Kansas, for insurance; the fact that there was an agent in Kansas being known to both the applicant and the Missouri agent. It was held (*Potter v. Phenix Ins. Co.* [C. C.] 63 Fed. 382) that, in view of the knowledge of the applicant, there could be no presumption in his favor that the Missouri agent was authorized to insure property in Kansas.

Whether the property insured was within or without the prescribed limits is a question for the jury (*Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674).

(3) Liabilities of agents.

It seems to be the doctrine of *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92, that an agent who without authority makes an insurance contract may be held liable thereon; but it was said that an

action on the case for deceit, and not *assumpsit*, is the proper form of action. A leading case, which may fairly be regarded as involving the question of unauthorized contracts, is *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718. In this case it appeared that the agent issued a policy covering a certain store, and in response to inquiry advised the insured that a condition therein, providing that petroleum could not be kept on the premises without the written consent of the company, did not apply to the keeping of a single barrel of petroleum, but only when it was kept in large quantities. On the faith of these representations the insured accepted the policy. A loss having occurred, the company refused to pay, on the ground that petroleum was kept on the premises in violation of the condition, and insured was unable to recover. It was held that, as the agent had given the insured positive assurances in excess of his authority, inducing him to accept the policy, he was liable for the loss. In *Montross v. Roger Williams Ins. Co.*, 49 Mich. 477, 13 N. W. 823, it was held that where an insurance company has ceased to do business in the state, and has revoked the authority of its agent, such agent might be held liable on a contract to renew.

Though not strictly within the scope of the present discussion, attention may be called to two cases, arising in Pennsylvania, involving policies issued on risks which were prohibited by the company. In *Bradford v. Hanover Fire Ins. Co.*, 102 Fed. 48, 43 C. C. A. 310, 49 L. R. A. 530, it appeared that a subagent, employed by the agent of the company, issued a policy on a risk which had been prohibited by the company, signing the agent's name to the policy. The court regarded this act of subagent as a forgery, and held that, in the absence of anything to show a subsequent ratification by the agent of his subagent's unauthorized act, the agent could not be held liable to the company, which had been obliged to pay a loss on the policy. Another policy, issued by the same subagent in the same way and on the same property, was involved in *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770. The court took the opposite view, and held that the agent was liable. It is difficult to ascertain from the opinion whether the court regarded the act of the subagent in signing the policy as authorized or not, as the court assumes in one place that he had no such authority, but in another argues on the theory that the subagent had general authority to issue policies.

In *Stewart v. Helvetia Swiss Fire Ins. Co.*, 102 Cal. 218, 36 Pac. 410, where a local agent, having no authority to renew policies, neglected to fulfill his promise to inform the company of the insured's offer to renew, it was said that the insured might hold the agent liable for

the loss. But, in *Arrott v. Walker*, 118 Pa. 249, 12 Atl. 280, where it was sought to enforce a contract to procure insurance made by an insurance agent, the court held that, in view of Act Feb. 4, 1870, making it unlawful for individuals to execute contracts of fire insurance, the agent could not be held liable as an insurer.

(k) Same—Writing insurance in unauthorized or insolvent company.

In view of the statutes requiring insurance companies not domiciled in the state to comply with certain regulations as a condition precedent to doing business in the state, the question has arisen whether an agent writing insurance in a company which has not complied with the law can be held liable as an insurer on the failure of the company to pay the loss. The Code of Alabama provides (section 1206) that any person acting as agent for a foreign insurance company which has not complied with the laws regulating such companies shall be personally liable to the holder of any policy in respect to which he so acted as agent for any loss covered by it. It is further provided in section 1207 that the term "insurance company" includes any corporation, association, or partnership organized for the purpose of transacting an insurance business. On the ground that, in view of the provisions of section 1207, the statute discriminated against citizens of other states who might compose such "partnerships," it was contended in *Noble v. Mitchell*, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238, that the statute was unconstitutional; but the court held that the statute is separable in its provisions, and that it is not unconstitutional in so far as it applies to "corporations." The agent was held liable for the amount of the loss, irrespective of the solvency or insolvency of the company. The constitutionality of the statute was subsequently reaffirmed by the Supreme Court of the United States in *Noble v. Mitchell*; 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472. The principle that an agent writing insurance in an unauthorized company is personally liable for the loss is also approved by Justice Tyson in his dissenting opinion in *Insurance Co. of North America v. Thornton*, 30 South. 614, 130 Ala. 222, 55 L. R. A. 547, 89 Am. St. Rep. 30.

The Pennsylvania act of May 1, 1876 (section 48) was applied in *McBride v. Rinard*, 172 Pa. 542, 33 Atl. 750. This act provides that the agent of any insurance company of any other state which does not comply with the laws of the commonwealth shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on behalf of any such company.

The court held that under this act any person who acts for the company in the particular transaction is liable for writing the unauthorized insurance. It is not limited in its operation to general agents of the company. The moment the agent makes a contract for a foreign company which has not obtained authority to do business within the state, his liability attaches, and it is consummated by a loss by fire. He becomes liable as one of the principals to the contract, and his liability is complete the moment the loss occurs. It is not necessary that the insured should, by submitting proofs of loss, fix the liability of the company. The liability of the agent is not that of a surety or guarantor, but that of a principal. The same statute was involved in *Rothschild v. Adler-Weinberger S. S. Co.* (C. C. A.) 130 Fed. 866, reversing (C. C.) 123 Fed. 145, and it was held that it applied only to contracts of insurance on property in the state.

An action to enforce the liability of an agent issuing an unauthorized policy of marine insurance is an action to recover statutory damages for a tort, and not an action on contract. Consequently it is not maritime in its nature, and is not within the jurisdiction of a court of admiralty. *Reliance Lumber Co. v. Rothschild* (D. C.) 127 Fed. 745.

Under Rev. St. Mo. 1899, § 7989, insurance companies are prohibited from doing business in Missouri unless they comply with certain requirements. By section 8001 agents writing insurance in such companies are made guilty of a misdemeanor. It was held (*Jones v. Horn*, 104 Mo. App. 705, 78 S. W. 638) that under such statutes the agent of the company which had not been admitted to do business in the state was not personally liable for the loss on the ground that he had misrepresented to the insured that the company was so admitted, thereby inducing him to take out the insurance. It was also said that no presumption of insolvency of a foreign insurance company arises from the fact that it has not been authorized to do business in the state. In *Morton v. Hart*, 88 Tenn. 427, 12 S. W. 1026, it appeared that plaintiff applied to insurance agents for a policy, and directed them to return his money if they could not give him a good company. Insurance was effected with a foreign insurance company, which had not complied with the statutes regulating foreign companies doing business in the state. The goods insured were lost by fire, and the insurance company was insolvent. It was held that, as defendants were undertaking an unlawful and prohibited business by procuring insur-

ance in an insolvent company which was not authorized to do business in the state, they were liable to plaintiff for the loss, and must look to their principal, the insurance company, for indemnity. In *Price v. Garvin* (Tex. Civ. App.) 69 S. W. 985, it was held that, under Rev. St. arts. 3093, 3095, providing that any person who in any way acts as an agent for an unauthorized fire insurance company shall be personally liable for any loss incurred under a policy in such company in respect to which he so acted as agent, an agent who procured insurance from a foreign company, not licensed to do business in Texas, was liable for the loss. The petition in this case alleged that defendants, being the agents of a foreign insolvent fire insurance company unauthorized to do business in the state, and known by defendants to be so unauthorized, entered into a conspiracy with such company to defraud plaintiff, and procured for him a fire insurance policy in such company; that during the life of the policy a loss occurred; and that the company had ignored plaintiff's request for the payment of the loss, and he sought to recover of defendant actual and exemplary damages. The court held that the facts stated made a case for both actual and exemplary damages, irrespective of any statutory provision making persons acting as agents for unauthorized companies personally liable.

3. EXECUTORY AGREEMENTS TO INSURE.

- (a) Validity of agreement.
- (b) Contract may be oral.
- (c) Nature and requisites of an executory contract.
- (d) Presumption as to usual conditions of policy.
- (e) Payment of premium.
- (f) Commencement of risk.
- (g) Merger of executory agreement in policy.
- (h) Powers of agents—In general.
- (i) Same—Subagents—Life insurance.
- (j) Same—Soliciting agent.
- (k) Same—Statutes.
- (l) Same—Limitations of agents' powers.
- (m) Action on agreement—Remedies—Jurisdiction.
- (n) Same—Pleading.
- (o) Same—Evidence.
- (p) Same—Damages—Trial—Appeal.

(a) Validity of agreement.

It is well established that where a contract of insurance has been agreed on, so that nothing remains to be done more than to execute it by the issuance and delivery of a policy, the agreement is binding on the parties.

This rule is supported by *Frankle v. Pennsylvania Fire Ins. Co.*, 9 Fed. Cas. 706; *Preferred Acc. Ins. Co. of New York v. Stone*, 61 Kan. 48, 59 Pac. 986; *Fire Ins. Co. of Philadelphia County v. Sinsbaugh*, 101 Ill. App. 55; *Hubbard and Spencer v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Solms v. Rutgers Fire Ins. Co.*, 5 Abb. Prac. N. S. (N. Y.) 201, 4 Abb. Dec. 279; *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 609, 53 Pac. 177; *Insurance Co. of North America v. Thornton*, 30 South. 614, 130 Ala. 222, 55 L. R. A. 547, 89 Am. St. Rep. 30; *Potter v. Phenix Ins. Co. (C. C.)* 63 Fed. 382; *North British & M. Fire Ins. Co. v. Lambert*, 26 Or. 199, 37 Pac. 909; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54.

In *Gerrish v. German Ins. Co.*, 55 N. H. 355, it is said that the cases are numerous where the party may resort to a court of equity to compel the delivery of the policy.

This doctrine is laid down in *Taylor v. Merchants' Fire Ins. Co. of Baltimore*, 9 How. 390, 13 L. Ed. 187; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671; *Preferred Acc. Ins. Co. of New York v. Stone*, 58 Pac. 986, 61 Kan. 48; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683; *Chase v. Washington Mutual Ins. Co.*, 12 Barb. (N. Y.) 595; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Scranton Steel Co. v. Ward's Detroit & Lake Superior Line (C. C.)* 40 Fed. 866; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Union Mutual Ins. Co. v. Commercial Mutual Marine Ins. Co.*, 24 Fed. Cas. 603; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268.

Generally the question of liability arises on the insurer's denial or refusal to pay a loss. But it is equally true that the insured is liable for the premium agreed upon, if the insurer is ready and willing to execute and deliver the policy. (*American Ins. Co. v. McWhorter*, 78 Ind. 136.) As a contract for a policy is valid, it also follows that an agreement to continue or renew an insurance is also valid.

Sater v. Henry County Farmers' Ins. Co., 92 Iowa, 579, 61 N. W. 209;
Akin v. Liverpool & London & Globe Ins. Co., 1 Fed. Cas. 284. In

Springer v. Anglo & Nevada Assur. Corporation, 11 N. Y. Supp. 533, 58 Hun, 601, it was held that a recovery could be had on such a contract, before the issuance of the policy, for the payment of the premium.

In *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, the effect of the standard policy law is discussed. The court comes to the conclusion that the contract for insurance embraced a standard policy, and is therefore a complete one, though no policy has been actually issued. This is in effect to hold that in New York there can be no executory contract. But a different view is taken by three of the justices, who dissent from the majority opinion.

(b) Contract may be oral.

It is now well settled that parol contracts of insurance are valid, in the absence of statutory or other positive provisions to the contrary.¹ In *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, it is said that it is equally well settled that parol contracts to effect an insurance by issuing policies are valid and enforceable.

The validity of a parol contract to insure is supported by *Merchants' Mutual Ins. Co. v. Lyman*, 15 Wall. 684, 21 L. Ed. 246; *Potter v. Phenix Ins. Co.* (C. C.) 63 Fed. 382; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. 786; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Revere Fire Ins. Co. v. Chamberlain*, 56 Iowa, 508, 8 N. W. 338; *Howard Ins. Co. v. Owen's Adm'r*, 94 Ky. 197, 14 Ky. Law Rep. 881, 21 S. W. 1037; *Sanford v. Orient Ins. Co.*, 54 N. E. 883, 174 Mass. 416, 75 Am. St. Rep. 358; *Duff v. Fire Ass'n of Philadelphia*, 56 Mo. App. 355; *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. (N. Y.) 75; *Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82; *Reynolds v. Westchester Fire Ins. Co.*, 40 N. Y. Supp. 336, 8 App. Div. 193; *Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53; *Fish v. Cottenet*, 44 N. Y. 538, 4 Am. Rep. 715; *Hardwick v. State Ins. Co.*, 20 Or. 547, 23 Pac. 840; *Consolidated Mfg. Co. v. Westchester Fire Ins. Co.*, 13 Pa. Co. Ct. R. 321; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Waldron v. Home Mut. Ins. Co.*, 47 Pac. 425, 16 Wash. 193; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379; *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497, 75 N. W. 173; *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648; *Mobile Marine Dock & Mutual*

¹ See post, "Validity of Oral Contracts of Insurance," p. 391.

Ins. Co. v. McMillan & Son, 31 Ala. 711; *Pacific Mut. Ins. Co. v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566.

As the oral contract for insurance is valid, it likewise follows that a similar agreement for the renewal of an existing policy is enforceable.

Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co., 18 Barb. 69, 19 N. Y. 305; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *King v. Hekla Fire Ins. Co.*, 58 Wis. 508, 17 N. W. 297.

In the *Cohen Case* it is said that an insurance company may contract by parol for the renewal of a policy, though it may be stipulated on the face of the instrument itself that this shall not be done. This doctrine is based on the general rule that the parties to an agreement may by mutual concurrence change its terms after execution. The *King Case* is distinguished from that of *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584, on the ground that the latter was on the policy as though renewed by parol. It appears from the *Taylor Case* that plaintiff's failure to recover was due to the fact that he based his action on an oral contract of renewal, instead of a contract for renewal. In a dissenting opinion Taylor, J., held that plaintiff was entitled to recover, apparently disregarding the distinction between an executory and an executed contract.

Agreements for reinsurance, like agreements for direct insurance, can be made by parol.

Such is the doctrine of *Merchants' Ins. Co. v. Union Ins. Co. of San Francisco*, 58 Ill. App. 611, and *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301.

As said in *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34, neither an agreement to issue a policy nor an agreement to renew an existing policy is within the statute of frauds.

This also appears to be the doctrine of *Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb. (N. Y.) 69; *Van Loan v. Farmers' Mutual Fire Ins. Ass'n*, 24 Hun (N. Y.) 132; *Howard Ins. Co. v. Owen's Adm'r*, 94 Ky. 197, 14 Ky. Law Rep. 881, 21 S. W. 1037.

In *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, an oral agreement to renew a policy of insur-

ance from year to year, either party being at liberty to give notice at any time of the discontinuance of the agreement, was held not to be within the statute of frauds.² But in *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272, 2 S. W. 139, it appears that an agreement to renew a policy would be invalid, unless made within a year before the renewal was to commence. The distinction between the two cases is apparently that in the New York case the parties had the option to terminate the agreement at any time,³ which the parties in the Missouri case evidently did not have. A doctrine similar to that of the *Giddings* Case is supported by *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 363. And in *Klein v. Liverpool & London & Globe Ins. Co. (Ky.)* 57 S. W. 250, it is said that a contract to renew from year to year until otherwise directed is within the statute as to renewals to be made after the expiration of a year from the time the contract was entered into.

Unquestionably the majority of the executory contracts are of such a nature that the insurance attaches immediately, leaving only the execution and delivery of the policy, and possibly the payment of the premium, for the future. In other words, the insurance commences at the time of the agreement. But, as indicated in the Missouri and New York cases just cited, and as said in *McCabe v. Aetna Ins. Co.*, 81 N. W. 426, 9 N. D. 19, 47 L. R. A. 641, it seems to be too well settled to admit of doubt that an insurance company can by parol contract bind itself to issue and renew a policy in the future.⁴ In *Baldwin v. Phoenix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. Rep. 362, the court concedes that there is a conflict of authority on the question as to the validity of a verbal agreement for insurance in futuro, but sees no reason why an insurance company cannot, in anticipation of the expiration of a policy of insurance, agree that it will issue a new policy at that time in consideration of a given sum. The court argues that, if a contract for a policy made two or three weeks before its expiration is binding, a contract made five months before is equally binding.

² See Cent. Dig. vol. 23, "Frauds, Statute of," cols. 2013-2016, § 78.

³ See *Blake v. Voigt*, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622, in which a contract not to be performed within a year, but containing an option permitting its termination within that

time, was held not within the statute of frauds.

⁴ See *Ostrander, Ins.* § 12, where the author takes a different view, but he begs the question by assuming a state of facts under which even an executed policy would be void.

A mutual insurance company can, like any other company, bind itself by parol agreement to issue a policy (*Van Loan v. Farmers' Mut. Fire Ins. Ass'n*, 90 N. Y. 280, s. c. 24 Hun, 132); and this appears to be so, even though the charter requires "all policies on contracts founded thereon" to be subscribed by the company's officers. Such was the holding of Chancellor Williamson in *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333. This holding was, however, reversed on the ground that a condition in the charter requiring a deposit of a premium note could not be dispensed with; but Cornelison, J., took the same view as the chancellor. Where a statute requires all policies to be signed by the officers of insurance companies, this does not preclude such companies from making parol agreements to insure. In the leading case of *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636, a statute of this nature[•] was held only to direct the formal manner of executing policies, and not to apply to agreements for insurance. This was in line with the decision of the Circuit Court in the same case, reported in 24 Fed. Cas. 603. In *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478, the court seems inclined to hold that a statute[•] requiring all contracts of insurance to be in writing does not prohibit parol agreements for insurance. But where a statute, like Rev. St. Mo. 1889, § 5917, imposes a penalty on any company attempting to do business without authority, it seems that an insurer which has failed to comply with the requirements of the law cannot make a valid executory contract (*Swing v. Clarks-ville Cider & Vinegar Co.*, 77 Mo. App. 391). A charter provision requiring all contracts and policies of insurance to be in writing does not prevent an insurance company from entering into a valid parol agreement for insurance. In *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423, it was held that, while a company having such a charter provision could not make a valid contract of insurance except by a written policy, yet before the policy was executed the company might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract.

▲ similar doctrine is asserted in *Constant v. Allegheny Ins. Co.*, 6 Fed. Cas. 356; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441;

• Rev. St. Mass. c. 37, § 18.

• Code Ga. 1873, § 2794.

Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

A different view appears to be taken in *Lindauer & Co. v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461; but, as Arkansas has now accepted the doctrine that a contract of insurance may rest in parol,⁷ the generally accepted rule as to the effect of charter provisions requiring policies in writing on executory contracts would no doubt prevail there.

(c) Nature and requisites of an executory contract.

The authorities in general support the doctrine that an executory contract for insurance is not enforceable, unless all the elements essential to a contract of insurance have in some manner been agreed upon. In other words, nothing can be left open for future negotiations with reference to the subject-matter, parties, rate of premium, amount, or duration of risk.

This doctrine is asserted in *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Kimball v. Lion Ins. Co.* (C. C.) 17 Fed. 625; *Weeks v. Lycoming Fire Ins. Co.*, 29 Fed. Cas. 581; *Fitton v. Phoenix Assur. Co.* (C. C.) 25 Fed. 880; *Same v. Fire Ins. Ass'n* (C. C.) 20 Fed. 766; *German Ins. Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 84; *Manchester Fire Assur. Co. v. Insurance Co. of Illinois*, 91 Ill. App. 609; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Cotton v. Southwestern Mutual Life Ins. Co.*, 115 Iowa, 729, 87 N. W. 675; *Sater v. Henry County Farmers' Ins. Co.*, 92 Iowa, 579, 61 N. W. 209; *Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. 1032; *Johnson v. Connecticut Fire Ins. Co.*, 84 Ky. 470, 8 Ky. Law Rep. 460, 2 S. W. 151; *Hartford Fire Ins. Co. v. Trimble* (Ky.) 78 S. W. 462; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 39 Am. Rep. 277; *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *Zimmermann v. Dwelling House Ins. Co.*, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Farmers' & Merchants' Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386; *Brown v. Dutchess County Mut. Ins. Co.*, 64 App. Div. 9, 71 N. Y. Supp. 670, s. c. 86 N. Y. Supp. 1130, 90 App. Div. 613; *Sargent v. National Fire Ins. Co.*, 86 N. Y. 626; *Sandford v. Trust Fire Ins. Co.*, 11 Paige (N. Y.) 550; *Connecticut Fire Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 Ohio Dec. 60; *Cleveland*

⁷ See post, p. 395.

Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 34 Or. 228, 55 Pac. 435; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Mattoon Mfg. Co. v. Oshkosh Mut. Fire Ins. Co.*, 69 Wis. 564, 35 N. W. 12; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777; *John R. Davis Lumber Co. v. Scottish Union & Nat. Ins. Co.*, 94 Wis. 472, 69 N. W. 156; *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497, 75 N. W. 173; *King v. Hekla Fire Ins. Co.*, 58 Wis. 508, 17 N. W. 297.

It is not, however, required that the elements enumerated shall be expressly agreed upon. Such agreement may be implied from various circumstances. So the elements not specifically agreed upon may be presumed to be those of the original policy, where the contract is for renewal, or they may be implied from former dealings of the parties in regard to insurance, or other circumstances.

That the terms may be implied from the fact that a contract is for renewal is supported by *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 368; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Abel v. Phoenix Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Scott v. Home Ins. Co. of New York*, 53 Wis. 238, 10 N. W. 387.

The following cases support the rule that terms not expressly agreed upon may be presumed from former dealings: *Audubon v. The Excelsior Ins. Co.*, 27 N. Y. 216; *Ames-Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346, 86 N. W. 344; *Guggenheimer v. Greenwich Fire Ins. Co.*, 9 N. Y. St. Rep. 316; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Insurance Company of North America v. Bird*, 175 Ill. 42, 51 N. E. 686; *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185; *Boice v. Thames & Mersey Marine Ins. Co.*, 38 Hun (N. Y.) 246; *Michigan Pipe Co. v. North British & Mercantile Ins. Co.*, 97 Mich. 493, 56 N. W. 849; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

The doctrine that certain elements of a contract may be supplied by custom and usage is supported by *Eames v. Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 298; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.) 535.

Where the insurer is limited by its charter to insurance on a certain class of risks, it will be presumed that a risk not mentioned was of that class. Such is the doctrine of *Baile v. St. Joseph Fire & Marine Ins. Co.*, 78 Mo. 371.

Of course, no terms not expressly agreed upon will be presumed from former dealings, where (*New Orleans Ins. Ass'n v. Boniel*,

20 Fla. 815) the terms of an alleged contract of insurance differ materially from those of a former policy. So, if the insurer issues several kinds of policies at different rates (*Cotton v. Southwestern Mut. Life Ins. Co.*, 115 Iowa, 729, 87 N. W. 675), there can be no presumption as to the form of policy and rate. Where a contract provides means by which certain elements not specifically agreed upon can be determined, it will be upheld.

Scammell v. China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462; *Bunten v. Orient Mut. Ins. Co.*, 21 N. Y. Super. Ct. 448; *Worth v. German Ins. Co.*, 64 Mo. App. 583.

But, in the *Scammell Case*, the insured was held to have abandoned his contract, as he did not communicate to the insurer the information necessary to fix the amount and rate when he had ascertained it. Likewise, in *Hubbell v. Pac. Mut. Ins. Co.*, 100 N. Y. 41, 2 N. E. 470, a contract was considered abandoned, as the insured had not called for the policy and secured the premium, though notified to do so.

Again, the insurer need not be specifically agreed upon, where dealing is had with an agent representing several insurance companies and it is left to his discretion to select the insurer. When the agent makes his selection, the contract becomes binding on the insurer designated by him.

Such is the doctrine of *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Same v. North British & Mercantile Ins. Co.*, 97 Mich. 493, 56 N. W. 849; *Connecticut Fire Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 Ohio Dec. 60.

But in *Fitton v. Fire Ins. Ass'n (C. C.)* 20 Fed. 766, it was held that an agent who had stated to the insurer the names of the companies in which the risk was to be written could not afterwards, without the insured's knowledge, make another apportionment, so as to bind the company not named; and in *German Ins. Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213, it was held that an apportionment by an agent of the amount among several companies was not binding, as the agent's action was subject to revision by the insured.

If an insurance company, in response to an application for insurance, states the terms and conditions on which it will insure, a contract of insurance becomes binding on acceptance of its

terms by the applicant within a reasonable time (*Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. [N. Y.] 527). And in the leading case of *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187, it was held that such acceptance became complete on the mailing of a letter to that effect.* But in *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, it was held that a contract did not become binding until the insurer had received the acceptance of its proposal, or at least until a reasonable time had elapsed after the acceptance was mailed. This holding has, however, been repudiated in subsequent cases in which it has been discussed. A contract for insurance will not be specifically enforced, where insured would not have been bound by it, but for his ratification of his agent's act in making it, after loss (*Insurance Co. of North America v. Schall*, 96 Md. 225, 53 Atl. 925, 61 L. R. A. 300). Where the applicant has performed the conditions imposed on him, negligence on the part of the insurers will not defeat the consummation of the contract (*Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339). The rule as to the acceptance of a proposal made by an insurance company applies equally to the acceptance by the insurer of the application for insurance.

Such is the doctrine of *Hebert v. Mutual Life Ins. Co.* (C. C.) 12 Fed. 807; *Union Cent. Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263; *Kohne v. Insurance Co. of North America*, 14 Fed. Cas. 835; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329.

In *Van Slyke v. Trempealeau County Farmers' Mut. Fire Ins. Co.*, 48 Wis. 683, 5 N. W. 236, the organization of a mutual fire insurance company was held to entitle one of the original applicants for the charter to recover, though no policy had been made out at the time of the loss. But in *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154, an application for life insurance was not considered accepted on a mere showing that a policy had been sent to the local agent for delivery; and a similar doctrine was asserted in *Hamblet v. City Ins. Co.* (D. C.) 36 Fed. 118.

* See Cent. Dig. vol. 11, "Contracts," cols. 122-124, § 119.

It is elementary that, where a proposition for insurance made by one side has not in some manner been accepted by the other, there is no agreement that can be enforced. As a matter of fact there is no contract, no meeting of minds having taken place.*

Prescott v. Jones, 69 N. H. 305, 41 Atl. 352; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683; *Fireman's Fund Ins. Co. v. Rogers*, 108 Ga. 191, 33 S. E. 954.

In *Blake v. Hamburg-Bremen Fire Ins. Co.*, 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15, the depositing of an unstamped letter was not considered to create a contract without further notice. And in *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326, the delivery of an acceptance of a proposal to the postmaster, who was acting as agent for the acceptor, was not considered to create a contract for insurance before the acceptance was actually put in the mail to be forwarded. Likewise, mere delay in acting upon an application will not amount to an acceptance.

This rule is asserted in *Helman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *New York Mut. Insurance Co. v. Johnson*, 23 Pa. 72; *Easley v. New Zealand Ins. Co.*, 5 Idaho, 593, 51 Pac. 418; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Krumm v. Jefferson Fire Ins. Co.*, 8 Ohio Dec. 103, 5 Wkly. Law Bul. 646.

A different view was taken in *Preferred Accident Ins. Co. of New York v. Stone*, 61 Kan. 48, 61 Pac. 986; but in this case the delay was due to the fact that the company desired to adjust some matters with the agent in regard to the premium, which had been paid the agent, but not forwarded. When an adjustment had been reached, the policy was issued, but meanwhile the applicant had been injured. It was held that a retention of the premium and application was tantamount to an acceptance. In *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622, the mere silence of the insurer when asked to renew certain policies was held not to make out a contract to renew. But in *Keen v. Mutual Life Ins. Co. (C. C.)* 131 Fed. 559, it was held that where a provisional certificate of insurance for 90 days provided that, if the officers of defendant company should not agree to continue the insurance during said 90 days, they might terminate it any time prior to the expiration of that term, and in such case the provisional policy should be null

* See Cent. Dig. vol. 11, "Contracts," cols. 60-64, § 61.

and void, but that, if the application for insurance was accepted by defendant's officers, a permanent policy should be made out and delivered to the insured as soon as may be, and the amount paid for the provisional policy credited on the first year's premium on the permanent policy, and defendant gave no notice to insured within the 90 days that it elected to terminate the insurance, and took no steps to return the premium paid for the provisional policy, at the end of that period insured was entitled to assume that his permanent policy took effect and was in force at his death shortly thereafter. Of course, when the application expressly provides that there shall be no contract until the application has been accepted, there is no binding contract to insure until the contract is actually accepted.

Cooksey v. Mutual Life Ins. Co. (Ark.) 83 S. W. 817; *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679, 2 N. W. 583.

So, when the application specifically provides that no liability shall attach until the delivery of the policy, there is no contract for insurance. Such is the rule in *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782, where it is said that a stipulation of this kind is most important. Many things might arise between the application and delivery which would induce the insurance company not to contract.

A similar doctrine finds support in *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851; *Farmers' & Merchants' Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386; *McMaster v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119; *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584.

In *Sourwine v. Supreme Lodge Knights of Pythias of the World*, 12 Ind. App. 447, 40 N. E. 646, 54 Am. St. Rep. 532, the beneficiary of a member who had applied for and was entitled to a transfer from a depleted insurance rank to one newly created was held entitled to recover, though the deceased had never sought to compel a transfer by mandamus. And in *Potter v. Phenix Ins. Co. (C. C.)* 63 Fed. 382, it was held that a usage might be shown to the effect that an expression by an insurance agent that he would "try it on" in a certain company meant an agreement to insure in that company. But a promise of an agent taking up a policy that the insurance should be in force until other insurance could be written was, in *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45, 73 S. W. 886, held not to be an agreement to insure. In *Buffum v. Fayette Mut.*

Fire Ins. Co., 3 Allen (Mass.) 360, a promise by the treasurer of a mutual company to pay the premium of a delinquent member, if anything should happen, was considered too indefinite to constitute an agreement. So in *Ames-Brooks Co. v. Ætna Ins. Co.*, 83 Minn. 346, 86 N. W. 344, it was contended that an agreement with shippers to insure the cargoes of next season was without mutuality, as the shippers did not bind themselves to have any cargoes to insure. But the court held that, as the insurers promised the insurance on all of their cargoes to the insurer, this presupposed that they would continue in their business and have cargoes to insure.

(d) Presumption as to usual conditions of policy.

In regard to the conditions governing a contract for insurance it seems to be the general rule that where nothing is said about conditions the parties are presumed to intend that the policy shall contain the conditions usually inserted in policies of insurance in like cases or in policies previously used by the parties.

This rule is supported by *Salisbury v. Hekla Fire Ins. Co.*, 82 Minn. 458, 21 N. W. 552; *Eames v. Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 298; *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 2 N. E. 470; *DeGrove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305; *Phoenix Fire Ins. Co. v. Hoffheimer*, 46 Miss. 645.

A similar doctrine, only modified in form, is stated in *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. 373. It is there said that the law will presume that the minds of the contracting parties met upon a contract containing the terms and conditions of the policy usually issued by the insurer on like risks.

Support to this doctrine is given by *Sproul v. Western Assur. Co.*, 33 Or. 98, 54 Pac. 180; *Duff v. Fire Association of Philadelphia*, 56 Mo. App. 355; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65; *State Fire & Marine Ins. Co. v. Porter*, 3 Grant, Cas. (Pa.) 123; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 55 Pac. 435, 34 Or. 228; *Agricultural Ins. Co. v. Fritz*, 61 N. J. Law, 211, 39 Atl. 910; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599; *Smith v. State Ins. Co.*, 64 Iowa, 716, 21 N. W. 145; *Lee v. Union Cent. Life Ins. Co. (Ky.)* 56 S. W. 724.

In *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, it was held that under the standard policy law every agreement for insurance embraced the terms and conditions of the standard policy. It seems that, if an action is brought for

the breach of a contract to deliver a policy, the provisions that would have been contained in the policy are not applicable.

That is the doctrine of *Hardwick v. State Ins. Co.*, 23 Or. 290, 31 Pac. 656, *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358, and *Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53. A contrary doctrine is, however, laid down in New York by the *Hicks Case*.

(c) Payment of premium.

It appears to be a generally accepted rule that the prepayment of premium is not essential to an executory contract, unless expressly required. As said in *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 2 N. E. 470, the insurer is bound to issue the policy in the usual way within a reasonable time, and within the same time the insured is bound to pay the premium. In *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840, it is said that the delivery of the policy and the payment of the premium are concurrent acts. Neither party can insist on performance by the other without performance or an offer to perform on his part.

That prepayment is not necessary finds support in *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *McCabe v. Aetna Ins. Co.*, 81 N. W. 426, 9 N. D. 19, 47 L. R. A. 641; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77; *Wood v. Prussian National Ins. Co.*, 99 Wis. 497, 75 N. W. 178.

In *Van Loan v. Farmers' Mut. Fire Ins. Ass'n*, 90 N. Y. 280, s. c. 24 Hun, 132, it is said that an undertaking or premium note required of a member of a mutual company need not be given before execution of the policy. There is, however, a line of cases that do not go to the extent of the rule just stated. They stop with the assertion that the premium need not be prepaid if credit is given. No doubt the rule first stated would have been supported by even these cases, had the question been squarely presented. As it is, it seems that the only contention was as to whether or not credit could be given.

Such cases are *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 822; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Bennett v. Connecticut Fire Ins. Co.* (Super. Ct. Cin.) 27 Wkly. Law Bul. 15, 11 Ohio Dec. 429.

In *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320, it was held that the contract was valid, even though the premium was not paid. Though the policy to be issued contains provision that the insurance shall not be considered binding until actual payment of the premium, credit may nevertheless be given.

Mallette v. British American Assur. Co., 91 Md. 471, 46 Atl. 1005; *Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222.

In *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 732, a tender to and set-off against the insurer's agent was held a sufficient compliance with a provision requiring prepayment of premium. So, in *Gay v. Farmers' Mut. Ins. Co.*, 51 Mich. 245, 16 N. W. 392, a provision in the charter that no insurance policy should be binding until actual payment of premium was held not to apply to a member who had an absolute right to insurance and who had tendered the necessary amount. An agreement to issue a policy was, in *American Ins. Co. v. McWhorter*, 78 Ind. 136, held to be a sufficient consideration for a premium note on which the insurer sought a recovery. In *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 2 N. E. 470, it was said that a refusal to pay the premium or to deliver the policy would entitle the party not at fault to treat the agreement as abandoned. But in *Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82, it was held that a mere demand of the premium, without insisting on it or tendering a valid policy, did not entitle the insurer to abandon the contract.

(f) Commencement of risk.

The question as to when the contract commenced does not appear to have been raised in the majority of cases. However, the general rule to be deduced from the cases in which the question is discussed is that **the risk attaches and takes effect immediately on consummation of the agreement, unless some other time is expressly agreed upon.**

This rule is supported by *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Hubbard & Spencer v. Hartford Fire Ins. Co.*, 88 Iowa, 325, 11 Am. Rep. 125; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.

But in *Consumers' Match Co. v. German Ins. Co.* (N. J. Err. & App.) 57 Atl. 440, the court takes the position that, where there is no

specific agreement to keep the property insured pending the writing and delivery of a policy, a loss occurring prior to delivery is not covered by a contract to write and deliver a policy.

In *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, the court seems inclined to the view that an acceptance will relate back to the time of the offer. But this is at least doubtful, unless there is a stipulation to that effect in the application. Thus an application containing a statement that a certain sum had been paid to make the insurance binding from the date of the application, provided it should be approved (*Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544), does not make the risk commence before the approval of the application. In *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584, the application contained a stipulation that the contract should be completed only by delivery of the policy, and the policy contained a condition that it should take effect on being countersigned by the local agent. It was held that the risk could not commence until the policy was countersigned during the lifetime of the applicant. So, in *Firemen's Fund Ins. Co. v. Rogers*, 108 Ga. 191, 33 S. E. 954, the soliciting agent had promised that the risk should begin with the date of the promise, if approved. It was held that the risk would attach only on approval of the application.

(c) Merger of executory agreement in policy.

It appears to be the general rule that the agreement for insurance, which is oftentimes oral, is merged in the policy, unless there is a material variance between the executory agreement and the policy as executed.¹⁰

Such is the rule of *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Insurance Co.*, 60 Fed. 351, 9 C. C. A. 1; *Commercial Union Assur. Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272, 2 S. W. 139; *Green v. Liverpool & London & Globe Ins. Co.*, 91 Iowa, 615, 60 N. W. 189; *Huggins Cracker & Candy Co. v. People's Ins. Co.*, 41 Mo. App. 530; *Poste v. American Union Life Ins. Co.*, 32 App. Div. 189, 52 N. Y. Supp. 910; *Masons' Union Life Ins. Ass'n v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677; *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Howard Ins. Co. v. Owens*, 13

¹⁰ For the general rule as to the merger of contracts, see Cent. Dig. vol. 11, "Contracts," cols. 1262-1272, §§ 1129, 1130.

Ky. Law Rep. 237; *Union Mutual Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *McMaster v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119; *Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544; *Gray v. Germania Fire Ins. Co.*, 155 N. Y. 180, 49 N. E. 675.

Where, however, the policies do not comply with the terms agreed on in the executory contract, there is no merger. Thus it was held, in *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351, that an executory agreement was not merged in a policy which did not fairly cover all the branches and elements of the original agreement.

A similar rule appears to be supported by *McMaster v. New York Life Ins. Co.*, 22 Sup. Ct. 10, 183 U. S. 25, 46 L. Ed. 64, and *Humphry v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 884, though the *McMaster* Case appears to rest partly on estoppel and the *Hartford* Case partly on failure of delivery.

In *Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82, an executory agreement was not considered merged in the policy, which was invalid on account of not being countersigned. The case of *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246, is a peculiar one. There a contract for the renewal of a marine policy was held merged in a policy executed after loss, and, as the insured had not disclosed the loss at the time he took out the policy and paid the premium, it was held that he could not recover, though the policy provided by its terms that the risk commenced on the date agreed on in the executory contract, which was prior to the loss. The rule thus laid down appears to be peculiar to the United States Supreme Court. The general doctrine of the state courts is that a loss occurring after an executory agreement has been entered into need not be disclosed at the time of the execution of the policy.

This principle is asserted in *Brownfield v. Phoenix Ins. Co. of London*, 26 Mo. App. 390; *Howard Ins. Co. v. Owens*, 13 Ky. Law Rep. 237; *Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82.

(h) Powers of agents—In general.

In the leading case of *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, the rule is laid down that an insurance agent who has unrestricted authority to negotiate contracts of insurance by issuing policies, and who is furnished with blank policies of insurance signed by the insurance company's officers to

be countersigned by him, has authority to make preliminary contracts for policies. As was there said, it is elementary that the delegation of authority to transact any business includes authority to transact it in the usual way and to do the acts usual in its accomplishment.

A similar rule is asserted in *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883; *Ellis v. Albany City Fire Ins. Co.*, 4 Lans. 433; *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Insurance Co.*, 60 Fed. 351, 9 C. C. A. 1; *Bolce v. Thames & Mersey Marine Ins. Co.*, 38 Hun, 246; *Connecticut Fire Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 Ohio Dec. 60; *King v. Phoenix Ins. Co. of Brooklyn*, 101 Mo. App. 163, 76 S. W. 55; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *More v. New York Bowery Fire Ins. Co.*, 55 Hun, 540, 10 N. Y. Supp. 44.

It also follows as a corollary that an agent having power to solicit insurance, to receive premiums, and to issue and deliver policies has authority to enter into executory contracts to renew existing policies.

This doctrine is supported by *Bauble v. Aetna Ins. Co.*, 2 Fed. Cas. 1038; *Taylor v. Germania Ins. Co.*, 23 Fed. Cas. 772; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641.

In *Manchester v. Guardian Ins. Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600, it was said that an agent having unrestricted authority to make the indorsement of a transfer necessary to continue a policy also had authority to make a preliminary contract for such indorsement. So, in *Weeks v. Lycoming Fire Ins. Co.*, 29 Fed. Cas. 581, it was held that an agent furnished with blank policies to be filled up and delivered by him had authority to make a preliminary contract to deliver such policies. The mere fact that an agent was supplied with policies signed in blank, to be countersigned, was in *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. (N. Y.) 75, not considered to limit his authority to enter into agreements for policies. In *Fish v. Cottenet*, 44 N. Y. 538, 4 Am. Rep. 715, the agent was authorized to bind his principal during negotiations. This was held to include necessary delays, so that an applicant could in good faith rely on the agreement from October to January. So, in *Greenwich Ins. Co. v. Waterman*, 6 U. S. App. 549, 4 C. C. A. 600, 54 Fed. 839, it was held that, if there was a well-defined usage by which local agents of foreign insurance companies could make binding contracts on applications for insurance

to attach the same day without consulting their superiors, this custom would be presumed to be known by a foreign company engaged for years in the business at that place. And a similar rule seems to control in *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93.

But authority to insure one kind of risk does not necessarily include authority to enter into agreements for insurance on all kinds.

Such appears to be the doctrine of *Smith v. State Ins. Co.*, 58 Iowa, 487, 12 N. W. 542, and *Consumers' Match Co. v. German Ins. Co.* (N. J.) 12 Ins. Law J. (N. S.) 180.

Where it did not appear that an agent had ever done anything for a company, except to countersign and deliver a policy, he would not be presumed to have had authority to bind the company by an oral agreement to renew the policy, when it expired 10 months later (*Brown v. Dutchess County Mut. Ins. Co.*, 64 App. Div. 9, 71 N. Y. Supp. 670, s. c. 86 N. Y. Supp. 1130, 90 App. Div. 613). In *Commercial Mutual Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636, it was held that a usage could be shown to authorize the president of the company to enter into a parol contract for insurance.

In *Howard Ins. Co. v. Owen's Adm'r*, 94 Ky. 197, 21 S. W. 1037, it was held that an insurance agent whose authority was limited to a city and vicinity could enter into an executory contract in a neighboring village, as the company had sanctioned contracts in that place. Similarly it was held, in *Harron v. City of London Fire Ins. Co.*, 88 Cal. 16, 25 Pac. 982, that as the company had written prior policies on the building, and its general manager had written the agent that he would give his attention to any insurance required on the property, this was sufficient to support a finding that the agent was authorized to make the contract. In *Ganser v. Firemen's Fund Ins. Co.*, 38 Minn. 74, 35 N. W. 584, it appeared that an agent, who had resigned and was seeking the appointment of his son, wrote as an inducement that the work of the latter would be under his immediate supervision, and that another agent, to whom this was communicated by the company, added that the business would run the same as before. It was held that this justified a finding that the former agent still had authority to act for the company in making a parol contract for insurance. But a mere promise to renew a policy of insurance, made by parties who had acted as agents of an insurance company, after such

company has ceased to do business and has revoked the authority of such agents, although the party to whom the promise is made has no knowledge of such revocation, gives no cause of action against the company (*Montross v. Roger Williams Ins. Co.*, 49 Mich. 477, 13 N. W. 823).

In *McCabe v. Ætna Ins. Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641, it was held that an agent who has authority to issue and renew policies can make a binding preliminary parol contract to renew a policy about to expire, contrary limitations in the policy notwithstanding. The broad rule thus laid down is, however, modified in *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351. It appears there to be limited to such agents as have been in the habit of exercising this authority. A similar view is taken in *Shank v. Glens Falls Ins. Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14.

(1) Same—Subagents—Life insurance.

In *Insurance Co. of North America v. Thornton*, 130 Ala. 232, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30, it was held that an agent with general authority for a certain territory could appoint subagents within that territory, who would have authority to enter into binding agreements subject to approval by their superior. To this, however, *Tyson, J.*, dissents. So it was held, in *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.) 555, that a chief clerk, authorized to fill out policies, could make a valid parol agreement to transfer a policy when at his place behind the company's desk. But, in *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180, it was held that a surviving partner of a firm of insurance agents did not have authority to act. Hence a subagent acting alone under him could not enter into a contract to insure. If an insurance agent has held himself out as having full authority, and this has been acquiesced in by the company, the latter will be bound by his agreement to insure. This is the rule of *Fire Ins. of Philadelphia County v. Sinsabaugh*, 101 Ill. App. 55, and it appears to be supported by *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645. In the latter case, Chancellor Kent took a different view at the trial, reported in 6 Johns. Ch. 485, probably on the ground that it did not appear that the company had sanctioned an advertisement by a soliciting agent indicating that he had general powers. With reference to life insurance it is said, in *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48, that the usage is so general that an agent

of a life insurance company has no authority to conclude an agreement for insurance that, if such authority is claimed in a particular case, there should be affirmative evidence thereof, or of its repeated exercise with the insurer's knowledge.

(J) Same—Soliciting agent.

An agent to solicit insurance, subject to approval, has not, as a general rule, authority to make agreements for insurance. Thus it was said, in *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527, that a written instrument authorizing a person to act as solicitor or broker for the purpose of receiving applications and transmitting them to the home office did not authorize such person to bind the company by agreements for insurance.

This rule is asserted in *Stewart v. Helvetia Swiss Fire Ins. Co.*, 102 Cal. 218, 36 Pac. 410; *Farmers' & Merchants' Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 39 Am. Rep. 277; *New York Union Mut. Insurance Co. v. Johnson*, 23 Pa. 72; *Allen v. St. Lawrence County Farmers' Ins. Co.*, 88 Hun, 461, 34 N. Y. Supp. 872; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Rowland v. Springfield Fire & Marine Ins. Co.*, 18 Ill. App. 601; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503; *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48; *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537, 29 N. E. 757; *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. 298; *Markey v. Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Firemen's Fund Ins. Co. v. Rogers*, 108 Ga. 191, 33 S. E. 954; *Agricultural Ins. Co. v. Fritz*, 61 N. J. Law, 211, 39 Atl. 910; *Fleming v. Hartford Fire Ins. Co.*, 42 Wis. 616.

In *Welsh v. Continental Ins. Co.*, 47 Hun (N. Y.) 598, it was held that an insurance agent intrusted with blank receipts and blank applications to be used in the course of his business might make an agreement binding on the company until the application was rejected. In *Palm v. Medina County Mut. Fire Ins. Co.*, 20 Ohio, 529, it was held that a limitation making risks subject to approval which had been taken by an agent authorized to examine premises, determine the character of the risk, and receipt for premiums was held not to reserve to the company the right of arbitrarily setting aside fire contracts made for insurance by the agent. A peculiar rule is laid down in *Trask v. German Ins. Co.*, 53 Mo. App. 625, namely, that if it appears that a soliciting agent has a right to reject the application it will be presumed that he has authority to accept it. But *Rombauer, P. J.*, dissents from this doctrine in

58 Mo. App. 431, holding that a right to solicit necessarily includes a right not to take—to reject.

(k) Same—Statutes.

Rev. St. Wis. § 1977, making a solicitor of insurance an agent for the company to all intents and purposes, has been held to clothe such agents with authority to make contracts for insurance, notwithstanding limitations to the contrary.

Mathers v. Union Mut. Acc. Ass'n, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379.

The *Mathers Case* was, however, overruled in *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851, in so far as the former held that limitations contained in the application and receipt would not restrict the agent's authority under the statute. Under the Kansas statute requiring foreign companies to have agents in the state it was held (*Potter v. Phenix Ins. Co.* [C. C.] 63 Fed. 382) that, if it was known to an applicant that a company had an agent within the state and that the statute required this, there could be no presumption in his favor that an agent of another state with whom he was doing business had authority to make a contract for insurance in the applicant's state.

(l) Same—Limitations of agents' powers.

It is elementary that a secret limitation of an agent's power does not prevent third parties from dealing with the agent to the full extent of his apparent authority. This rule applies to insurance. It therefore follows that parties dealing with an agent having apparent authority to enter into contracts for insurance cannot be affected by special instructions to the contrary, not known to them.

This rule is supported by *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840, s. c. 23 Or. 290, 31 Pac. 656; *Howard Ins. Co. v. Owens*, 18 Ky. Law Rep. 287, s. c. 94 Ky. 197, 21 S. W. 1037; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Brownfield v. Phoenix Ins. Co. of London*, 26 Mo. App. 390; *Commercial Union Assurance Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *Hicks v. British America Assurance Co.*, 13 App. Div. 444, 43 N. Y. Supp. 623; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185.

In *Potter v. Phenix Ins. Co.* (C. C.) 63 Fed. 382, it was said that, when an insurance company appoints an agent for a large city and

sends commissions to him to solicit applications, the public is warranted, in the absence of any notice of limitation of his authority, in assuming that he is clothed with authority to receive and act on applications and to bind the company.

An agent cannot make a contract with himself to issue a policy, even though he could make such contract with third parties.

Bentley v. Columbia Ins. Co., 17 N. Y. 421; *Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220; *Zimmermann v. Dwelling House Ins. Co. of Boston*, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698.

Neither can an agent for both parties enter into valid agreements for insurance (*Manchester Fire Assur. Co. v. Insurance Co. of Illinois*, 91 Ill. App. 609), unless he acts for both parties with their knowledge and consent, or deals directly with one party while acting for the other (*North British & M. Fire Ins. Co. v. Lambert*, 26 Or. 199, 37 Pac. 909).

(m) Action on agreement—Remedies—Jurisdiction.

Where there has been an agreement for insurance, and no loss has occurred, a suit in equity for specific performance would, as said in *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187, be the appropriate, if not the only, remedy. But, where a loss has occurred, the remedy appears to be either a suit in equity for specific performance or an action at law for damages.¹¹ As stated in *Sproul v. The Western Assur. Co.*, 33 Or. 98, 54 Pac. 180, two remedies appear to have grown up and are now well established by authority for redress on a contract for insurance. One is in equity to require specific performance of the agreement to issue the policy, and the other is by an action at law directly upon the agreement.

This doctrine is also asserted in *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351, *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. Prac. (N. Y.) 179, and *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268.

In *Akin v. Liverpool & London & Globe Ins. Co.*, 1 Fed. Cas. 264, it was said that where there is a valid agreement for insurance the failure of the insurer to issue a policy is no impediment to a recovery in an action at law on the contract. And a similar rule is asserted in *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am.

¹¹ See Cent. Dig. vol. 44, "Specific Performance," cols. 1526, 1527, § 213.

Rep. 705. In the leading case of *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187, it was held that equity could entertain jurisdiction of a suit for specific performance after loss, and, having obtained jurisdiction for this purpose, would grant full relief by decreeing payment of the loss.

This rule is supported by *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408; *Wooddy v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 732; *Hebert v. Mutual Life Ins. Co.* (C. C.) 12 Fed. 807; *Fitton v. Fire Insurance Ass'n* (C. C.) 20 Fed. 766; *Constant v. Allegheny Ins. Co.*, 6 Fed. Cas. 356; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595; *Preferred Accident Ins. Co. of New York v. Stone*, 58 Pac. 986, 61 Kan. 48; *Balle v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo. 371; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. (N. Y.) 75; *Tullidge v. National Life Ins. Co.*, 8 Ohio Dec. 222, 6 Wkly. Law Bul. 341; *Union Mut. Ins. Co. v. Commercial Mutual Marine Ins. Co.*, 24 Fed. Cas. 603; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Neville v. Merchants' & Manufacturers' Mut. Ins. Co. of Cincinnati*, 17 Ohio, 192; *Union Cent. Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683.

In *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379, it was held that, after a policy had been made out and the applicant's proposal accepted, he might maintain an action of trover for the policy or assumpsit on proof of its contents.

A similar rule is asserted in *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423, *Guggenheimer v. Greenwich Fire Ins. Co.*, 9 N. Y. St. Rep. 316, and *Fried v. Royal Ins. Co.*, 50 N. Y. 243.

In *Prudential Ins. Co. v. Sullivan*, 26 Ind. App. 30, 59 N. E. 873, it was held that where the issuance of a policy is averred, and the recovery is sought on the policy itself, the proceeding is an action at law on the policy, and not in equity to enforce the agreement. Under the standard policy law of New York an action can be maintained only on the contract, and not for the failure to deliver the policy. This is the doctrine enunciated by the majority in *Hicks v. British America Assur. Co.*, 56 N. E. 743, 162 N. Y. 284, 48 L. R. A. 424. But in a more recent case (*Northam v. Dutchess County Mut. Ins. Co.*, 177 N. Y. 73, 69 N. E. 222) the same court held that an action by an assignee, based on a policy as assigned, was not

supported by proof of an agreement to insure the assignee's interest, though it would have supported an action for a breach of the contract to insure.

(a) Same—Pleading.

In an action on an oral contract to issue a fire insurance policy, the policy agreed to be issued is not the foundation of the action, in the sense that it must be filed with the complaint. And it is not necessary to show compliance with the conditions of the policy, the insurer having refused to issue it.

Such is the doctrine of *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423, and *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536. A similar view is taken in *Schwahn v. Michigan Fire & Marine Ins. Co.*, 89 Wis. 84, 61 N. W. 78, and *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358.

But a contrary doctrine is adopted in *Trask v. German Ins. Co.*, 58 Mo. App. 431, and *Duff v. Fire Ass'n of Philadelphia*, 56 Mo. App. 355. It is there regarded necessary to aver performance of the conditions, either specifically or generally. The decision in the *Duff Case* is, however, overruled in the Supreme Court in 129 Mo. 463, 30 S. W. 1034. In *Mallette v. British American Assur. Co.*, 91 Md. 471, 46 Atl. 1005, a count on an agreement to renew a policy was held insufficient, because it did not state the conditions of the former policy with clearness. In *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34, a count which sought a recovery on an agreement to issue or renew a policy, which did not aver a breach of the agreement, was considered defective. In *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. 786, it was held that the complaint need not allege that a premium was paid or a satisfactory agreement had been made for its payment, if consideration was alleged generally. But, in *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840, it was considered necessary to allege payment or tender of the premium. So, in *Farmers' Co-operative Ins. Ass'n v. Nolan*, 26 Ind. App. 514, 60 N. E. 163, a complaint was held defective which failed to allege that the agreement was made with the insurer, or that the person with whom it was made was acting or had authority to act for the insurer. Under the Code system the pleadings in a suit for specific performance and an action for breach are in substance the same (*Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351). In *Continental Ins. Co. v.*

Roller, 101 Ill. App. 77, it was held that the declaration might count on both the written policy and the agreement therefor. But a different view was taken in *Connecticut Fire Ins. Co. v. Judge of Monroe Circuit Court*, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398. It was there held that a declaration on the policy and an amendment for the breach of agreement to deliver a policy counted on two independent and distinct causes of action, though both sounded in assumpsit and might be said to grow out of the same transaction. And in *Northam v. Dutchess County Mut. Ins. Co.*, 177 N. Y. 73, 69 N. E. 222, the court took the position that a recovery could not be had in an action on a policy by proof of a breach of an oral agreement to insure. In *Boice v. Thames & Mersey Marine Ins. Co.*, 38 Hun (N. Y.) 246, it was held that plaintiff was not aided by the issuing of a certificate after loss, but must rest his case on the executory agreement. In *Schwahn v. Michigan Fire & Marine Ins. Co.*, 89 Wis. 84, 61 N. W. 78, an allegation of the complaint as to a subsequent statement by the agent was held irrelevant. In *Bennett v. Connecticut Fire Ins. Co.* (Super. Ct. Cin.) 27 Wkly. Law Bul. 15, 11 Ohio Dec. 429, it was said that there was no fatal variance between a petition on a policy and a reply admitting its execution after loss, but in consequence of a prior agreement.

An answer in chancery, admitting the acceptance of a proposal for insurance, but averring that no contract was made, was in *Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co.*, 24 Fed. Cas. 603, regarded as stating a mere conclusion of the pleader. So, in *Insurance Co. of North America v. Bird*, 175 Ill. 42, 51 N. E. 686, it was held that there was no variance between a plea that the contract was to take effect on a certain day and proof that a prior policy was to expire on that day and that some time before then the insured paid the premium for a new one and told the agent that he wanted it written out at once. An action for specific performance of an agreement to deliver a policy is not supported by proof of a renewal of an existing policy (*Dodd v. Home Mut. Ins. Co.*, 22 Or. 3, 28 Pac. 881, 29 Pac. 3). In *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320, it was held that defendants were properly required to furnish a copy of the policy made out, but not delivered. A plea that the agreement was for a three-year policy was not considered a good defense (*Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902) to a suit on a contract for a one-year policy, as the loss had occurred within one year.

(c) Same—Evidence.

It is, of course, elementary that the burden of proving the contract is on the plaintiff in an action for its breach. In *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435, it was held that in an action for damages, based on a parol executory contract, the terms and conditions usually contained in a policy issued in such cases must be shown. Where the declaration counted on the policy, and not on the contract for the policy (*Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171), it was held that the negation of a restrictive clause contained in the policy, which could not have been presumed to have been included in the contract as originally made, must be proved. In *Salisbury v. Hekla Fire Ins. Co.*, 32 Minn. 458, 21 N. W. 552, it was held that a party insisting on a condition must show that it is usual. Proof of the agent's authority to enter into the executory agreement is necessary (*Brown v. Dutchess County Mut. Ins. Co.*, 64 App. Div. 9, 71 N. Y. Supp. 670). In *American Horse Ins. Co. v. Patterson*, 28 Ind. 17, it was considered doubtful whether a policy covering a period antecedent to its date should be deemed *prima facie* evidence of the time the insurance was to commence.

Where the action is on an agreement to renew, it appears that the expired policy is admissible to prove the terms of the agreement.

It is so held in *Home Ins. Co. v. Adler*, 71 Ala. 516, and *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

In *Scott v. Home Ins. Co. of New York*, 53 Wis. 238, 10 N. W. 387, it appeared that, after the agent had received the renewal policy and premium, plaintiff had asked him for the certificate of renewal, and that the agent had insisted that he had previously delivered it. This was held admissible as a part of the *res gestæ*. Conversations with an agent at the time of a preliminary oral contract for insurance are admissible (*Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358); but subsequent statements and admissions are inadmissible.

Fidelity & Casualty Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379; *Crawford v. Trans-Atlantic Fire Ins. Co.*, 125 Cal. 609, 58 Pac. 177.

Dealings with other persons are admissible to show the apparent scope of an agent's authority (*Hardwick v. State Ins. Co.*, 23

Or. 290, 31 Pac. 656), and declarations by a general agent as to the limitations of his territory are admissible to prove the extent of a subagent's authority (*Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30). In *Abel v. Phoenix Ins. Co.*, 68 N. Y. Supp. 19, 57 App. Div. 629, it was regarded proper to cross-examine an agent as to his neglect to issue policies in other cases, in order to affect his credibility.

In *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 2 N. E. 470, the main contention was whether or not an agreement for marine insurance had been abandoned by plaintiff. The fact that defendant had accepted the premium on a contemporaneous agreement for insurance on another ship was held immaterial, as it was not shown that plaintiff had ever treated the other agreement as abandoned. In *Chaney v. Phoenix Ins. Co.*, 62 Mo. App. 45, it was held that the court did not abuse its discretion in permitting leading questions by allowing plaintiff to be asked on direct examination as to what was said in regard to which company was to take the risk.

Equity will not enforce a contract for insurance, unless the proof is conclusive.

Suydam v. Columbus Ins. Co., 18 Ohio, 459; *Neville v. Merchants' & Manufacturers' Mut. Ins. Co. of Cincinnati*, 19 Ohio, 452; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548. A similar rule is asserted in *McCann v. Aetna Ins. Co.*, 3 Neb. 198. According to *Patterson v. Benjamin Franklin Ins. Co.*, *81 Pa. 454, and *Abel v. Phoenix Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218, the proof must be clear.

In Missouri it seems that in equity the proof must be conclusive, while in an action at law it is sufficient to show the agreement by a preponderance of the evidence. Such is the rule laid down in *Chaney v. Phoenix Ins. Co.*, 62 Mo. App. 45.¹²

Only a preponderance of the evidence was required in *Waldron v. Home Mut. Ins. Co.*, 16 Wash. 193, 47 Pac. 425, *McCabe v. Aetna Insurance Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641, and *Dinning v. Phoenix Ins. Co.*, 68 Ill. 414, though the latter case was a suit in chancery.

In *Friend v. Brown*, 6 Ohio Dec. 809, 8 Am. Law Rec. 308, it was held that mere proof of payment of a premium to an insurance agent, under the mistaken idea that a policy written by the agent

¹² See, also, *Girard v. Car Wheel Co.*, 46 Mo. App. 79.

had been renewed, did not show payment on a contract for a renewal.

The evidence was considered and held sufficient to support a verdict for plaintiff in *Abel v. Phoenix Ins. Co.*, 57 App. Div. 629, 68 N. Y. Supp. 19.

(p) Same—Damages—Trial—Appeal.

If an action for a breach of an agreement to insure is brought after loss, the measure of damages appears to be the amount of the loss, not exceeding the insurance, less the premium, if that has not been paid. In other words, the amount of recovery is the same as if the policy had been issued.

Such is the doctrine in *Humphry v. Hartford Fire Ins. Co.*, 12 Fed. Cas. 884; *Weeks v. Lycoming Fire Ins. Co.*, 29 Fed. Cas. 581; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. 373.

In *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, it was held that, while evidence contained in the proof of loss was not competent against the insurer on the amount of damages, yet, since it was shown that the property insured was in fact worth more than the amount stated in the proof, the insurer was not prejudiced by the judge adopting that amount in directing a verdict for the insured. So, in *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216, it was held proper to submit to the jury the probability of the applicant being satisfied with the agent's answer that he would see about insuring the property. Whether an oral contract for a policy was limited as to time is a question for the jury (*Insurance Co. of Illinois v. Manchester Fire Assur. Co.*, 77 Ill. App. 673). In *Springer v. Anglo-Nevada Assur. Corp.*, 11 N. Y. Supp. 533, 58 Hun, 601, it was held that an objection could not be raised for the first time on appeal that proof of a contract to insure would not support an action on a policy. So, in *Reynolds v. Westchester Fire Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336, it was held that no question could be raised on appeal as to the authority of the agent to make the contract, as the complaint had been dismissed by the trial court.

4. VALIDITY OF ORAL CONTRACTS OF INSURANCE.

- (a) Scope of discussion.
- (b) Nature and requisites of the oral contract.
- (c) Validity of oral contract—Common-law doctrine.
- (d) Same—Present doctrine.
- (e) Same—Life and accident insurance.
- (f) Same—Renewal.
- (g) Statutory and charter provisions.
- (h) Mutual companies.
- (i) Statute of frauds.
- (j) Powers of agents.
- (k) Presumption as to terms.
- (l) Pleading and practice.

(a) Scope of discussion.

The general manner in which a contract of insurance is effected is, as said in *Northwestern Iron Co. v. Ætna Ins. Co.*, 23 Wis. 160, 99 Am. Dec. 145, by a policy in writing. The oral contract is not common, though it sometimes happens that such a contract is made. Usually the oral contract is for insurance, and contemplates the issuing of a policy to complete it. As said in *Misselhorn v. Mutual Reserve Fund Life Association*, 30 Mo. App. 589, leading writers on insurance note the distinction between an agreement to insure and be insured and a contract of insurance. The first is, according to *Hicks v. British America Assurance Co.*, 43 N. Y. Supp. 623, 13 App. Div. 444, merely an executory contract, while the latter is executed. This discussion is limited to the validity of the oral contract as a completed contract of insurance, and will not include the oral executory contract. That has been discussed in a preceding brief.¹ In the following discussion the terms "oral" and "parol," as applied to contracts, are used to designate contracts not in writing. It is true that technically the term "parol," as applied to contracts, means a contract not under seal, and is not limited to agreements wholly oral; but the courts generally and the leading writers of text-books on insurance make no distinction between the terms "oral" and "parol," when used with reference to insurance contracts. The words are used interchangeably.

(b) Nature and requisites of the oral contract.

In order that there shall be a valid contract, it is elementary that there must be a meeting of the minds as to the essential elements.

¹ See ante, p. 364.

In *Tyler v. New Amsterdam Fire Ins. Co.*, 27 N. Y. Super. Ct. 151, the court, assuming that a contract can be made by parol, quotes with approval the rule laid down in *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 161, as to the essentials of a valid contract of insurance—i. e., that the minds of the parties must meet as to the premises, as to the risk, as to the amount insured, as to the time the risk should continue, and as to the premium—and therefore concludes that at least five elements are necessary to the contract: (1) The subject-matter; (2) the risk insured against; (3) the amount; (4) the duration of the risk; and (5) the premium. As there was no evidence as to the risk and the duration of the insurance, it was held that there was no contract by which the company was bound. The doctrine that all the requisites prescribed by the common law as essential to a contract must be complied with is supported by *People's Ins. Co. v. Paddon*, 8 Ill. App. 447, wherein it is stated that, as respects an oral contract of insurance, those requisites are substantially that the minds of the respective parties at some instant of time have met upon all the essential elements of the contract; these essentials being in substance those enumerated in the *Tyler Case*. But as the insured merely called at the office of the company's agent and left his policy book with a clerk, without giving any directions or saying a word about the insurance, and afterwards spoke to one of the agents, without giving any specific directions in regard to the desired insurance, it was held that there was no binding verbal contract.

Other cases holding that the essential elements of the contract must be agreed upon are *Deadman v. Royal Ins. Co.*, 12 Ky. Law Rep. 389, and *Worth v. German Ins. Co.*, 64 Mo. App. 583, 2 Mo. App. Rep'r, 1048.

Though it is regarded essential that all the elements of the contract be agreed upon, it is not necessary that this be done expressly. In *Concordia Fire Ins. Co. v. Heffron*, 84 Ill. App. 610, it was held that an oral contract of insurance will sustain an action, though no express agreement is made as to the amount of premium to be paid or the duration of the policy, if the intention of the parties to the contract in these particulars can be gathered from the circumstances of the case. So it is held, in *Cleveland Oil & Plant Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435, that a parol agreement of insurance not specifying the premium to be paid is a contract of insurance at the customary rates, and in *King v. Cox*, 63 Ark. 204, 37 S. W. 877, an oral contract was re-

garded as binding, though the premium was not paid at the time of its consummation, if credit was given or it appeared from the circumstances and the situation of the parties that payment at the time was not exacted. In *Pacific Mut. Ins. Co. of California v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566, a petition on an oral contract of life insurance was held sufficient which alleged that, though the insurance was to commence in October, the payments of premium thereon were not to begin until the subsequent month. In *Agricultural Insurance Co. v. Fritz*, 61 N. J. Law, 211, 39 Atl. 910, it appeared that the applicant had been told that "the paper" would be sent her in a few days. This was held to show a contract for a policy and not an oral contract.

An agreement with an applicant for accident insurance that, in consideration of the application and the promise to pay the premium, he should be insured until the application was rejected and the company had notified him thereof, was considered sufficient to support an action in *Fidelity & Casualty Co. v. Ballard & Ballard Co.*, 105 Ky. 253, 48 S. W. 1074, provided the agent had authority to make the agreement. In *Fowler v. Preferred Accident Ins. Co.*, 100 Ga. 330, 28 S. E. 398, the court, doubting the validity of a parol contract of accident insurance, probably on account of statutory requirements, held that, even if such a contract could be made, it did not result from the mere verbal assurance by the agent to the applicant that he was insured from the date of the application and the giving of a receipt, where from the terms of the application it was apparent that the agent had no authority to make any binding contract of insurance.

A parol renewal of a policy was involved in *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584. In that case insured told defendant's agent that he wanted a policy renewed. The agent assented and the premium was agreed upon; the agent stating that he had a description of the property in his office and promising to attend to the renewal. The insured directed the agent to renew the old policy, the same as it was before, in the same company and for the same amount, and the agent promised to do so. It was held that, as this pointed unmistakably to some further act to be done to renew the policy, there was no contract of insurance on which insured could recover. In *Idaho Forwarding Co. v. Firemen's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586, it appeared that when a policy was about to expire plaintiff's cashier, who was authorized to pay premiums on insurance,

and who was also defendant's agent with authority to issue policies, was directed to renew the policy, which he promised, but neglected, to do, and the property was destroyed after the policy had expired. The court held that plaintiff could not recover as on a contract of insurance, though it seems to be intimated that, had the action been brought for a breach of a contract to insure, it might have been sustained.

(c) Validity of oral contract—Common-law doctrine.

Independent of statutory provisions, verbal contracts of insurance have been declared against in several states, especially in the earlier decisions. So in *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, decided in 1847, the court said that such a thing as a verbal policy was unknown to the law of insurance, all books and decisions on the subject uniting in the declaration that the policy must be in writing: that in every instance where the municipal law created and empowered corporations to enter upon the business of insurance, it required the contract or policy to be in writing and signed by the parties; and that to hold that there could be such a thing as a verbal policy would be contrary to all commercial usage. A similar doctrine is supported by *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, wherein it is said that the contract of insurance must always be in writing, and by *Platho v. Merchants' & Manufacturers' Ins. Co.*, 38 Mo. 248.

The validity of the oral contract is questioned by the court in *Lindauer v. Delaware Mut. Ins. Co.*, 13 Ark. 461, though it is admitted that it might be valid in other jurisdictions, and by Gardiner, J., in a concurring opinion in *Spitzer v. St. Marks Ins. Co.*, 13 N. Y. Super. Ct. 6. In the early cases of *Sandford v. Trust Fire Ins. Co.*, 11 Paige (N. Y.) 550, and *Smith v. Odlin*, 4 Yeates (Pa.) 468, the courts refrain from deciding the question, but seem adverse to the oral contract. In a dissenting opinion by Smith, J., in the latter case, it is considered worthy of remark that no instance has been heard of where parol insurance had been made.

As to the power of insurance companies to insure by parol, it is said, in *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, that it is doubtless true that they cannot ordinarily make such contracts, and a similar rule seems to be supported by *Courtney v. Mississippi Marine & Fire Ins. Co.*, 12 La. 233. With the exception of the Bishop Case, the cases holding against the validity of the oral contract are all of an early date, and seem to be founded

on a misapprehension of the common-law doctrine and on the requirements of the commercial codes generally that the contract must be in writing.

It is now well settled that at common law the contract was not required to be in writing. In *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419, it is said that no principle of the common law seems to require contracts of insurance, any more than other simple contracts, to be evidenced by a writing; and in *People's Ins. Co. v. Paddon*, 8 Ill. App. 447, the court states that the doctrine is now very generally recognized in this country that the rules of the common law present no impediment to the verbal contract.

That such is the rule of the common law is supported by *Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son*, 81 Ala. 711; *Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160, 99 Am. Dec. 145; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Simonton v. Liverpool & London & Globe Ins. Co.*, 51 Ga. 76.

(d) Same—Present doctrine.

As has been stated, the validity of the oral contract was denied by the courts of last resort in Missouri, Louisiana, and Ohio, and by the superior court of New York, and questioned in Pennsylvania, Arkansas, and Connecticut. But this early doctrine has been overruled by later decisions in all the states, with the possible exception of Louisiana and Connecticut. It is, however, doubtful if the courts of the latter state would adhere to the dictum in *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, were the question squarely presented for decision. The question also appears to be unsettled in Vermont, as in *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552, a case involving an oral assignment of a policy, the court reserves its opinion as to whether or not an oral contract of insurance would be binding.² In *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628, 27 Am. Rep. 533, the doctrine of *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, that the contract must be in writing, was considered as virtually overruled by *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am.

² The validity of an oral assignment of a policy is supported by *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 88 N. E. 835; *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628, 27 Am. Rep. 533; *Pratt v. New York Cent. Ins. Co.*, 64

Barb. (N. Y.) 589; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337. But, for a more complete discussion of this question, see post, vol. 2, p. 1069.

Rep. 612, wherein it was held that a provision requiring "all policies or contracts of insurance" to be subscribed by a designated officer does not conclude the company from entering into contracts for insurance in other modes. While the soundness of this view as to the effect of the decision in the Kelly Case was questioned in *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, it was nevertheless held that the early rule in Ohio had been so qualified by subsequent cases as to limit it to policies in a strictly technical sense and leave unaffected by it parol contracts of insurance. The early doctrine in Missouri seems to be modified by *Henning v. United States Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332, wherein it is said that a private person engaging in the business of insurance can bind himself by a parol contract, the same as in any other business. The more recent cases of *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252, and *Duff v. Fire Ass'n of Philadelphia*, 56 Mo. App. 355, support the now generally accepted doctrine that oral contracts of insurance are valid. In determining the validity of an oral assignment of a policy, the court, in *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337, says that, in the absence of any explicit prohibition in the charter and by-laws, corporations, like natural persons, may make parol contracts. This doctrine is also controlling in New York. In the leading case of *Ellis v. Albany Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, it is said: "Whatever doubt may formerly have been entertained as to the validity of parol contracts of insurance made by insurance companies authorized by their charters to make insurance by issuing policies, it is now settled that they are valid."

This doctrine is supported by *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Tyler v. New Amsterdam Fire Ins. Co.*, 27 N. Y. Super. Ct. 151 (dissenting opinion); *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. (N. Y.) 75; *Hicks v. British America Assurance Co.*, 43 N. Y. Supp. 623, 13 App. Div. 444; *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.) 555.

In regard to the rule in Pennsylvania, it is said, in *Lenox v. Greenwich Ins. Co.*, 165 Pa. 575, 30 Atl. 940, that it is settled and unquestionable that the whole contract of insurance may be oral. A similar doctrine seems to govern in Arkansas, and finds support in *King v. Cox*, 63 Ark. 204, 37 S. W. 877. As said in *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291, it has been too

often decided to leave it an open question that a contract of insurance can be made by parol unless prohibited by statute or other positive regulation. The very existence of the requirement in the commercial codes that the contract should be in writing shows that it was necessary to make such provision.

The validity of the oral contract is upheld by the following cases: *Firemen's Fund Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Insurance Co.*, 60 Fed. 351, 9 C. C. A. 1; *Humphry v. Hartford Ins. Co.*, 12 Fed. Cas. 884; *Daniels v. Citizens' Ins. Co. (C. C.)* 5 Fed. 425; *Mobile Marine Dock Mutual Ins. Co. v. McMillan & Son*, 31 Ala. 711; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Concordia Fire Ins. Co. v. Heffron*, 84 Ill. App. 610; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. 835; *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. 535; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *Phoenix Ins. Co. of Hartford, Conn., v. Ireland*, 9 Kan. App. 644, 58 Pac. 1024; *Commercial Union Assur. Co. v. Urbansky*, 24 Ky. Law Rep. 462, 68 S. W. 653, 113 Ky. 624; *National Fire Ins. Co. v. Rowe*, 20 Ky. Law Rep. 1473, 49 S. W. 422; *Deadman v. Royal Ins. Co.*, 12 Ky. Law Rep. 389; *Phoenix Ins. Co. v. Splers*, 87 Ky. 285, 8 S. W. 453; *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Brown v. Franklin Mutual Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Connecticut Fire Ins. Co. v. Judge of Monroe Circuit Court*, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Vining v. Franklin Fire Ins. Co.*, 89 Mo. App. 311; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169; *Smith & Wallace Co. v. Prusslan National Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458; *Palm v. Medina Fire Ins. Co.*, 20 Ohio, 529; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Patterson v. Ben Franklin Insurance Co.*, *81 Pa. 454; *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. 280; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160, 99 Am. Dec. 145; *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648; *Stehlick v. Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379; *Wood v. Prusslan National Ins. Co.*, 99 Wis. 497, 75 N. W. 173.

(e) Same—Life and accident insurance.

Though, as intimated in *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631, the usual custom of life insurance companies is to make no insurance except by writ-

ten policies, still the authorities are practically unanimous that life and accident insurance can be made orally.

Such appears to be the doctrine of *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163, *Pacific Mut. Ins. Co. of California v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566, and *Fidelity & Casualty Co. v. Ballard & Ballard Co.*, 105 Ky. 253, 48 S. W. 1074.

It is true that in the *McElroy Case* the court seems to be adverse to the oral contract, but it does not, even there, go further than to hold that, where no policy of life insurance has been issued and no premium has been paid, there is a strong presumption that there was no contract, and no intention to contract otherwise than by a policy made and delivered upon the simultaneous payment of a premium. To this *Caldwell, J.*, dissents, on the ground that it is well settled that a verbal contract of insurance is as binding and effectual as a written one. In *Fowler v. Preferred Accident Ins. Co.*, 100 Ga. 330, 28 S. E. 398, the Supreme Court of Georgia seems to doubt that a valid contract of accident insurance can in that state be made in parol, but this is probably because of the requirements of the statute.

(f) Same—Renewal.

Since a contract of insurance can rest in parol, it follows as a necessary corollary that generally a policy may be renewed by parol; and this seems to be true, even though the policy requires the renewal to be acknowledged by a writing. In *Carey v. Nagle*, 5 Fed. Cas. 60, it is stated that a provision in a policy that no insurance, whether original or continuing, shall be binding until the actual payment of the premium and the written acknowledgment thereof, does not invalidate a subsequent contract of renewal by parol. An oral renewal of a policy was sustained in *Squier v. Hanover Fire Ins. Co.*, 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349; *Id.*, 46 N. Y. Supp. 30, 18 App. Div. 575, even though credit had been given for the premium. But a contrary doctrine seems to be held in *O'Reilly v. London Assurance Corporation*, 101 N. Y. 575, 5 N. E. 568. However, in this case, the agent did not consider the conversation as a renewal, and the insured made no claim on the insurer until six months after the loss had occurred.

(g) Statutory and charter provisions.

Where there are direct statutory provisions requiring all contracts of insurance to be in writing, as in Georgia,³ it, of course,

³ Code 1895, §§ 2022, 2089.

follows that an executed contract cannot rest in parol. The rule seems to be different in regard to the executory contract.⁴ In *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478, a declaration on a parol renewal of a policy was held demurrable; but in *Simonton v. London & Liverpool & Globe Ins. Co.*, 51 Ga. 76, the court intimates that an insurer would not be permitted to deny an oral contract, where the insured by virtue of it had so far acted that it would be aiding in a fraud to allow it to be repudiated. However, in the latter case, it was held that plaintiff had not shown himself to be entitled to relief. Pub. St. Mass. c. 119, § 138, prohibiting the issuing of fire policies, other than those of the standard form, and St. 1894, c. 522, § 59, requiring conditions of insurance to be stated in full, do not, according to *Goodhue v. Hartford Fire Ins. Co.*, 175 Mass. 187, 55 N. E. 1039, preclude an insurer from orally insuring goods pending their removal until an existing policy can be modified. Similarly *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291, holds that the object of Acts Mass. 1864, c. 196, § 1, which provides that the conditions of insurance shall be stated in the body of the policy, was not to prohibit parol contracts of insurance. The legislatures of several states have enacted laws requiring a copy of an application referred to in a policy to be attached to it, if the statements contained in such application are to be binding on the insured. Such laws do not, however, by implication, change the established rule in regard to oral contracts. This, at least, seems to be the opinion of the Pennsylvania Supreme Court in *Lenox v. Greenwich Ins. Co.*, 165 Pa. 575, 30 Atl. 940. In *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347, it is intimated that the revenue law requiring stamps on documents might make a writing necessary. Rev. St. Me. c. 49, § 14, requires "all policies of insurance" to be signed by the president or other designated officer and countersigned by the secretary, and provides that such policies shall be binding on the company as if executed under its corporate seal. In *Walker v. Metropolitan Ins. Co.*, 56 Me. 371, it was held that this section did not either expressly or impliedly limit the general powers granted by section 12 to insurance companies to make insurance against fire on property, and that, therefore, insurance companies might still exercise the right of making parol contracts of insurance, if their charters did not contain provisions to the contrary.

⁴ See ante, p. 367.

The rule to be deduced from the cases construing charter provisions requiring insurance contracts and policies to be signed by the proper officers seems to be that where only the "policies" are required to be so signed the companies are not precluded from making oral contracts, but that they are so precluded where the charter provisions embrace "all" contracts. In the early case of *Henning v. United States Ins. Co.*, 47 Mo. 427, 4 Am. Rep. 332, provisions of the charter that all the conditions of policies issued by the company should be printed on the face thereof, and provisions of the by-laws requiring all policies or other contracts to be signed by the president, and that every proposal for insurance should be by written application, were held to prevent the company from insuring by parol. An opposite view was taken by the United States Circuit Court in an action on the same policy, reported in 11 Fed. Cas. 1132. In view of the fact that the general law (Rev. Code 1845, p. 232, § 8) declared that parol contracts might be binding on aggregate corporations, if made by duly authorized agents or under general regulations of the corporation, the rule thus laid down by the Circuit Court was approved in *Baile v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo. 371. The contrary view is taken in *Spitzer v. St. Mark's Ins. Co.*, 13 N. Y. Super. Ct. 6, and likewise in *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, though the latter case was decided on the broad principle that insurance could not be effected orally. The *Spitzer* Case does not, however, represent the true doctrine in New York, for in *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, it was held that the provision in a charter that policies and other contracts founded thereon, subscribed by the president and countersigned by the secretary, should be binding, though not made under seal, did not restrict the general authority of the corporation to contract in other modes than by writings.

This doctrine is supported by *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419, and by *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291.

In the *Shaw* Case the company's charter provided that its business should be to make insurance by instrument under seal or otherwise, and that the president or other officer appointed by the board should be authorized in and by a policy of insurance in writing, to be signed by the president and secretary, to make contracts of insurance. The court says that it was manifest that the last provision was merely affirmative as to what the officers might

do, and contained no negative clause that insurance made otherwise than by a written policy should be void. Though it is not directly decided that the company could make a valid oral contract, yet such seems to be the opinion of the court. So, in *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.) 555, where an oral consent to the transfer of property was involved, it was held that a charter declaring that all policies should be subscribed by the president and countersigned by the secretary or his assistant applied only to cases where the contract was evidenced by a writing, and did not destroy the power to make parol contracts. Of course, where the act under which a company is chartered requires every contract of insurance to be in writing, such company cannot insure by parol. Thus it was held, in *Hazlett v. Allegheny Ins. Co.*, 1 Walk. (Pa.) 336, 1 Wkly. Notes Cas. 24, 31 Leg. Int. 372, that an insurance company incorporated under P. L. Pa. 211, § 10 (Act April 2, 1856), which requires every contract of insurance to be in writing, under the seal of a corporation and signature of the president or vice president, was not bound by a verbal contract of insurance.

(h) Mutual companies.

As to the capacity of mutual companies to contract by parol, the court, in *Brown v. Franklin Mut. Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534, said that it could see no reason why the general rule should not apply to mutual companies, unless there was something in the statutes or in the by-laws of the company which necessitated a different conclusion. And in *Alliance Co-op. Ins. Co. v. Corbett* (Kan.) 77 Pac. 108, it was held that, in the absence of a controlling provision of the by-laws, a binding contract of insurance may be consummated with a mutual fire insurance company without the issuance of a policy of insurance. A by-law providing that the directors might authorize the president to make insurance and issue policies at such rates and under such limitations as they should prescribe was in the *Brown Case* merely held to be enabling words, and not a restriction on the power which such company had by law to make contracts. In *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521, 44 N. W. 828, the by-laws of the company and instructions to its agents provided that all applications for insurance should be examined and approved by the directors, that the secretary should issue and deliver all policies, and that the policies

were to be signed by the president and secretary and should be in force as soon as approved by the committee, unless otherwise provided for in the application. It was held that the company could bind itself by a contract of insurance without issuing a written policy. But the case of *Mound City Mut. Fire & Marine Ins. Co. v. Curran*, 42 Mo. 374, seems to support the doctrine that, where the charter and by-laws of a mutual insurance company provide that a policy shall be issued only on a written application making representation of all material circumstances affecting the risk and shall be signed by the president and secretary, the secretary has no authority to make a policy or contract of insurance otherwise than in the manner prescribed in the charter and by-laws. According to *Stoelke v. Hahn*, 55 Ill. App. 497, a settlement of an alleged oral contract of a mutual company, which had some evidence to support it, by the payment of a little more than half of the claim, was within the power of the directors as a valid compromise, and the fact that such oral contract was forbidden by the company's by-laws did not render the settlement ultra vires.

(1) Statute of frauds.

It appears to be the general rule that an oral contract of insurance is not within the statute of frauds.⁵ So it was held, in *Springfield Fire & Marine Ins. Co. v. DeJarnett*, 111 Ala. 248, 19 South. 995, that, although a policy or verbal agreement of insurance might cover a period of three years, its performance could be required one hour after its execution, or after it had been agreed upon, and hence such agreement was not within the statute.

This rule is supported by *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Firemen's Fund Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644, 58 Pac. 1024; *Phoenix Ins. Co. v. Splers*, 87 Ky. 285, 8 S. W. 453; *Equitable Life Assurance Society v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631; *King v. Cox*, 63 Ark. 204, 87 S. W. 877; *Mattingly v. Springfield Fire & Marine Ins. Co.*, 26 Ky. Law Rep. 1187, 88 S. W. 577.

A contract of insurance against loss of goods by fire, and also against loss by other risks, was, in *Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son*, 31 Ala. 711, held divisible and enforceable for a loss by fire. In *Trustees of the First Baptist Church*

⁵ See Cent. Dig. vol. 23, *Frauds, Statute of*, cols. 2005-2011, §§ 74, 75.

v. Brooklyn Fire Ins. Co., 19 N. Y. 305, s. c. 18 Barb. 69, an oral contract of renewal from year to year, subject to termination at any time, was held not to be within the statute of frauds; and in *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419, a contract for a year, including its date, was considered as one to be performed within a year, and therefore not within the statute. But a contract of reinsurance cannot be enforced, if not in writing, as a promise to pay the debt of another is within the statute of frauds (*Egan v. Firemen's Ins. Co.*, 27 La. Ann. 368).

(J) Powers of agents.

An agent who has authority to "survey risks, fix the rate of premium, and issue and sign policies" has, according to *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419, authority to enter into oral contracts of insurance, as well as to issue policies. That is to say, an agent who is authorized to take risks can make oral contracts binding on his company.

Such is the doctrine of *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. 280; *Fire Association of Philadelphia v. Smith*, 59 Ill. App. 655; *Ellis v. Albany City Fire Insurance Co.*, 4 Lans. (N. Y.) 433; *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. 55. So, in *Squler v. Hanover Fire Ins. Co.*, 46 N. Y. Supp. 30, 18 App. Div. 576, a local agent, who could receive proposals at fixed rates, and countersign, issue, and renew policies, was held authorized to make a parol renewal of a policy. The rule as thus laid down by the Appellate Division was approved by the Court of Appeals in a subsequent hearing, reported in 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349.

It is, of course, elementary that, as said in *Brown v. Franklyn Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534, an agent's authority cannot be limited by private instructions not known to the insured. If the ordinary mode of making insurance in a certain city is by parol, it follows that an agent for an insurance company in such city has authority to make parol contracts. This, at least, seems to be the doctrine of *Ætna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458, where a contract of marine insurance was involved. But a mere declaration of the agent that it was not customary to give policies in marine insurance was held not to show sufficient authority; plaintiff's evidence not being clear as to whether an oral contract was made or only a contract for a policy. In *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252, it was held that, though a general agent for an insurance company cannot delegate his authority, yet, where he approves

the acts of a clerk in regard to an oral contract done in his name, such acts will be regarded as those of the agent, and consequently binding on the company. Where, however, the agent merely has authority to receive applications for insurance in accordance with instruction, and to collect and transmit premiums, he cannot bind his principal orally (*Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64). Furthermore, it was held, in *Courtney v. Mississippi Mut. Fire Ins. Co.*, 12 La. 233, that the president could not be considered as acting within the scope of his authority in making an alleged oral contract; but in this case the court seemed, as before stated, adverse to oral insurance.

(k) Presumption as to terms.

If a contract of insurance is made orally, and nothing is said about conditions, it is presumed that the parties intended it should contain the usual conditions of such contracts. That is the rule laid down in *Vining v. Franklyn Fire Ins. Co.*, 89 Mo. App. 311. In the early case of *Northwestern Iron Co. v. Ætna Ins. Co.*, 26 Wis. 78, it seems to be the opinion of the court that, where it affirmatively appears that the usage in a city in which a contract for marine insurance is effected by parol is to make such contracts subject to the conditions of the customary written policies, the insurance will be considered as embracing those conditions and terms, with such modifications and additions as are specifically agreed upon. The rule first stated appears to have been modified by recent decisions, so that the contract will be presumed to embrace the conditions of the customary policy used by the insurer to cover the risks, evidently on the ground that, as nearly all oral contracts are for policies, the parties have in view the conditions and terms of the usual policy.

This appears to be the rule of *Concordia Fire Ins. Co. v. Heffron*, 84 Ill. App. 610, and *Duff v. Fire Ass'n*, 129 Mo. 460, 30 S. W. 1034.

The effect of the law prescribing a standard fire insurance policy is discussed in *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424. It is there said that the contract, though verbal, embraced within it the provisions of the standard policy of fire insurance, and it appears to be the opinion of the court that, where a standard policy has been prescribed, all contracts of insurance, whether verbal or written, are subject to the conditions contained in the standard policy.

(1) Pleading and practice.

A plaintiff who relies on an oral contract of insurance is not required to set out the terms of the policy in use by the insurer to cover similar risks in plaintiff's locality.

This is the doctrine of *Duff v. Fire Ass'n*, 129 Mo. 460, 30 S. W. 1034, *Ganser v. Firemen's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943, and *Northwestern Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78.

In the *Duff Case*, it was held that, if the insurer relied on the nonperformance of the conditions of the policies issued by it on similar risks, it must plead the legal implication that such conditions were a part of the contract. In Illinois, it seems, a recovery cannot be had on an oral contract of insurance under the common counts; a special count being necessary. This is the holding of *Concordia Fire Ins. Co. v. Heffron*, 84 Ill. App. 610. In *Sahlman v. Mutual Reserve Fund Life Ass'n*, 53 S. C. 183, 31 S. E. 50, it was held that two causes of action, one on a verbal agreement and one on a receipt, were not stated by a complaint alleging that defendant agreed to and did insure the life of S. for the benefit of plaintiff; said agreement being verbal and being evidenced by a receipt. An employer, who has taken out a "workmen's collective policy," is not (*Fidelity & Casualty Co. v. Ballard & Ballard Co.*, 105 Ky. 253, 48 S. W. 1074) a necessary party to an action by the beneficiary of a deceased workman.

If plaintiff relies on an oral contract of insurance, without setting out the terms of the written policies in use by defendant, which it, by the latter's testimony, appears were included in the contract, evidence that certain conditions were modified by specific agreement will not create a variance. Such appears to be the holding in *Northwestern Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78.

The burden is on insured to prove the contract and the authority of the agent to make it (*Smith v. State Ins. Co.*, 58 Iowa, 487, 12 N. W. 542). In *Smith v. Odlin*, 4 Yeates, 468, it was said by Smith, J., that an oral contract of insurance ought to be proved clearly and beyond a doubt; and in *Deadman v. Royal Ins. Co.*, 12 Ky. Law Rep. 389, and *Patterson v. Ben Franklin Ins. Co.*, *81 Pa. 454, it was held that the evidence to establish such a contract should be clear. But in *Equitable Life Assur. Co. v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631 (dissenting opinion), it was said that the contract need only be proved by preponderance of the evidence. A writing, drawn up after the

contract was concluded, and meant to be merely a memorandum, is admissible (*Mobile Marine & Dock Mut. Ins. Co. v. McMillan & Son*, 31 Ala. 711). This case involved insurance on cotton in transit, and it was held that evidence of the business which plaintiffs were engaged in was admissible, but not the fact that the consignee had a policy which would cover the cotton when it reached its destination. However, evidence of declarations and statements made by an agent of an insurance company, in conversations with others, that "he had accepted a risk," that "he had taken a premium note," and that "the policy was not issued on account of his negligence," is not admissible to make out a case in chief against an insurance company, as on a verbal contract of insurance (*German Fire Ins. Co. v. Schroeder*, 48 Kan. 643, 29 Pac. 1078). The fact that an insurer has not made an entry of the contract in a book kept by it is not evidence in its favor that no contract has been made (*Sanborn v. Firemen's Ins. Co.*, 16 Gray [Mass.] 448, 77 Am. Dec. 419). In *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. 280, it was held that, where a parol contract of insurance was made by an agent authorized to take risks, it need not be affirmatively shown that such agent had authority to make parol contracts of insurance. In *Pacific Mut. Ins. Co. of California v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566, plaintiff rested his right to recover on the fact that defendant's agent had agreed with the deceased that the insurance on his life was to commence the day after the delivery of the application. It was held that if, as plaintiff's evidence tended to show, the application was not dated when delivered, it could be shown that the agent subsequently inserted a date other than that agreed on and without authority. In *Squier v. Hanover Fire Ins. Co.*, 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349, a statement of defendant's agent, after the fire, that the company would make good the loss, was admissible as affecting his credibility; he having denied the contract. *Idaho Forwarding Co. v. Firemen's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586, was an action on a parol renewal. An admission by defendant's agent that the property was insured, made subsequent to the conversation alleged to constitute the contract, was held incompetent, on the ground that it was not part of the *res gestæ*. So a question asked plaintiff's manager as to how long insurance was to be for was held inadmissible as calling for a conclusion.

5. COMPLETION OF CONTRACT—APPLICATION OR OFFER AND ACCEPTANCE.

- (a) Application and necessity therefor in general.
- (b) Necessity of mutuality.
- (c) Necessity of acceptance or approval.
- (d) Withdrawal of application.
- (e) Power of agent to accept or prove application.
- (f) What constitutes acceptance or approval.
- (g) Same—Necessity of notice of acceptance.
- (h) Same—Effect of delay in acceptance or failure to give notice of rejection.
- (i) Effect of acceptance or approval.
- (j) Rejection and notice thereof.
- (k) Offer to insure and acceptance thereof.
- (l) Matters peculiar to mutual benefit associations.

(a) Application and necessity therefor in general.

The inception of a contract of insurance is generally through a proposition made by the person desiring insurance, though in some instances the proposal or offer to insure comes from the insurer.

When the offer or proposition for a contract of insurance proceeds from the person desiring to be insured, it is designated as the application (*Mutual Ben. Life Ins. Co. v. Robison*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325). In fire insurance the terms "plan," "application," or "survey" are often used as meaning the same thing. Formerly "survey" was most commonly employed. As said in *Albion Lead Works v. Williamsburg City Fire Ins. Co.* (C. C.) 2 Fed. 479, when a person wrote for insurance, his letter was an application, but often not a full and satisfactory one. The company would send back a form for a more complete application. This paper, filled out and signed by the insured, was the final application, and to avoid misunderstanding it came to be called a "survey," as in many instances the original letter was referred to as the "application."

While it has been said in some cases, and notably in *John R. Davis Lumber Co. v. Scottish Union & National Ins. Co.*, 94 Wis. 472, 69 N. W. 156, that there must be an application, it is probably only a general way of asserting the principle laid down in *Clark v. Insurance Co. of North America*, 35 Atl. 1008, 89 Me. 26, 35 L. R. A. 276, to the effect that an insurance agent cannot, as against

a company represented by him, effect a contract of insurance in favor of one who has not applied therefor. Certainly, a formal application may be waived.

Jones v. New York Life Ins. Co., 168 Mass. 245, 47 N. E. 92; *Burlington Voluntary Relief Department of Chicago, B. & Q. R. Co. v. White*, 41 Neb. 547, 59 N. W. 747, 43 Am. St. Rep. 701; *Wagner v. Supreme Lodge Knights and Ladies of Honor*, 87 N. W. 903, 128 Mich. 680.

Nevertheless, the rule that there must be an application seems to be given effect in cases where, as in *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, an existing policy was canceled by the insurer, and the agent, without the knowledge or consent of the insured, substituted the present policy for the canceled policy.

An interesting case is *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452. The plaintiff made inquiries of the company concerning the negotiations between the company and her deceased husband for insurance. The company sent her what purported to be an amended application, which was apparently signed by the husband. The court held, nevertheless, that the company was not estopped to deny that such application had in fact been signed. In *Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544, the insured made application and was duly examined for life insurance. Owing to the large amount of insurance requested, another examination by a second physician was had, and the results thereof were filled in on the reverse side of one of the company's blank applications. No further application from insured was required, but he filled in and signed the blank form identically as the first. It was, however, held that this could not be regarded as a new or modified application for the desired insurance.

Generally speaking, an application must be made by the person whose property or life is to be insured, or by his duly authorized agent. As said in *Carrigan v. Massachusetts Ben. Ass'n (C. C.)* 26 Fed. 230, a policy is fraudulent and void when procured by a paper purporting to be an application by the insured, but executed by another in his name; the by-laws requiring an application by the applicant in person.¹ But, as said in *Somers v. Kansas Protective Union*, 42 Kan. 619, 22 Pac. 702, an application made by

¹ For discussion of principle that insurance without the knowledge of the insured is invalid, see post, p. 556.

another may be subsequently ratified by the insured. So the application may be made by another, if under the direction or by the authority of the insured.

Prudential Ins. Co. v. Cummins' Adm'r (Ky.) 44 S. W. 431; *Sullivan v. Industrial Ben. Ass'n*, 73 Hun, 319, 26 N. Y. Supp. 186; *Pickett v. Metropolitan Life Ins. Co.*, 20 App. Div. 114, 46 N. Y. Supp. 693; *Thornburg v. Farmers' Life Association of Des Moines*, 98 N. W. 105, 122 Iowa, 260.

Evidence that insured did not sign an application for the policy sued on on a particular occasion was insufficient to establish the fact that he did not sign it at some other time. *Berry v. Metropolitan Life Ins. Co.*, 88 N. Y. Supp. 140, 43 Misc. Rep. 670.

The fact that the application was not in fact executed by the person insured may be waived by the insurer.

Reference may be made to *Thornburg v. Farmers' Life Ass'n of Des Moines*, 98 N. W. 105, 122 Iowa, 260; *Pickett v. Metropolitan Life Ins. Co.*, 46 N. Y. Supp. 693, 20 App. Div. 114; *Home Mut. Life Ass'n v. Riel* (Pa.) 17 Atl. 36.

An application may or may not be in writing.² In life and accident insurance the application may be said to be always in writing. On the other hand, in fire insurance, the application is generally oral, though it may assume a written form in the shape of agents' memoranda, before the negotiation is complete. Thus, in *Fire Ass'n of Philadelphia v. Bynum* (Tex. Civ. App.) 44 S. W. 579, the policy was issued without a written application, though one was subsequently called for by the insurer. The court held that such subsequent application did not relate back and become part of the original contract. In *John R. Davis Lumber Co. v. Scottish Union & National Insurance Co.*, 94 Wis. 472, 69 N. W. 156, it was said that the application need not necessarily be in writing.

The question whether the policy was issued on a written application was one of the questions at issue in *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Cronin v. Fire Association*, 112 Mich. 106, 70 N. W. 448; *Id.*, 123 Mich. 277, 82 N. W. 45; *Ames v. Manhattan Life Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244.

But in *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998, an application made on a blank of another company

² But see *Comp. St. Neb. 1901, § 3494z (5)*, relating to insurance on growing crops.

and transferred to the present company without the knowledge of the insured was regarded as not an application of the insured on which warranty could be predicated. It does not appear to be necessary that the application should be in any particular form. As said in *City Ins. Co. v. Bricker*, 91 Pa. 488, an application is good, though drawn in lead pencil, and it does not affect the validity of the application that it is written on the blank of another company, if it is properly identified. The application may take the form of a mere memorandum or a receipt for premium paid, as in *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305, or even a mere letter asking for insurance, as in *Blake v. Hamburg-Bremen Fire Ins. Co.*, 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15. But, if the letter was mailed unstamped, it cannot be regarded as an application within an agreement that the depositing of a letter in the post office, directed to the agent and asking for the insurance, would cover the risk for 24 hours, within which time regular insurance could be secured.

Where applications for the indorsement of risks on an open policy take effect from the time they are deposited in the post office, depositing in a mail box is not a sufficient mailing. *Banco De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 100 N. W. 532.

The provisions of the Virginia statute (Code 1887, § 3252 [Code 1904, p. 1712]), declaring that no condition or restrictive provision in a policy shall be operative unless in writing or in type as large as long primer, applies to the provisions in the application, where such application is made a part of the policy (*Burruss v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49).

Clerical errors in an application, not affecting its meaning, are immaterial, according to *Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440.

(b) Necessity of mutuality.

It is elementary that contracts of insurance, like other contracts, are based on mutuality. This fundamental principle is not less true because in some aspects contracts of insurance are regarded as unilateral.* Not only is the mutual assent of the parties necessary (*Alliance Marine Assur. Co. v. Louisiana State Ins.*

* See the discussion as to right of payment of dues and assessments, post, mutual benefit associations to enforce p. 1035. See, also, ante, p. 82.

Co., 8 La. 1, 28 Am. Dec. 117), but there must also be mutuality of obligation.

Reference may be made to *Reynolds v. Mutual Fire Ins. Co.*, 34 Md. 280, 6 Am. Rep. 337; *Travis v. Peabody Ins. Co.*, 28 W. Va. 583; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. 339; *Schaffer v. Mutual Fire Ins. Co.*, 89 Pa. 296; *John R. Davis Lumber Co. v. Scottish Union & National Ins. Co.*, 94 Wis. 472, 69 N. W. 156.

By reason of the principle of mutuality it is necessary that the parties to the contract should mutually agree on or assent to the terms of the contract. As said in *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34, a mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure without more, would not amount to a contract of insurance or an agreement to insure. It is true, as said in *Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516, ordinarily it is not expected that an application will contain all of the terms and conditions which are included in the policy when it is issued. Certain particulars are named; others are not. The application is for insurance on such terms and conditions as, in view of the particulars submitted, the company sells. The principle is well expressed in *Clark v. Insurance Company of North America*, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276, where the court said that the contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of contract must have been agreed upon. If it is incomplete in any material particular, or the assent of either party is wanting, it has no binding force.

In view of these principles certain elements have been settled upon as essential to the contract of insurance. These are the subject-matter, the parties, the amount of the indemnity, the duration of the risk, the extent of the risk, and the rate of premium. These elements must be present in every completed contract.

Citation of authorities is hardly necessary; but reference may be made to the cases hereinafter cited.

So it was said, in *John R. Davis Lumber Co. v. Scottish Union & National Ins. Co.*, 94 Wis. 472, 69 N. W. 156, that if the application be made to an agent representing several companies, the particular company or companies to carry the risk must be des-

ignated, with the amount each is to carry. A similar principle is asserted in *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

As to these elements, so regarded as essential, there must be a meeting of minds, an agreement and accord between the proposer and the insurer, in order to create a contract of insurance.

This fundamental principle is supported by *Mutual Life Ins. Co. v. Young*, 23 Wall. 85, 23 L. Ed. 152; *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Kimball v. Lion Ins. Co. (C. C.)* 17 Fed. 625; *The Waubaushene (D. C.)* 22 Fed. 109; *Hamblet v. City Ins. Co. (D. C.)* 36 Fed. 118; *Phoenix Ins. Co. v. Schultz*, 80 Fed. 337, 25 C. C. A. 453; *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *New Orleans Ins. Ass'n v. Boniel*, 20 Fla. 815; *People's Ins. Co. v. Paddon*, 8 Ill. App. 447; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77; *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Johnson v. Connecticut Fire Ins. Co.*, 84 Ky. 470, 2 S. W. 151; *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307; *Wallingford v. Home Mutual Fire & Marine Ins. Co.*, 30 Mo. 46; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305; *Tyler v. New Amsterdam Fire Ins. Co.*, 27 N. Y. Super. Ct. 151; *Brink v. Merchants' & Farmers' United Mut. Ins. Ass'n (S. D.)* 95 N. W. 929; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777.

The necessity of an agreement as to the essential elements is illustrated in *Zimmermann v. Dwelling House Ins. Co.*, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698. Defendant's general agent directed the local agent, who desired a policy on his own household goods and a barn he was building, to write it in the usual way. The policy was written on completion of the barn some three months later, but not forwarded to the company. No statement was made as to the value of the property to be insured, or for how much it was to be insured, or what rate of premium was to be paid. No date had been fixed for the commencement or termination of the risk. Giving the most liberal construction possible to the language used and the acts of the parties, there was no mutual and valid contract, binding upon both parties. In *Sheldon v. Hekla Fire Insurance Company*, 65 Wis. 436, 27 N. W. 315, the agent agreed to insure plaintiff's house on certain specified terms in some company represented by him, but not designated.

The defendant, being one of those companies, decided to insure the house on entirely different terms, but, before plaintiff was informed thereof, the company determined not to take the risk. It was held that there was no contract. And when, after the policy was written, the insured instructed the agent to ask the company for a lower rate, and, if it was not granted, to cancel the policy, it was held, in *Manchester Fire Assur. Co. v. Benson*, 66 Ill. App. 615, that there was no meeting of minds. Where an insurance company assumed all the liabilities and contracts of another company, and issued an invitation to all the members of the latter company to exchange policies for those of the reinsuring company, and it was shown that the reinsurer issued 10 different kinds of policies at different rates, a surrender of a certificate of the original insurer, with a request for a policy in the reinsurer, does not constitute a contract for insurance, according to *Cotton v. Southwestern Mut. Life Ins. Co.*, 115 Iowa, 729, 87 N. W. 675.

On the other hand, in *Home Ins. Co. v. Adler*, 77 Ala. 242, where the insured understood the contract was for a policy for \$2,000 entirely on merchandise, while the agent understood the agreement to be for \$1,500, of which \$300 was on furniture, the court said that the discrepancy did not show that there was no agreement.

The necessity of a meeting of minds on the essential elements of the contract is also illustrated in *New Orleans Ins. Ass'n v. Boniel*, 20 Fla. 815, *Dodd v. Gloucester Mut. Fishing Ins. Co.*, 120 Mass. 468, and *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584, where renewal contracts were involved.

(c) Necessity of acceptance or approval.

The making of an application is, however, merely a step in the creation of a contract. As was said in *Lee v. Guardian Life Insurance Company*, 15 Fed. Cas. 158, the rights of the applicant are not concluded by the making out of the application. When the application is made out and forwarded to the company, it is not yet a contract of insurance. It has then only attained the position of a proposition on one side, which must be accepted on the other. That is to say, until it is accepted by some one having authority to accept the terms proposed, the application is not a contract, but merely a proposal.

Reference may be made to *Weinfeld v. Mutual Reserve Fund Life Ass'n* (C. C.) 53 Fed. 208; *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348;

Walker v. Farmers' Ins. Co., 51 Iowa, 679, 2 N. W. 583; Armstrong v. State Ins. Co., 61 Iowa, 212, 16 N. W. 94; Winchell v. Iowa State Ins. Co., 103 Iowa, 189, 72 N. W. 503; Blue Grass Ins. Co. v. Cobb, 24 Ky. Law Rep. 2132, 72 S. W. 1099; Allen v. Massachusetts Mut. Acc. Ass'n, 167 Mass. 18, 44 N. E. 1053; Helman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; Alabama Gold Life Ins. Co. v. Herron, 56 Miss. 643; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. Law, 476; Globe Mut. Life Ins. Co. v. Snell, 19 Hun, 560; Hacheny v. Leary, 12 Or. 40, 7 Pac. 329; New York Union Mut. Ins. Co. v. Johnson, 23 Pa. 72; McCully's Adm'r v. Phoenix Mut. Life Ins. Co., 18 W. Va. 782.

In addition to the cases cited above the necessity of approval of the application is also asserted in Miller v. Northwestern Mutual Life Ins. Co., 111 Fed. 465, 49 C. C. A. 380; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64; Barr v. Insurance Company of North America, 61 Ind. 488; McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278; Trask v. German Ins. Co., 53 Mo. App. 625; St. Paul Fire & Marine Ins. Co. v. Kelley, 2 Neb. (Unof.) 720, 89 N. W. 997; Haden v. Farmers' & Mechanics' Fire Ass'n, 80 Va. 683; Chamberlain v. Prudential Ins. Co., 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851.

If the application is made to an agent representing several companies, and it designates the companies in which insurance is desired, specifying the amount to be assumed by each, each company must signify its acceptance (John R. Davis Lumber Co. v. Scottish Union & National Insurance Co., 94 Wis. 472, 69 N. W. 156).

In some instances the application or receipt for premium contains a stipulation that the contract shall not take effect until the application is approved. As was said in Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544, this amounts, at best, only to a contract of insurance, provided the application shall be approved by the company. In others words, a contract of insurance was completed, subject to the condition.

Substantially the same rule is asserted in Steidle v. New York Life Ins. Co., 81 Fed. 489, 26 C. C. A. 491; Pace v. Provident Savings Life Assur. Soc., 113 Fed. 13, 51 C. C. A. 32; Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 81, 52 C. C. A. 675; Rowland v. Springfield Fire & Marine Ins. Co., 18 Ill. App. 601; Pickett v. German Fire Ins. Co., 39 Kan. 697, 18 Pac. 903; Jacobs v. New York Life Ins. Co., 71 Miss. 658, 15 South. 639; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. Law, 476; Allen v. St. Lawrence County Farmers' Ins. Co., 88 Hun, 461, 34 N. Y. Supp. 872; Coker v. Atlas Accident Ins. Co. (Tex. Civ. App.) 31 S. W. 703.

An interesting case is Walker v. Farmers' Ins. Co., 51 Iowa, 679, 2 N. W. 583. The plaintiff made a written application for insur-

ance to defendant's agent, giving his note for the amount of the premium, receiving in return a written receipt, providing that the note should be returned if the policy was not issued. The agent was a special one to receive applications, and through his neglect the application and note were not forwarded to the company, and the loss occurred 25 days after the papers were executed. It was held that no contract of insurance was entered into that bound the company, but that it would be liable in a proper action for damages sustained by plaintiff, caused by neglect of the agent to forward the application. The court said that the application, note, and receipt did not constitute a contract binding upon defendant, in the absence of approval of the application and acceptance of the proposition for insurance contained therein.

Since an application is merely a request for or a proposition to take insurance, the insurer, as said in *McMaster v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119, is not bound to grant the request or accept the proposition. It may reject the proposition in toto, or it may reject it in part and make a counter proposition. As said in *Michigan Pipe Co. v. Michigan Fire & Marine Insurance Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277, the same rule applies to contracts for insurance as to other contracts. When one applies for insurance, the insurer must accept the terms of the application before a contract can exist. If the insurer replies to the application by proposing different terms, or by sending a policy differing in essential matters from the application, no contract has been made until the counter proposition or policy has been accepted by the applicant.

This doctrine was also applied in *Wallingford v. Home Mutual Fire & Marine Ins. Co.*, 30 Mo. 46, where a change was proposed in the rate of premium, and in *Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139, where the application asked for insurance to a certain amount against fire and another amount against cyclone and wind storms, and changes were proposed as to the property to be covered by the tornado clause.

Where an application for an insurance policy contained a stipulation that no liability should attach until its approval by the company's general agent in another state, and the general agent approved the same with a modification, as in *Born v. Home Ins. Co.*, 94 N. W. 849, 120 Iowa, 299, it was not necessary to the completion of the contract that the general agent should again approve the application after the insured's acceptance of the modification.

(d) Withdrawal of application.

In view of the general rule that the application is merely a proposal for a contract, the applicant may withdraw it at any time before acceptance. As was said in *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653, propositions, negotiations, correspondence, conversations, do not make a contract, unless the minds of the parties meet upon the same stipulations and they consent to comply with them. Until this has been done, either party has a right to withdraw or to modify his proposition, to make new conditions or proposals, or to retire absolutely from the negotiations. An application for life insurance is not a contract. It is only a proposal to contract on certain terms, which the company to which it is presented is at perfect liberty to accept or to reject. It does not in any way bind the applicant to take the policy, to make the contract he proposed, or to pay the premium, until his proposal has been accepted by the company and its policy has been issued. Until the meeting of the minds of the parties upon the terms of the same agreement is effected by an acceptance of the proposition contained in the application, or of some other proposition, each party is entirely free from contractual obligations. The applicant may withdraw his application and refuse to take the insurance on any terms. He may modify his proposal, may affix additional conditions or terms to it, or may make an entirely new proposition, while the company may refuse to entertain any proposition, or may reject that presented and submit a substitute.

The general right to revoke or withdraw the application is asserted in *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; *Northampton Mut. Life Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Globe Mutual Life Ins. Co. v. Snell*, 19 Hun, 560; *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. 72; *John R. Davis Lumber Co. v. Scottish Union & National Ins. Co.*, 94 Wis. 472, 69 N. W. 156.

There is, however, no presumption that there has been a withdrawal. In *Hallock v. Commercial Insurance Co.*, 26 N. J. Law, 268, the insurer insisted that as the application was made March 2d, and no action was taken thereon by March 13th, the application must be regarded as withdrawn. There was, however, no pretense of an express withdrawal. The court laid down the general principle that the application and the answer can never be at the same precise instant, but the application must wait upon the answer. If the application is considered to be withdrawn as soon

as made, no two minds ever could meet upon the proposition; the *aggregatio mentium* never could take place. In all cases, the application is construed to stand until the contrary appears, or until it is either withdrawn or answered. But, in view of the rule that there can be no insurance if the subject-matter is not in existence, it was said, in *Paine v. Pacific Mutual Life Ins. Co.*, 10 U. S. App. 256, 2 C. C. A. 459, 51 Fed. 689, that an application for life insurance is revoked by the death of the applicant before acceptance.

Where, after a written application for insurance, and a premium note, were delivered to the insurance agent, and by him forwarded to the company, but before the latter had acted upon the application, it was agreed between applicant and agent that the note should be recalled and returned, and the affair stop where it then was, though no consideration was paid to the company, it was a valid rescission, according to *Crutchfield v. Dailey*, 25 S. E. 526, 98 Ga. 462. Where additional particulars were requested by the insurer, as in *Miller v. North-western Mut. Life Ins. Co.*, 111 Fed. 465, 49 C. C. A. 330, and the applicant, after giving such information, expressed the hope that his explanations were satisfactory, but, if not, the company might consider the application withdrawn, there was in effect an admission that no contract had been made.

(c) Power of agent to accept or approve application.

The general principle that, in the absence of restrictions, an agent has power to bind the company by the acceptance of a risk, is asserted in *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, reversing 55 Hun, 540, 10 N. Y. Supp. 44. A broad rule was asserted in *Horter v. Merchants' Mut. Ins. Co.*, 28 La. Ann. 730. where the court said that one applying for insurance at the company's office has the right to presume that the employes in such office are authorized to transact the business which they undertake to perform, even to the extent of an acceptance of the risk. A similar principle may be deduced from *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.) 555.

It may be laid down as an established rule that, where the agent has in his possession blank policies signed by the proper officers of the company, his power to accept risks and approve applications may be presumed.

This is substantially the rule laid down in *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444;
B.B.Ins.—27

Howard Ins. Co. v. Owen's Adm'r, 94 Ky. 197, 21 S. W. 1037; **Welsh v. Continental Ins. Co.**, 47 Hun (N. Y.) 598; **Connecticut Fire Ins. Co. v. Bennett**, 1 Ohio N. P. 71, 1 Ohio Dec. 60.

The rule would not apply, notwithstanding the general authority of the agent, according to **Pickett v. German Fire Ins. Co. of Peoria**, 39 Kan. 697, 18 Pac. 903, if by the express terms of the application no liability was to attach until the application had been approved at the home office. Nevertheless, it was said, in **Moulton v. Masonic Mut. Ben. Soc.**, 64 Kan. 56, 67 Pac. 533, that a life insurance company whose by-laws reserve to its board of directors power to accept applications for insurance, but authorize its secretary to receive them and the advance premiums, and correspond with the applicants, will be bound by the written, but erroneous, statement of that officer to an applicant that his application had been accepted, and that a policy would be issued, where the secretary retained the premium and the applicant died before he knew of the real facts. The principle on which the decision was based seems to be that in the making or renewal of a contract of insurance the agent will be held to possess that authority with which the company appeared to clothe him, or, to state it more accurately, the company will be estopped to deny that the agent possessed such authority.

Where an insurance company vests its agent with power to accept risks, such agent at the same time representing other companies, it is charged with notice that such agencies are accustomed to make selections of the insurer who is to assume a particular risk, and after loss it cannot be heard to deny that such agent had authority to do so.

Such seems to be the rule approved in **Fire Ins. Co. of Philadelphia County v. Sinsabaugh**, 101 Ill. App. 55; **Ellis v. Albany City Fire Ins. Co.**, 50 N. Y. 402, 10 Am. Rep. 495, affirming 4 Lans. 433; **Croft v. Hanover Fire Ins. Co.**, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

Though it was intimated in **Trask v. German Ins. Co.**, 53 Mo. App. 625, that, where an agent has the right to reject an application, it is but fair to presume that the authority to accept proposals exists, it is undoubtedly a general rule, established by authority, that a soliciting agent has power only to receive and forward applications, and cannot bind the company by an acceptance of the risk.

Reference may be made to **Armstrong v. State Insurance Co.**, 61 Iowa, 212, 16 N. W. 94; **Cornellus v. Farmers' Ins. Co.**, 113 Iowa, 183, 84

N. W. 1087; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 39 Am. Rep. 277; *Trask v. German Ins. Co.*, 53 Mo. App. 625; *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, 89 N. W. 997.

The rule may, of course, be modified by statutory provisions. Thus, in *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379, it was held that under Rev. St. § 1977, making a solicitor of insurance an agent for the company to all intents and purposes, the solicitor must be regarded as an agent of the company, with authority to make valid contracts for insurance, binding on the company, whatever might be the limitations of his powers as between himself and the company.

It may be stated, as a general rule, that agents of life insurance companies do not have authority to conclude absolutely the contract of insurance, but only to procure and receive applications, which they forward to the company to be acted upon by the immediate officers of the corporation.

The rule that life insurance solicitors cannot accept risks seems to be approved in *Miller v. Northwestern Mutual Life Ins. Co.*, 49 C. C. A. 330, 111 Fed. 465; *Pace v. Provident Savings Life Assur. Soc.*, 118 Fed. 13, 51 C. C. A. 32; *United States Mut. Acc. Ass'n v. Kittenring*, 22 Colo. 257, 44 Pac. 595; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348; *Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165.

According to *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225, where an agent of an insurance company, who had full power to receive proposals for insurance, fix rates of premium, receive moneys, and countersign and issue policies of insurance, appointed a subagent to solicit and receive applications, fix rates of premium, and forward the applications, on which, if approved, the agent was to issue policies, an application accepted by such subagent binds the company. Similarly a general agent may delegate to his clerk power to accept risks, according to *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.) 555. A still more general doctrine was laid down in *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41, where it was said that an insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same, in the performance of his duties, and one dealing with the clerk as such is not bound to inquire into his authority as to those matters. It was held, in *Continental Ins. Co. v. Ruckman*, 29 Ill. App. 404, that under 1 Starr

& C. Ann. St. p. 1322, providing that the term "agent" or "agents" shall include an acknowledged agent, surveyor, broker, or other person or persons, who shall in any manner aid in transacting the insurance business of an insurance company, a clerk in the office of an agent, having full power and authority to issue policies and make contracts of insurance, has power to accept a risk.

Though an agent has power generally to approve applications, it may be regarded as an established rule that an agent authorized to accept risks has no authority to accept his own application or to make an agreement to issue a policy to himself.

Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399, 68 N. W. 215, 88 L. R. A. 698; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

Neither has he authority to accept a risk on property owned by a partnership of which he is a member (*Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220). Where the by-laws of a mutual company provided that all applications must be approved by one of the executive committee, which consisted of the president, vice president, and secretary (*Pratt v. Dwelling House Mutual Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117, reversing 53 Hun, 101, 6 N. Y. Supp. 78), an application by the secretary for insurance on his own property was properly approved by the vice president.

It would seem to be almost elementary that an express limitation on his powers renders ineffectual an approval by the agent (*Trask v. German Insurance Co.*, 58 Mo. App. 431). It has even been held that, unless such power was expressly conferred, it did not exist. Such, at least, seems to be the doctrine governing *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. 72, where one was appointed "agent and surveyor" of the company, and "authorized to take applications for insurance and receive the cash percentage to be paid thereon." The court says that this is not authority to bind the company by effecting insurance. He was to survey property proposed to be insured, and to receive applications or proposals for insurance, and, of course, to transmit them to the company; but no word indicates that he could bind the company by accepting a proposition, or making a contract of insurance for them. Where the application recited that it shall not be binding until approved at the home office, such recital was regarded in *Allen v. St. Lawrence County Farmers' Ins. Co.*, 34 N. Y. Supp. 872, 88 Hun, 461, as an express limitation on the power of the agent to approve the risk.

Though, as said in *Potter v. Phenix Ins. Co.* (C. C.) 63 Fed. 382, the general rule of law is that a person dealing with an agent, knowing him to be an agent, must take notice of the extent and power of that agent, and should make inquiry of the limitations, if any, upon the authority of the agent, yet, when a company appoints an agent and sends a commission to him to solicit applications for insurance, and he has thus been held out to the community as an agent, then the public dealing with him, in the absence of any knowledge or notice of special instructions limiting his authority, has the right to assume that such agent is clothed with all the power necessary to enable him to receive and act on all such applications and to bind the company. So it was said, in *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166, that, where an agent has power to accept risks generally, the insured is not charged with notice of a limitation on his power not communicated to such insured. It would seem to be the doctrine of *Welsh v. Continental Ins. Co.*, 47 Hun, 598, that, where the company has given an agent evidences of authority to approve risks, it is estopped to set up limitations on his powers as against persons dealing with him on the faith of such evidences.

(2) What constitutes acceptance or approval.

The acceptance of a proposal for insurance must be evidenced by some act that binds the party accepting. A mental resolution, that can be changed, is not sufficient. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the insurer, is sufficient to show the concurrence of the parties, the meeting of minds. A formal letter of acceptance is not indispensable.

Helman v. Phoenix Mutual Life Ins. Co., 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100.

But it is not every act that will constitute an acceptance. Thus the receipt of the premium does not necessarily show acceptance.

Allen v. Massachusetts Mutual Acc. Ass'n, 167 Mass. 18, 44 N. E. 1053; *Mohrstadt v. Mutual Life Ins. Co.*, 115 Fed. 81, 52 C. C. A. 675.

So the fact that an official of a railroad company, without authority, has deducted from the pay of an employé the dues for a railway relief association, does not show an acceptance of the

employé's application to become a member of the association, so as to constitute a contract of insurance with him (*Baltimore & Ohio Employés' Relief Ass'n v. Post*, 122 Pa. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44).

In the absence of stipulations requiring some other act to be done before the contract is complete, the issuance of the policy may be sufficient to show an acceptance (*Grier v. Mutual Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28). On the other hand, as said in *Palm v. Medina County Mut. Fire Ins. Co.*, 20 Ohio, 529, it is not necessary that a policy should issue to show an acceptance. Moreover, as shown by *Hamblet v. City Ins. Co.* (D. C.) 36 Fed. 118, the issuance of a policy does not necessarily complete the contract, unless it so agrees with the proposal as to show an entire meeting of minds.

Whatever may be the mode of acceptance, it must be definite and identical with the terms proposed. Thus, in *Connecticut Mutual Life Ins. Co. v. Rudolph*, 45 Tex. 454, the insurer returned the application to the insured for correction, because his name was spelled in three different ways in such application. The court said that the return of the application was in itself a fact indicating that it had not been accepted, and the request for an explanation had the same tendency. But where, as in *Hartford Steam Boiler Inspection & Insurance Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859, in a letter accompanying a policy issued in accordance with plaintiff's application for insurance against damages arising from the explosion of a steam boiler, defendant suggested certain changes in the setting of the boiler, as recommended in the report of plaintiff's inspector, this was not regarded as qualifying the acceptance. On the other hand, if the insurer advises the applicant that the policy will be issued when certain alterations are made in the building to be covered (*Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339), the acceptance is conditional on insured's compliance with such requirement. So an application for insurance on a vessel was only accepted conditionally, where the insurer advised the applicant that a policy would issue if the inspector said the vessel was in condition to make the voyage (*Gauntlett v. Sea Ins. Co.*, 127 Mich. 504, 86 N. W. 1047). Where the application was subject to approval by the general agent of the company, and was approved by him, except as to the amount of premium, which was raised (*Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849), the approval

became complete on the acceptance of the modified rate by the insured.

The sufficiency of the evidence to show an acceptance was considered in *Petrie v. Phenix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380, affirming 57 Hun, 591, 11 N. Y. Supp. 188; *Sullivan v. Industrial Benefit Ass'n*, 73 Hun, 319, 26 N. Y. Supp. 186; *Hicks v. British America Assur. Co.*, 43 N. Y. Supp. 623, 13 App. Div. 444.

(g) Same—Necessity of notice of acceptance.

In an early case, *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, the plaintiff wrote to the defendant company asking for terms on an insurance on a certain vessel. The company answered, January 1st, fixing the rate; the letter being received by the plaintiff January 3d. On that day he replied, accepting the terms proposed and requesting a policy. It appeared, however, that on January 2d, defendants wrote again to plaintiff declining the risk; this letter crossing defendants' letter accepting the terms offered in the letter of January 1st. The court held that there was no acceptance binding defendants until the fact thereof was known to them, or should have been known to them by ordinary course of mail, and that, therefore, the withdrawal of their offer was effective. In a subsequent case, *Thayer v. Middlesex Mutual Fire Ins. Co.*, 10 Pick. (Mass.) 326, it appeared that the plaintiff applied for insurance, and a statement of the terms and a formal application were sent to him. The application and premium note were signed by plaintiff January 28th, and left with his agent, who was postmaster, to be forwarded in the next mail, which left February 3d. The buildings were destroyed January 31st. The court held that, if the act of defendants amounted to an offer to insure, there was no complete contract until the offer was accepted by the plaintiff, and notice, actual or constructive, given to the company. The deposit of the acceptance in the hands of the postmaster cannot, under the circumstances, be regarded as constructive notice, until the papers were actually inclosed and forwarded, which was not until after the loss.

The doctrine thus laid down has been applied in, and has apparently governed, several other cases of later date. Thus it is said, in *Barr v. Insurance Co. of North America*, 61 Ind. 488, that no valid or binding contract is concluded between the parties unless defendant not only accepts the proposition, but also notifies the plaintiffs of such acceptance. In view of the decision in *Kentucky Mutual Insurance Company v. Jenks*, 5 Ind. 96, where it was

said that as soon as the offer is accepted the contract is complete, though the party making the offer is ignorant of such acceptance, it is doubtful if much weight should be given to the Barr Case.

In *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643, it was said that, where the offer comes from the insured, he must have notice of acceptance. Until notice, it stands as a proposal for insurance. But it was also held that, as the application stipulated that the defendant's agents were also to be plaintiff's agents, a notice to them of the approval of the application was sufficient notice to plaintiffs. The doctrine was also approved in *Paine v. Pacific Mutual Life Ins. Co.*, 51 Fed. 689, 2 C. C. A. 459, and *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

In the *Perry Case* the company approved the application, executed a policy, and sent it to their agents, with instructions to deliver it to plaintiff and collect the premium. There was no evidence that prior to its delivery the plaintiff had notice, by mail or otherwise, that his application was accepted. The court said: "Upon these facts the contract was made and concluded by the delivery and acceptance of the policy, not because of its delivery, but because until that moment the plaintiff had no notice of the acceptance of his application. Prior to that time the plaintiff was at liberty to revoke his application, and the defendant to withdraw its acceptance and countermand its instructions for the delivery of the policy. A proposition does not become a contract until the maker or his agent is notified of its acceptance." The court cited in support of this reasoning *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, but that case involved an entirely different principle. An existing policy had been canceled, and the agent, without the knowledge or consent of the insured, substituted another policy. The court held that there was no valid contract, as there was neither a proposal nor an acceptance.

The rule that the acceptance must be communicated to the applicant is also asserted in *Kilcullen v. Metropolitan Life Ins. Co.* (Mo. App.) 82 S. W. 966, and *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41.

The rule laid down in the *McCulloch Case* was directly disapproved in *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187. The insured in this case had caused letters to be written to the company in relation to insurance on his house. The company in reply stated the terms on which they would take the insurance, and these terms were communicated to the insured, who

was at a distance. The insured answered, requesting the insurance on the terms proposed and inclosing the check for the stipulated premium. The court holds that the contract was completed at the time of the acceptance of the company's offer by the insured and the mailing of the letter by him signifying such acceptance.

It is no objection, the court says, that the company at the time of the mailing of the letter had no knowledge that their offer was accepted. In all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. The offer and acceptance cannot occur at the same moment of time, and the meeting of the minds cannot be known by each at the moment of concurrence. This is in accordance both with the general law and with the custom of insurance companies; for if the applicant accepts the terms granted by the company the contract is considered complete, without waiting for the local agent to communicate the acceptance to the company, and the policy to be thereafter issued is to bear date from the time of the acceptance. The company desire no further communication after they have settled upon the terms of the risk and sent them for the inspection of the applicant. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

The doctrine of the Tayloe Case was subsequently approved in *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

It had been intimated in the Thayer Case that, had the notice been actually put into the mail and forwarded, so as to be beyond the control of the applicant, it might have been good notice. However that may be, it has been directly held that a letter properly mailed is a sufficient acceptance.

Commercial Ins. Co. v. Hallock, 27 N. J. Law, 645, 72 Am. Dec. 379;
Blake v. Hamburg-Bremen Fire Ins. Co., 67 Tex. 160, 2 S. W. 368,
60 Am. Rep. 15.

So it was said, in *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584, that, though it was formerly held, both in England and America, that, to give vitality to an agreement, not only the minds must meet, but the fact of such agreement must be communicated,

these cases have been overruled, and it is now everywhere held that, as soon as an offer by letter is accepted, consent is given and the contract is complete, though the party making the offer may be ignorant of the fact. In view of these decisions we are justified in assuming that the rule is that laid down in *Northampton Mutual Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476, where it was said that the obligation of the insurer depends on the fact of acceptance, and not on notice of such acceptance to the insured.

The rule that notice to the applicant is not necessary is supported by *Robinson v. United States Benev. Soc.*, 132 Mich. 695, 94 N. W. 211, 102 Am. St. Rep. 436; *Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379; *Hartford Steam Boiler Inspection & Insurance Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859.

(h) Same—Effect of delay in acceptance or failure to give notice of rejection.

In many instances the question has been raised whether delay in accepting an application or failure to notify the applicant of its rejection operates as a virtual acceptance. Though, in *Robinson v. United States Benev. Soc.*, 132 Mich. 695, 94 N. W. 211, and *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. 486, a failure to notify the applicant of a rejection, and in *Pickett v. German Fire Ins. Co.*, 39 Kan. 697, 18 Pac. 903, a delay in acting on the application, were regarded as raising a presumption of acceptance, such a doctrine does not seem to be supported by the weight of authority. In some cases the length of the delay has apparently been regarded as determining the question. Thus, in *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64, the court said that under some circumstances, perhaps, a proposal may become a contract by tardiness in rejecting or answering it; but a lapse of 18 days, considering the irregularity of the mails, cannot be considered so extraordinary as to authorize an implication from it that the application was accepted, and thereby insurance effected. In *Harp v. Grangers' Mut. Fire Ins. Co.*, 49 Md. 307, the company was incorporated July 24th. On August 7th plaintiff made application for insurance; the application being subject to approval by the board of directors. The first meeting was held September 25th, and the application was rejected. The court held that there was not such unreasonable delay as would justify a recovery on the ground of negligence on the part of the company. The rule

established by the overwhelming weight of authority seems, however, to be that mere delay, mere inaction, cannot amount to an acceptance of the application. As said in *Connecticut Mutual Life Ins. Co. v. Rudolph*, 45 Tex. 454, the very fact that the insurer postpones definite action is sufficient to indicate that there is no acceptance. Even an unreasonable delay in acting on an application does not amount to an acceptance (*Brink v. Merchants' & Farmers' United Mut. Ins. Ass'n* [S. D.] 95 N. W. 929). Such failure is evidence of rejection, rather than acceptance.

This is also the doctrine of *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. 72, and *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, reversing 55 Hun, 540, 10 N. Y. Supp. 44.

In the last case it was said that silence operates as an assent, and creates an estoppel, only when it has the effect to mislead. There must be such conduct on the part of the insurer as would, if it were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it.

The rule that delay in passing on an application or a failure to signify rejection does not amount to an acceptance is also asserted in *Kohen v. Mutual Reserve Fund Life Ass'n* (C. C.) 28 Fed. 705; *Mis-selborn v. Mutual Reserve Fund Life Ass'n* (C. C.) 30 Fed. 545; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503; *Helman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Ross v. New York Life Ins. Co.*, 124 N. C. 395, 32 S. E. 733; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700.

But see *Mallette v. British American Assur. Co.*, 91 Md. 471, 46 Atl. 1005, and *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. 486, where it was held that a failure to notify the insured of the rejection of an application for a renewal bound the company.

Where applications for membership in a mutual benefit association must be approved by the supreme officers of the order, delay by the local lodge in forwarding the application will not create a contract, without such approval, according to *Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165. Similarly, in *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340, 32 N. W. 371, where the application, though forwarded to the insurance company, never reached it, the court said that, while it might be held that if the company had received the application and premium and retained them, acceptance

of the risk would be presumed, such a presumption could not be raised in view of the circumstances.

In *Easley v. New Zealand Ins. Co.*, 5 Idaho, 593, 51 Pac. 418, the receipt for the premium advised the applicant to make inquiry if the policy was not received within 30 days, and the court held that in such case failure to notify the applicant of rejection could not be construed as an acceptance. Indeed, the basis of the foregoing decisions is possibly the principle laid down in *Winchell v. Iowa State Insurance Co.*, 103 Iowa, 189, 72 N. W. 503, to the effect that, while it might be the duty of the insurer to notify the applicant promptly of the rejection of his application, yet it was just as much the duty of the applicant to make inquiry, if action was in his opinion unnecessarily delayed. Similarly, in *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163, it was said that the applicant has no right, without inquiry, to rely on the supineness of the insurer as an acceptance of his proposal.

In the *Mayes Case* some stress was apparently laid on the principle that an insurer cannot arbitrarily reject a contract made by its agent; but such was not the fact. No contract was in fact made by the agent, nor had he power to complete a contract. The principle was, however, applied in *Continental Ins. Co. v. Haynes*, 10 Ky. Law Rep. 276, where there was a completed contract for temporary insurance pending the approval of the application, and the premium receipt contained the request that the applicant should make inquiry if a policy was not received in 30 days. The court held that the final rejection could not relate back, so as to prevent recovery for a loss occurring 12 days after the application was made.

The rule that delay cannot raise a presumption of acceptance will not apply, however, if the other circumstances are such as to lend support to the presumption. Thus, where the premium had been duly paid to and accepted by a general agent (*Preferred Accident Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986), and the issuance of the policy was delayed by the company merely for the purpose of securing a settlement with such general agent, it was held that the acceptance of the risk would be presumed.

(1) Effect of acceptance or approval.

It may be stated as the established rule that in the absence of stipulations requiring some other act to be done, such as payment of premium or delivery of the policy, an acceptance by the insurer

of the distinct proposition made by the applicant completes the contract, whether a policy is issued or not.

The rule is asserted in *Kohne v. Insurance Co. of North America*, 14 Fed. Cas. 835; *Shattuck v. Mutual Life Ins. Co.*, 21 Fed. Cas. 1183; *Kerr v. Union Marine Ins. Co.* (D. C.) 124 Fed. 835; *Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 South. 707; *Insurance Co. of North America v. Thornton*, 30 South. 614, 130 Ala. 222, 55 L. R. A. 547, 89 Am. St. Rep. 30; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Blanchard v. Waite*, 28 Me. 51, 38 Am. Dec. 474; *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316, 40 N. W. 545, 2 L. R. A. 206; *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Kelm v. Home Mutual Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379; *Northampton Mutual Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Van Slyke v. Trempealeau County Farmers' Mutual Fire Ins. Co.*, 48 Wis. 683, 5 N. W. 236; *Bishop v. Grand Lodge of Empire Order of Mutual Aid*, 112 N. Y. 627, 20 N. E. 562; *Herring v. American Ins. Co.*, 123 Iowa, 533, 99 N. W. 130; *Baldwin v. Golden Star Fraternity*, 47 N. J. Law, 111; *Preferred Accident Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986; *Loomis v. Jefferson County Patrons' Fire Relief Ass'n*, 92 App. Div. 601, 87 N. Y. Supp. 5.⁴

Where an open policy was involved, as in *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548, an acceptance of the risk completed the contract, though the risk was not entered in the book accompanying such policy.

It is evident that, if any act remains to be done which may be regarded as giving the applicant an opportunity to approve the contract finally offered to him, acceptance of the proposal by the insurer does not complete the contract.

This rule is stated in *The Waubaushene* (D. C.) 22 Fed. 109; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356.

Thus, when it is provided that the contract shall not take effect until the policy is delivered (*Ray v. Security Trust & Life Ins. Co.*, 126 N. C. 166, 35 S. E. 246), or until the premium is paid (*Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565),

⁴ Necessity of payment of premium to complete contract, see post, p. 461. Necessity of delivery of policy, see post, p. 442.

mere acceptance of the proposal by the insurer is not sufficient. So, too, the acceptance must be unconditional. If any condition is attached to the acceptance requiring changes in the risk before the contract takes effect, the acceptance is suspended until such condition is complied with.

Reference may be made to *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339; *Gauntlett v. Sea Ins. Co.*, 86 N. W. 1047, 127 Mich. 504; *Born v. Home Ins. Co.*, 94 N. W. 849, 120 Iowa, 299.

But where the application was for a life policy of \$20,000, and the agreement with the agent contemplated a possible reduction of the amount, as in *Hebert v. Mutual Life Ins. Co. (C. C.)* 12 Fed. 807, the subsequent acceptance of the risk for \$15,000 was not conditional, so as to delay completion of the contract. In *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859, where the acceptance was accompanied by a letter suggesting certain changes in the setting of the boiler, which was the subject of the insurance, the court did not regard the letter as a condition precedent, upon the fulfillment of which the contract was to take effect, but merely as a suggestion as regards the future state and condition of the boiler.

It was said in *Kentucky Mutual Ins. Co. v. Jenks*, 5 Ind. 96, that under the weight of authority an acceptance relates back and completes the contract as of the date of the application. An interesting case involving a somewhat similar principle is *Fried v. Royal Ins. Co.*, 50 N. Y. 243. But in this case there was an express agreement that the applicant should be insured until the decision of the home office was received. The risk was accepted by the home office, but the agent refused to deliver the policy as the applicant's health had changed. The court held, however, that the private instructions to the agent regarding the delivery of policies, not known to the insured, could not determine his rights under the contract. The contrary doctrine was announced in *Rogers v. Equitable Mutual Life & Endowment Ass'n*, 103 Iowa, 337, 72 N. W. 538, and it was held that, in the absence of a stipulation to that effect, the acceptance would not relate back to the date of the application.

Of course, when the application contains a provision that the contract shall take effect from the time of approval (*Winnesheik*

Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64), such stipulation must govern.

Such was the rule applied in *Coker v. Atlas Accident Ins. Co.* (Tex. Civ. App.) 81 S. W. 703, and *Robinson v. United States Benev. Soc.*, 132 Mich. 695, 94 N. W. 211, where accident policies were involved. But it was said, in *Mathers v. Union Mutual Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83, that, if the agent agreed that the insurance should take effect when the application was made, such agreement would prevail.

In *Palmer v. Commercial Travelers' Mut. Acc. Ass'n*, 6 N. Y. Supp. 870, 53 Hun, 601, affirmed in 127 N. Y. 678, 28 N. E. 256, the court held that the certificate of membership, and not the resolution of acceptance, constituted the contract between the parties. If the insured dies before the acceptance (*Paine v. Pacific Mutual Life Ins. Co.*, 51 Fed. 689, 2 C. C. A. 459), the acceptance of the application is of no effect.

(j) Rejection and notice thereof.

The effect of a rejection of the application to terminate the negotiations between the parties was illustrated in *Otterbein v. Iowa State Insurance Company*, 57 Iowa, 274, 10 N. W. 667, where, after a rejection known to the applicant, the agent retained the application and the premium for the purpose of endeavoring to secure a reconsideration of the proposal. There was testimony tending to show that the applicant knew of the rejection and acquiesced therein. The court said that, the company having exercised its right to reject the risk, the law will not hold it bound because the agent and the applicant united in an attempt to induce it to reconsider its action and to issue the policy. The agent and plaintiff could not by such an arrangement, or any other, annul the action of the defendant rejecting the risk.

The general rule that the rejection terminates the contractual relation was also asserted in *Rowland v. Springfield Fire & Marine Ins. Co.*, 18 Ill. App. 601, and in *Somerset County Mut. Fire Ins. Co. v. May's Ex'r*, 2 Wkly. Notes Cas. (Pa.) 43, though in this case no notice of rejection was received until after the buildings were burned, seven months after the application was made.

It is to be noted, however, that notice of rejection was regarded as necessary in *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. 486. In *Allen v. Massachusetts Mut. Acc. Ass'n*, 44 N. E. 1053, 167

Mass. 18, it was said that, where there is no act denoting acceptance, the receipt of such application by a local agent, together with the premium, such application containing a provision that until receipt and acceptance thereof by the company it shall not be liable, does not estop the company from rejecting the application after learning of an accident to the applicant. On the other hand, if by an agreement made by the agent the company is bound to issue a policy, as in *Howard Ins. Co. v. Owens*, 94 Ky. 197, 21 S. W. 1037, the rights of the applicant cannot be affected by the subsequent rejection of the application by the general manager after the destruction of the property.

On an issue as to whether an application had been approved by a mutual benefit association, evidence that the certificate was delivered to the beneficiary by an agent of the society, who received the premium and delivered to the beneficiary a receipt therefor, and that the application, on being forwarded to the society, was at first marked "Approved," but afterwards the approval was erased and it was marked "Rejected," was held sufficient to sustain a finding that the application was not rejected (*Sullivan v. Industrial Benefit Ass'n*, 26 N. Y. Supp. 188, 73 Hun, 819).

(k) Offer to insure and acceptance thereof.

The general principles heretofore discussed in relation to the application and acceptance thereof apply with equal force when the proposition comes from the insurer in the form of an offer to insure. As was said in *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352, an offer to insure does not become binding on the insurer until the acceptance is communicated to him. So, if the policy tendered is, under the circumstances, to be considered as an offer to insure (*Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 97), such offer must be accepted to become binding on the company, and if the person to be insured did not receive the policy, so as to accept the offer, there is no contract. In *Faughner v. Manufacturers' Mutual Fire Ins. Co.*, 86 Mich. 536, 49 N. W. 643, an application was returned for further details. The applicant filled the application, but omitted certain essential terms. It was held that, even if the company could be understood to have made an offer to insure, it was not accepted by returning the incomplete application. But where an application was properly renewed, at the suggestion of the company, in accordance with the terms it proposed (*Chase v. Hamilton Mutual Ins. Co.*, 22 Barb. [N. Y.] 527), such application

was an acceptance of the offer to insure. Whether notice of acceptance must be received by the insurer has been discussed.⁵

Though the acceptance of a written offer to insure before its withdrawal completes the contract (*Walker v. Metropolitan Ins. Co.*, 56 Me. 371), yet, as said in *Van Tassel v. Greenwich Ins. Co.* of N. Y., 72 Hun, 141, 25 N. Y. Supp. 301, an insurer is not bound by an offer to insure property unless it is accepted, and it cannot be maintained that an owner can delay his acceptance for six days, until the property is destroyed by fire, and then by an acceptance bind the company. That the acceptance must be unconditional seems to be the rule governing *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448 (Gil. 404). Where the company's offer to insure was accepted, but the policy issued did not conform to the offer, the insured was not bound thereby, so as to render him liable on the premium note (*Ocean Ins. Co. v. Carrington*, 3 Conn. 357). If the offer to insure is rejected, because unsatisfactory in some one particular (*Equitable Life Assurance Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365), the insurer is not bound by the offer, should the other party afterwards desire to complete the contract. When a contract between the insured and the company provided that at the expiration of the policies held by the insured the company would renew them for three years, the agreement being signed by both parties, it constituted a mere option, and did not bind insured to take the insurance (*Barker v. Pullman Co.* [C. C. A.] 134 Fed. 70).

The offer to insure may be in the form of a counter proposition to the application, which is practically rejected. Such counter proposition must be accepted by the applicant in order to complete the contract.

Reference may be made to *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 15 L. Ed. 636; *Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139; *Michigan Pipe Co. v. Insurance Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Wallingford v. Home Mutual Fire & Marine Ins. Co.*, 30 Mo. 46.

An acceptance of such counter proposition completes the contract.

McMaster v. New York Life Ins. Co., 99 Fed. 856, 40 C. C. A. 119; *Eames v. Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 298.

(1) Matters peculiar to mutual benefit associations.

In the case of fraternal insurance societies, an application for membership must be signed by the applicant (Supreme Lodge

⁵ See ante, p. 423.

Knights and Ladies of Honor v. Grace, 60 Tex. 569), presented to the subordinate lodge (Home Forum Ben. Order v. Jones, 5 Okl. 598, 50 Pac. 165), and must first receive the approval of an investigating committee of such lodge.

Levell v. Royal Arcanum, 9 Misc. Rep. 257, 30 N. Y. Supp. 205;
Brown v. Sovereign Camp Woodmen of the World, 20 Tex. Civ. App. 378, 49 S. W. 893.

It is also a condition of membership that the applicant shall undergo a physical examination by an approved medical examiner. This is usually an essential part of the application.

State v. Bankers' Union (Neb.) 99 N. W. 531; Lydon v. Police Pension Fund Ass'n, 29 Pittsb. Leg. J. (N. S.) 33, 8 Pa. Super. Ct. 251.

The association may, however, waive the provision, if it is merely a requirement of the by-laws (Watts v. Equitable Mut. Life Ass'n, 111 Iowa, 90, 82 N. W. 441). So an examination not made by a regularly appointed examiner of the order, but signed by an approved examiner, is sufficient, though the laws of the order declare that no examination shall be legal unless made by an examiner approved by the supreme medical director (Supreme Ruling of the Fraternal Mystic Circle v. Crawford [Tex. Civ. App.] 75 S. W. 844). The application, if acceptable to the local lodge and examiner, is forwarded to the supreme secretary, and by him submitted to the supreme medical examiner, who has power to reduce the amount of insurance to be granted or to reject the application altogether. It is usually provided that no benefit certificate shall be binding on the order until the same has been approved by the supreme medical examiner and signed by the president and secretary of the order. The approval of such officers is therefore essential to create an obligation on the benefit certificate. The mere forwarding of the application to the grand lodge does not create a contract (Home Forum Ben. Order v. Jones, 5 Okl. 598, 50 Pac. 165).

The laws of fraternal benefit associations also usually require that an applicant for membership shall, within a certain period after his election, present himself for initiation or forfeit his election. In view of such regulations, one who is not duly initiated according to the ritual of the order does not become a member thereof, so as to be entitled to a benefit certificate, though he has been elected.

Hiatt v. Fraternal Home, 99 Mo. App. 105, 72 S. W. 463; Matkin v. Supreme Lodge, Knights of Honor, 82 Tex. 301, 18 S. W. 306, 27

Am. St. Rep. 886. But see *Traders' Mut. Ins. Co. v. Humphrey*, 207 Ill. 540, 69 N. E. 875, where it was held that a person whose application for membership in a lodge of Odd Fellows has been approved, and such person duly elected, is a member of the lodge, although he has not yet been initiated according to the ritual of the order.

If the laws requiring the initiation of members relate exclusively and expressly to persons who become applicants for membership after the organization has been completed, they are not applicable to those who participate in the organization of the association as charter members. Consequently it cannot be objected that such person was not formally initiated according to the ritual of the association (*Shackelford v. Supreme Conclave Knights of Damon*, 98 Ga. 295, 26 S. E. 746).

If an applicant has passed his medical examination, made the required preliminary payments, and has been duly initiated, a finding that he was accepted as a member and is entitled to a benefit certificate is justified (*Supreme Council Chosen Friends v. Bailey* [Ky.] 55 S. W. 888). But, if the laws of the order provide that no applicant shall be initiated until a certificate has been issued by the proper officers of the supreme body and received by the local lodge, an initiation of the applicant prior to the reception of the certificate confers no rights (*McLendon v. Woodmen of the World*, 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444). It has been held in Texas that a fraternal order, after receipt of assessments from a person and delivery to him of a benefit certificate, cannot question his membership, though he was not initiated (*Supreme Ruling of the Fraternal Mystic Circle v. Crawford* [Tex. Civ. App.] 75 S. W. 844). And in *National Aid Ass'n v. Bratcher*, 65 Neb. 378, 91 N. W. 379, it was held that the requirement as to initiation might be waived.

As the issuance of a benefit certificate is evidence of a compliance on the part of the holder thereof with the conditions necessary to constitute him a member of the association (*Wagner v. Supreme Lodge Knights and Ladies of Honor*, 128 Mich. 660, 87 N. W. 903), the issuance of the certificate is, unless the laws of the association otherwise provide, a requisite to the completion of the contract of insurance between the member and the association.

May v. New York Safety Reserve Fund Soc., 14 Daly, 389; **Pfeifer v. Supreme Lodge of Bohemian Benevolent Slavonian Society**, 74 N. Y. Supp. 720, 37 Misc. Rep. 71; **Roblee v. Masonic Life Ass'n**, 88 Misc. Rep. 481, 77 N. Y. Supp. 1098.

6. COMPLETION OF CONTRACT—EXECUTION OF POLICY.

- (a) Necessity and sufficiency of execution.
- (b) Necessity of seal.
- (c) Countersigning by agent.

(a) Necessity and sufficiency of execution.

Though it would seem to be elementary that a policy not signed by any executive officer of the insurance company is not so executed as to become an effective contract, it has been definitely asserted as part of the decision in some cases.

Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73; *Planters' & People's Mut. Fire Ass'n v. De Loach*, 39 S. E. 466, 113 Ga. 802.

It does not cure the defect that the insurer's name appears in the body of the policy, and that the corporate seal is attached (*Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947). In some states the statute expressly provides that all policies or contracts shall be subscribed by the president of the company, or such other officer as may be designated for that purpose, and shall be attested by the secretary.¹ Except in Georgia (*Planters' & People's Mut. Fire Ass'n v. De Loach*, 39 S. E. 466, 113 Ga. 802), where the statute² expressly provides that insurance contracts must be in writing, it has been held that such statutes relate only to the formal policy, and do not forbid the making of parol contracts of insurance.

Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. 318, 15 L. Ed. 636; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.³

An insurance policy is not rendered void by reason of being signed by an officer of the company who had ceased to be such when the policy issued (*In re Pelican Ins. Co. of New Orleans*, 47 La. Ann. 935, 17 South. 427), especially as such policies were left

¹ Rev. St. Ariz. 1901, par. 786; *Mills' Ann. St. Colo.* 1891, § 2227; Rev. St. Idaho 1887, § 2742; Gen. St. Kan. 1899, §§ 3276, 3319; Rev. Laws Mass. 1902, c. 118, § 25; Consol. St. Neb. 1891, § 392; Comp. Laws N. M. 1884,

§ 1465; Rev. St. Ohio 1890, § 8645; *Hill's Ann. St. & Codes Wash.* 1891, § 2739; Rev. St. Wyo. 1899, § 3166.

² Civ. Code 1895, § 2089.

³ See ante, p. 398.

in the hands of agents for issuance. In the absence of a by-law requiring a policy in a mutual company to be signed by the township director, a policy is not void because not so signed (*Dickert v. Farmers' Mut. Assur. Ass'n*, 29 S. E. 786, 52 S. C. 412). The signatures of the supreme officers of a mutual benefit association are usually necessary to the validity of a benefit certificate (*Home Forum Benefit Order v. Jones*, 50 Pac. 165, 5 Okl. 598); but, when so signed and duly sealed, it is not necessary that it should also be signed by the officers of the subordinate lodge (*Fisk v. Equitable Aid Union* [Pa.] 11 Atl. 84).

Though ordinarily insurance policies are not required to be executed also by the insured, his signature is sometimes required to benefit certificates as evidence of his acceptance. So, where the laws of a mutual company require the signature of the insured to the policy to fix his liability for assessments, the policy is not valid unless signed by the insured (*Schaffer v. Mut. Fire Ins. Co.*, 89 Pa. 296).

Policies of fidelity insurance, furnishing indemnity against the dishonesty of employ  s, often contain a provision that they shall not be binding on the insurer unless signed by the employ   whose fidelity is insured. Such provisions are valid, and compliance therewith is necessary to the validity of the contract.

Proctor Coal Co. v. United States Fidelity & Guaranty Co. (C. C.) 124 Fed. 424; *Union Central Life Ins. Co. v. United States Fidelity & Guaranty Co.* (Md.) 58 Atl. 437; *United States Fidelity & Guaranty Co. v. Rldgley* (Neb.) 97 N. W. 836; *Adelberg v. United States Fidelity & Guarantee Co.* (Sup.) 90 N. Y. Supp. 465.

Where the copy of the policy set out in a complaint thereon was not signed, it may be amended on the trial to correspond with the original (*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264). The plea of non est factum is proper to put in issue the execution of the policy, though the instrument is under seal (*Tillis v. Liverpool & London & Globe Ins. Co.* [Fla.] 35 South. 171). In view of the statutes providing that the execution of a written instrument on which an action is founded must be denied by a verified plea,⁴ it has been held in several jurisdictions that a failure to deny the execution of a policy under oath is an admission of the execution, so that it need not be proved.

Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co., 1 Gilman (Ill.) 236; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122; *Peoria Marine*

⁴ See, for example, Rev. St. Ind. 1881,    364, and Rev. St. Mo. 1889,    2186.

& Fire Ins. Co. v. Perkins, 16 Mich. 380; Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346; Thomas v. Guaranty Fund Life Ass'n, 73 Mo. App. 371. But see Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73, where it was said that, if the policy did not show an apparent execution on its face, the failure to deny would not amount to an admission.

The evidence necessary to show the execution of the policy was considered in *Supreme Lodge Knights of Pythias v. McLennan*, 69 Ill. App. 599; *German Fire Ins. Co. v. Laggart*, 47 Kan. 663, 28 Pac. 718; *Grady v. American Central Ins. Co.*, 60 Mo. 116; *Stepp v. National Life & Maturity Ass'n*, 37 S. C. 417, 16 S. E. 134.

Where a charge with reference to forgery of the signature of one of the officers of an insurance company to a policy left it to the jury to determine what constituted forgery, and the signatures of what officers were requisite to the validity of the policy, it was properly refused (*International Order Knights and Daughters of Tabor v. Boswell* [Tex. Civ. App.] 48 S. W. 1108).

(b) Necessity of seal.

Though, if the charter of the company requires that policies shall be under the seal of the corporation, a policy, to be valid, must be sealed (*Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461), in the absence of any special provision, it is not necessary that the policy should be under seal.

Globe Acc. Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947; *Cahill v. Maryland Life Ins. Co.*, 90 Md. 333, 45 Atl. 180, 47 L. R. A. 614; *National Banking & Ins. Co. v. Knaup*, 55 Mo. 154. And see, also, *Higginson v. Dall*, 13 Mass. 96.

So, when the charter provides that the company may insure by instruments under seal or otherwise, the provision may be construed to mean by an instrument under seal or not under seal, or by a sealed instrument or otherwise (*Relief Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291); that is to say, even if policies must be sealed, the insurer may nevertheless insure by parol contract.

Insurance Co. v. Colt, 87 U. S. 560, 22 L. Ed. 423; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. 344.

So, too, in the absence of a statute requiring policies to be under seal, a policy, though under seal, may be modified or renewed by a writing not sealed.

Lockwood v. Middlesex Mutual Assur. Co., 47 Conn. 553; *Gates v. Home Mut. Life Ins. Co.*, 4 Am. Law Rec. 395, 5 Ohio Dec. 313.

It is provided by statute in several states that policies of insurance may be made either with or without seal.⁵

Covenant, and not assumpsit, is the proper form of action on a policy under seal.

Hodgson v. Marine Ins. Co., 5 Cranch, 100, 3 L. Ed. 48; *Marine Ins. Co. v. Young*, 1 Cranch, 331, 2 L. Ed. 128.

But a policy bearing merely the printed impression of a seal is not a sealed instrument, which can be enforced only in covenant (*Mitchell v. The Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529).

That a printed impression of a seal on the face of the policy does not constitute it a sealed instrument, see, also, *Brown v. Commercial Fire Ins. Co.*, 21 App. D. C. 325.⁶

Though covenant will lie on a renewal of a policy under seal (*Herron v. Peoria Marine & Fire Ins. Co.*, 28 Ill. 235, 81 Am. Dec. 272), such renewal does not continue the instrument as a specialty, so as to make covenant the necessary form of action.

The action on the renewal may be assumpsit (*Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; *Luciani v. American Fire Ins. Co.*, 2 Whart. [Pa.] 167), or debt (*Franklin Fire Ins. Co. v. Massey*, 33 Pa. 221).

The execution of a policy of insurance under seal is properly denied by a plea of non est factum (*Tillis v. Liverpool & London & Globe Ins. Co.* [Fla.] 35 South. 171).

(c) Countersigning by agent.

A stipulation that a policy must be countersigned by the agent, in order to become a valid and binding obligation, is one which the insurer has a legal right to make, and is not in any sense oppressive or unconscionable (*Newcomb v. Provident Fund Society*, 5 Colo. App. 140, 38 Pac. 61). The standard policy laws of the various states usually provide that the standard policy may contain a condition that it shall not be valid until countersigned by the agent of the company. The countersigning may be regarded as a necessary

⁵ Rev. St. Ariz. 1901, par. 786; *Mills' Ann. St. Colo.* 1891, § 2227; Rev. St. Idaho 1887, § 2742; Gen. St. Kan. 1899, § 3276; Consol. St. Neb. 1891, § 392; Comp. Laws N. M. 1884, § 1465; Rev. St. Ohio 1890, § 3645; *Hill's Ann. St. & Codes Wash.* 1891, § 2739; Rev. St. Wyo. 1899, § 3166.

⁶ See Cent. Dig. vol. 43, "Seals," cols. 2544-2546, §§ 4, 5.

part of the execution of the policy (*Firemen's Ins. Co. v. Barnsch*, 161 Ill. 629, 44 N. E. 285), and is therefore essential to its validity.

Insurance Co. v. Webster, 6 Wall. 129, 18 L. Ed. 888; *Newcomb v. Provident Fund Society*, 5 Colo. App. 140, 38 Pac. 61; *Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82.

Even when the policy containing the usual clause was issued on the life of the agent himself (*Badger v. American Popular Life Ins. Co.*, 103 Mass. 244, 4 Am. Rep. 547), it was held that he must countersign his own policy. On the other hand, it has been held that, though a policy required that renewal receipts should be countersigned by the agent, it was not necessary that he should so countersign a renewal receipt issued to himself on his own policy (*Norton v. Phoenix Mut. Life Ins. Co.*, 36 Conn. 503, 4 Am. Rep. 98). **The countersigning of a life policy must take place before the death of the insured** (*Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242). So where, under the by-laws of a fraternal beneficiary association, its certificates were not binding until countersigned by the secretary and president of the local lodges, and a certificate was not so countersigned until after the insured therein had deceased, the certificate was void (*Hiatt v. Fraternal Home*, 99 Mo. App. 105, 72 S. W. 463). Where a fidelity bond was not countersigned when issued, but the agent promised to countersign it, and did so countersign the bond, after a breach had occurred, of which he was ignorant, the surety company was liable on the bond, either on the ground of waiver, or because the agent had done what he had promised to do (*Cullinan v. Bowker*, 82 N. Y. Supp. 707, 40 Misc. Rep. 439).

A condition that a policy is to take effect only when countersigned by an agent creates a personal trust in such agent, who cannot delegate it to another (*McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782). But, if a policy of insurance is signed without authority by a subagent for the agent, and after the policy is delivered to the insured, it is returned to the agent, who with full knowledge of the fact that his name was signed to it by the subagent, receives the premium, such acts on his part make the signature to the policy as much his own as if it had at that time been signed by him (*Grady v. American Cent. Ins. Co. of St. Louis*, 60 Mo. 116).

It has, however, been held in some jurisdictions that, notwithstanding the express terms of the policy, the countersigning by the agent is not under all circumstances essential. If it be regarded as part of the execution, and the execution is otherwise sufficiently apparent, the countersigning may be considered as waived or dispensed with (*Kantrener v. Penn Mut. Life Ins. Co.*, 5 Mo. App. 581). So it may be regarded merely as evidence of delivery, and as dispensed with on proof of any reliable substitute therefor (*Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. 268, 67 Am. Dec. 462).

Reference may also be made to *Camden Consol. Oil Co. v. Ohio Ins. Co.*, 4 Fed. Cas. 1126; *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 29 Fed. Cas. 964; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

But where a policy declares that it is to take effect only when countersigned by B., general agent at ———, the place being left blank, the omission to fill the blank with the name of the place where B. is the general agent of the company is not sufficient to warrant a presumption that the requirement as to countersigning has been waived by the company (*Prall v. Mut. Protection Life Assur. Soc.*, 5 Daly [N. Y.] 298).

As the countersigning of an insurance policy by an agent, when required by the terms of the policy, is a part of its execution, when it purports to be countersigned by such agent, no further proof as to his signature or authority is required in an action on the policy, unless its execution is denied by plea verified by affidavit, as required by 3 Starr & C. Ann. St. 1896, p. 3017, c. 110, par. 34, § 33 (*Firemen's Ins. Co. v. Barnsch*, 161 Ill. 629, 44 N. E. 285, affirming 59 Ill. App. 78). When the original policy was properly countersigned, but the fact did not appear on the copy attached to the complaint, the copy may be amended on the trial to correspond with the original (*Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264).

7. COMPLETION OF CONTRACT—DELIVERY AND ACCEPTANCE OF POLICY.

- (a) Necessity of delivery of policy.
- (b) Sufficiency and effect of delivery.
- (c) Same—Conditional delivery.
- (d) Same—Delivery to and possession by agent.
- (e) Same—Mutual benefit certificates.
- (f) Same—Condition requiring delivery while insured is in good health.
- (g) Same—Effect of death of insured or destruction of property before delivery.
- (h) Same—Questions of practice.
- (i) Necessity of acceptance.
- (j) Sufficiency and effect of acceptance.

(a) Necessity of delivery of policy.

In view of the general doctrine that contracts of insurance may be made by parol, it is evident that ordinarily no delivery is necessary to the completion of the contract (*Milwaukee Mechanics' Ins. Co. v. Graham*, 54 N. E. 914, 181 Ill. 158). Especially is this so where the contract of insurance, though intended to be evidenced by a policy, is nevertheless completed by the acceptance of the application (*Blanchard v. Waite*, 28 Me. 51, 38 Am. Dec. 474). This is well discussed in *McCully's Adm'r v. Phoenix Mutual Life Ins. Co.*, 18 W. Va. 782, where the rule was laid down that if a contract of insurance has been entered into between the company and the insured, and nothing remains to be done to complete the contract, the mere fact that the policy has not been delivered does not affect the rights of the parties. Actual delivery of the policy to the insured is not essential to the validity of such a contract, unless it is expressly made so by its terms (*New York Life Ins. Co. v. Babcock*, 30 S. E. 273, 104 Ga. 67, 42 L. R. A. 88, 69 Am. St. Rep. 134).

This principle is supported by *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Springfield Fire & Marine Ins. Co. v. Jenkins*, 9 Ky. Law Rep. 932; *Loring v. Proctor*, 26 Me. 18; *Bragdon v. Appleton Mut. Fire Ins. Co.*, 42 Me. 259; *Equitable Fire Ins. Co. v. Alexander* (Miss.) 12 South. 25; *Keim v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N. W. 1113; *Hicks v. British America Assur. Co.*, 56 N.

E. 743, 162 N. Y. 284, 48 L. R. A. 424; Pennsburg Mfg. Co. v. Pennsylvania Fire Ins. Co., 16 Pa. Super. Ct. 91.

Also in the following life insurance cases: *Phillips v. Union Cent. Life Ins. Co. (C. C.) 101 Fed. 33; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 Pac. 180; Sheldon v. Connecticut Mut. Life Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; Union Cent. Life Ins. Co. v. Pauly, 8 Ind. App. 85, 35 N. E. 190; Prudential Ins. Co. v. Sullivan, 59 N. E. 873, 27 Ind. App. 30; Lee v. Union Cent. Life Ins. Co., 41 S. W. 319, 19 Ky. Law Rep. 608; Faunce v. State Mut. Life Assur. Co., 101 Mass. 279; Cooper v. Pacific Mut. Life Ins. Co., 7 Nev. 116, 8 Am. Rep. 705; Fried v. Royal Ins. Co., 47 Barb. (N. Y.) 127; Going v. Mutual Ben. Life Ins. Co., 36 S. E. 556, 58 S. C. 201.*

And in these cases, where certificates of membership in mutual benefit associations were involved: *Wagner v. Supreme Lodge Knights and Ladies of Honor, 87 N. W. 903, 128 Mich. 660; National Aid Ass'n v. Brachter, 91 N. W. 379, 65 Neb. 378; Baldwin v. Golden Star Fraternity, 47 N. J. Law, 111; Pledger v. Sovereign Camp Woodmen of the World, 17 Tex. Civ. App. 18, 42 S. W. 653.* The rule applies, whether the action is on the policy or is an action by the insurer for the premium.

In *Michigan Pipe Company v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277*, the plaintiff applied to an insurance agent for a specified amount of insurance on certain property, and intended the policies to be issued at once, but the companies in which they should be issued were not mentioned, nor was the rate. It was held that, though the policies were not delivered to or ratified by plaintiff before the loss occurred, there was a valid contract existing at the time with each company in which the agent issued a policy, as the agent acted for plaintiff in choosing the companies and distributing the risk.

If, however, there is merely a contract to insure, as distinguished from a contract of insurance, the policy must be delivered in order to complete the contract (*Consumers' Match Co. v. German Ins. Co. [N. J. Err. & App.] 57 Atl. 440*). But if the agent of several fire insurance companies agrees to insure certain property at a given rate, without naming the company in which he will place the risk, and thereupon such agent writes the policy in one of his companies, the fact that the policy is not delivered to the assured is not sufficient to relieve the company from liability thereon (*Manchester Fire Ins. Co. v. Plato, 23 Ohio Cir. Ct. R. 35*). It has been held that a preliminary contract of insurance, evidenced by a binding slip, does not require the delivery of a

policy in order to complete the contract of permanent insurance (*J. C. Smith & Wallace Co. v. Prussian National Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458). This rule applies as well in life policies, where a binding receipt is given (*Lee v. Union Central Life Ins. Co.*, 41 S. W. 319, 19 Ky. Law Rep. 608). So a policy issued without any request by the insured (*Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. 798), or without the knowledge of the insured (*Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65), must be delivered in order to complete the contract.

The converse of the foregoing proposition is obviously true; that is to say, if the contract is not otherwise complete, there must be a delivery of the policy.

Lindauer & Co. v. Delaware Mut. Safety Ins. Co., 13 Ark. 461; *Marks v. Hope Mut. Life Ins. Co.*, 117 Mass. 528; *Markey v. Mutual Benefit Ins. Co.*, 118 Mass. 178, and *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41, seem to be decided on this theory.

Thus, where the application contains a recital that the contract shall be completed only by delivery of the policy (*McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782), or that the policy shall not be in force until its delivery to the applicant (*Kohen v. Mutual Reserve Fund Life Ass'n [C. C.]* 28 Fed. 705), the contract will not become binding on the company until the policy is delivered.

McMaster v. New York Life Ins. Co., 99 Fed. 856, 40 C. C. A. 119; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 95 N. E. 190.

So, too, if the policy as written does not conform to the application, it cannot become a binding contract until it has been delivered and accepted by the insured; and the fact that the company retained the premium notes until after the fire will not render it liable on the policy, where they were returned to the insured within a reasonable time (*Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139). Delivery of a policy may, however, be waived by accepting premiums, receiving proofs of loss, and participating in an adjustment of the loss (*Star Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N. W. 1113).

In *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584, where the application contained a clause to the effect that the contract should be completed only by a delivery of the policy, and the policy provided that it should take effect only when countersigned by the company's local agent, it was held that, notwithstanding the pro-

vision as to countersigning, the policy did not take effect until delivered.

The provision that the contract shall not take effect until delivered is often a condition in the by-laws of mutual benefit associations, which provide that the certificate of membership shall not be in force until delivered.

Wilcox v. Sovereign Camp W. O. W., 76 Mo. App. 573; *May v. New York Safety Reserve Fund Soc.*, 14 Daly (N. Y.) 389; *Roblee v. Masonic Life Ass'n of Western New York*, 38 Misc. Rep. 481, 77 N. Y. Supp. 1098; *McLendon v. Woodmen of the World*, 64 S. W. 36, 106 Tenn. 695, 52 L. R. A. 444.

The rule just discussed is especially applicable where the policy provides that it shall not take effect unless it is delivered while the applicant is in good health.

Paine v. Pacific Mut. Life Ins. Co., 51 Fed. 689, 2 C. C. A. 459, 10 U. S. App. 256; *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Mo. App. 589; *Roblee v. Masonic Life Ass'n*, 77 N. Y. Supp. 1098, 38 Misc. Rep. 481; *Ray v. Security Trust & Life Ins. Co.*, 126 N. C. 166, 35 S. E. 246.

The recital in the application sometimes is that the contract shall not take effect until the policy is issued. It has been held that the word "issued," as here used, refers only to the signing and execution of the policy at the office of the insurer, and does not include delivery (*Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 44 Or. 447). So, too, the application, policy, or, in case of mutual companies, the by-laws, may provide that the policy shall not be delivered until the premium is paid. Under such recital it has been held that there must be a delivery in order to complete the contract.

Blue Grass Ins. Co. v. Cobb, 58 S. W. 981, 109 Ky. 339; *Hoyt v. Mutual Benefit Life Ins. Co.*, 98 Mass. 539; *Real Estate Mut. Fire Ins. Co. v. Roessle*, 1 Gray (Mass.) 336; *Myers v. Liverpool & L. & G. Ins. Co.*, 121 Mass. 338; *Walner v. Milford Mutual Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

(b) Sufficiency and effect of delivery.

Assuming that the contract is one requiring a delivery of the policy to complete it, it is obvious, subject to the qualification that an actual or implied acceptance is necessary, that a valid delivery completes the contract and renders it binding on the parties.

National Mut. Church Ins. Co. v. Trustees of M. E. Church, 105 Ill. App. 143; *Commonwealth Mut. Fire Ins. Co. v. William Knabe Co.*, 171

Mass. 265, 50 N. E. 516; *Shields v. Equitable Life Assur. Soc. of United States*, 121 Mich. 690, 80 N. W. 793; *Bushaw v. Women's Mut. Ins. & Acc. Co.*, 55 Hun. 607, 8 N. Y. Supp. 423; *Travelers' Ins. Co. v. Jones* (Tex. Civ. App.) 73 S. W. 978.

The important question to determine, therefore, is as to what constitutes a valid delivery. It may be conceded at the outset that actual delivery of the policy to the insured is not essential to the validity of a contract of insurance, unless expressly made so by the terms of the contract; but the delivery may be constructive.

Franklin Fire Ins. Co. v. Colt, 20 Wall. 560, 22 L. Ed. 423; *De Camp v. New Jersey Mut. Life Ins. Co.*, 7 Fed. Cas. 313; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Bragdon v. Appleton Mut. Fire Ins. Co.*, 42 Me. 259; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Equitable Fire Ins. Co. v. Alexander* (Miss.) 12 South. 25; *National Aid Ass'n v. Brachter*, 91 N. W. 379, 65 Neb. 378.

But to constitute a delivery there must be something answering to one or both of these, and with an intent to thereby give it effect as a delivery (*Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 [Gil. 127], 10 Am. Rep. 154).

Though an insurance policy may be delivered on the insured's promise to pay the premium in the future, payment in cash or its equivalent not being necessary to complete the delivery in the absence of a provision to that effect in the policy (*Jones v. New York Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92), when the policy contains a provision that it shall not take effect until the premium is paid, delivery without payment of the premium will not be valid, unless the agent had authority to waive such payment (*Smith v. Provident Sav. Life Assur. Soc. of N. Y.*, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163). It was, however, said in the same case that, if the agent's contract with the company declared that credit for premiums not actually received was at the agent's own risk, it showed that the company was aware of the practice of its agents to give credit, and was wholly inconsistent with the condition on the part of the company that, without actual payment of the premium, delivery by the agent was without authority. In *Markey v. Mutual Ben. Life Ins. Co.*, 118 Mass. 178,¹ the policy, after being

¹ For other reports of this case, see 103 Mass. 78, and 126 Mass. 158.

handed to the beneficiary, was returned to the agent, to enable him to present it to and get the premium from a third person. The policy was retained by the agent, and a demand with a tender of the money the following day was refused. It was held that there was no such delivery of the policy as would constitute a contract binding on the company. Where, however, the agent is not a general agent with undisclosed limitations, but merely a special agent with limited authority, a delivery without requiring a portion of the premium is not binding on the company (*Charter Oak Life Ins. Co. v. Smith*, 6 Ohio Dec. 625). So, where the premium for a life insurance policy is not paid, and the agent has not waived payment, except as to one-half thereof, the fact that he wrote the applicant that "your policy" has arrived is not equivalent to its constructive delivery (*Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190). A delivery of a policy by an agent is good, and binding upon the principals, where the premium had been previously paid, although the assured had been informed by the principals that they intended to revoke the appointment of the agent, if such delivery takes place before revocation, or knowledge by the agent of the intent to revoke (*Lightbody v. North American Ins. Co.*, 23 Wend. [N. Y.] 18).

The deposit in the post office by an insurance company of a policy, with postage prepaid, directed to the insured at his place of residence, is a delivery to the insured.

Yonge v. Equitable Life Assur. Soc. (C. C.) 30 Fed. 902; *Triple Link Mut. Indemnity Ass'n v. Williams*, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34; *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Armstrong v. Mutual Life Ins. Co.*, 96 N. W. 954, 121 Iowa, 862; *Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co.*, 171 Mass. 285, 50 N. E. 516; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859. An averment that a policy was executed by the company, and its corporate seal attached, and that it was placed in an envelope, addressed to insured, and deposited in the post office, will be construed to mean that it was deposited by the company (*Triple Link Mut. Indemnity Ass'n v. Williams*, 26 South. 19, 121 Ala. 138, 77 Am. St. Rep. 34).

So, where a solicitor procured three applications for insurance, one for himself and two for others, and the policies issued on these

applications were left on the desk of the company's local manager, in envelopes addressed to the respective parties insured, to be taken by the solicitor and delivered, and he took the policies, delivered two of them, and retained his own, it was held that his policy had been duly delivered to him (*Massachusetts Ben. Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137).

(c) Same—Conditional delivery.

That a policy of insurance, like any other instrument, may be delivered conditionally, and that in such case delivery will not have its usual effect of completing the contract, would seem to be elementary (*Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261, reversing 17 App. D. C. 14). Thus, a delivery may be made on condition that the policy is not to become binding upon the company until the insured has canceled another policy in a different company covering the same property (*Moore v. Farmers' Mut. Ins. Ass'n*, 107 Ga. 199, 33 S. E. 65). So, where one received a policy on the condition that it may be returned, unless the agent shall obtain the surrender value or paid-up insurance on other policies, there is only a conditional delivery, which is not binding (*Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150, affirming 40 Hun, 558). It was, however, held, in *Shields v. Equitable Life Assur. Soc.*, 80 N. W. 793, 121 Mich. 690, that the insurer cannot insist that delivery is conditional, when the condition is to be performed by the insurer, who persistently fails and refuses to comply therewith, and insists on treating the contract as binding until the death of the insured.

A policy delivered to insured solely for the purpose of examination is, of course, merely delivered conditionally, and does not become binding until accepted.

Equitable Life Assur. Soc. v. Mueller, 99 Ill. App. 460; *Rey v. Equitable Life Assur. Soc.*, 44 N. Y. Supp. 745, 16 App. Div. 194.

Conversely, the policy will not become binding by delivery to a third party, to be held until the agent ascertains whether or not the company will take the risk (*Brown v. American Cent. Ins. Co.*, 70 Iowa, 390, 30 N. W. 647). And where, after the agent has handed the policy to the insured, he takes possession of it, and retains it, with the statement that he would like to keep it until he knows whether the insurer will carry it, there is no delivery which will complete the contract (*Nutting v. Minnesota Fire Ins. Co.*, 98 Wis. 26, 73 N. W. 432).

(d) Same—Delivery to and possession by agent.

Delivery to a third person on account of the insured is generally a sufficient delivery (*Connecticut Indemnity Ass'n v. Grogan's Adm'r* [Ky.] 52 S. W. 959). An interesting phase of this question is presented where the delivery is to the agent who negotiated the contract, or is otherwise in the employ of the insurer. It may, however, be regarded as settled that the receipt by an agent from his company of a policy, to be unconditionally delivered by him to the applicant, is tantamount to a delivery to the insured, though the agent never parts with possession of the policy, and its delivery to the applicant is by contract made essential to its validity.

This principle is the basis of the decisions in *Yonge v. Equitable Life Assur. Soc.* (C. C.) 30 Fed. 902; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180; *New York Life Ins. Co. v. Babcock*, 30 S. E. 273, 104 Ga. 67, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Mutual Life Ins. Co. of New York v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Porter v. Mutual Life Ins. Co. of New York*, 70 Vt. 504, 41 Atl. 970.

The theory of the cases is, as expressed in *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268, that, when the policy is mailed to the agent to deliver, he is constituted, not the agent of the insurer to receive and keep the policy for them, but the trustee for the insured, and the deposit with the agent is made to the credit of the insured.

If the delivery is to one who under the circumstances can be regarded as acting only for the insurer, it is obvious that such delivery does not amount to a delivery to the insured (*Mutual Life Ins. Co. of New York v. Sinclair*, 71 S. W. 853, 24 Ky. Law Rep. 1543). And this is true, though the agent is a broker, if, in view of the facts, he is to be regarded as an agent of the insurer, rather than of the insured (*Ikeller v. Hartford Fire Ins. Co.*, 53 N. Y. Supp. 323, 24 Misc. Rep. 136). That the delivery to an agent is a delivery to the insured has in some cases been founded on the theory that he is the agent for the insured. Such was the fact in *Morrison v. Insurance Co.*, 64 N. H. 137, 7 Atl. 378.

Reference may also be made to *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643.

In view of the general rule that a delivery to the agent is a delivery to the insured, it has been held in numerous cases that the delivery is sufficient to give effect to the insurance, though the

agent retains the policy in his own possession for safe-keeping, whether at the request of the insured or not, and the policy is not, in fact, actually given into the possession of the insured before the loss.

Franklin Fire Ins. Co. v. Colt, 20 Wall. 560, 22 L. Ed. 423; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 South. 903, 67 Am. St. Rep. 154; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; *Cassville Roller Mill Co. v. Ætna Ins. Co.*, 79 S. W. 720, 105 Mo. App. 146; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Young v. St. Paul Fire & Marine Ins. Co.*, 47 S. E. 681, 68 S. C. 387. See, also, *Brown v. German-American Ins. Co.*, 10 N. Y. St. Rep. 412, and *Tennant v. Travelers' Ins. Co. (C. C.)* 31 Fed. 322, where it was held that there was a delivery of renewals to the insured, though they remained in the possession of the agent.

It was, indeed, insisted, in *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154, that the possession of the agent must appear to be on account of the insured. But if the agent has advanced the necessary premiums, and retained the policy for his own protection, it is nevertheless a delivery to the insured.

United States Life Ins. Co. v. Ross, 102 Fed. 722, 42 C. C. A. 601; *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1.

(e) Same—Mutual benefit certificates.

Since one cannot become insured in a mutual benefit association until he has become a member of a subordinate lodge, there can be no valid delivery of a certificate to him until he has been made a member of the lodge according to the laws of the order (*Hiatt v. Fraternal Home*, 99 Mo. App. 105, 72 S. W. 463). And since, as a general rule, members of mutual benefit associations become insured and entitled to a certificate as soon as they are duly initiated as members of the subordinate lodge and have paid the dues and assessments required in advance, the principle that delivery to the agent is a delivery to the insured is applicable, and it has been held that a delivery of the benefit certificate to the proper officer of the local lodge is a delivery to the member.

Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660, 87 N. W. 903; *Tracy v. Supreme Court of Honor (Neb.)* 93 N. W. 702; *Baldwin v. Golden Star Fraternity*, 47 N. J. Law,

111; *Supreme Lodge Knights of Honor v. Martin*, 16 Phila. (Pa.) 97; *Pledger v. Sovereign Camp Woodmen of the World*, 17 Tex. Civ. App. 18, 42 S. W. 653.

The same rule was asserted in *Supreme Court Order of Patricians v. Davis*, 129 Mich. 318, 88 N. W. 874, though stress was laid on the fact that the officer had been asked to act as custodian for the member.

In *Wilcox v. Sovereign Camp Woodmen of the World*, 76 Mo. App. 573, it was held that the possession of the certificate by an officer of the lodge was not sufficient as delivery; but it is to be remarked that the court called attention to the fact that no tender of assessments and dues had been made, but the member had merely expressed a willingness to pay.

(f) Same—Condition requiring delivery while insured is in good health.

While good faith requires that the insured shall disclose any change in his health or physical condition intervening between the date of the application and the day the policy is delivered, yet, if the contract is complete without delivery, the fact that a change has taken place in the insured's health does not affect the question of the validity of the delivery (*Southern Life Ins. Co. v. Kempton*, 56 Ga. 339). In the absence of a condition that delivery can be made only while the insured is in good health, mere private instructions, not known to the applicant, that the agent shall not deliver policies unless the insured is in good health, do not affect the insured's right to the policy.

Schwartz v. Germania Life Ins. Co., 18 Minn. 448 (Gil. 404); *Id.*, 21 Minn. 215; *Fried v. Royal Ins. Co.*, 50 N. Y. 243. But see *Whitley v. Piedmont & Arlington Life Ins. Co.*, 71 N. C. 480.

It is, therefore, customary to provide, either in the application or the policy, that the policy shall not take effect until delivery has been made while the insured is living or in good or sound health. It is clear that under such a condition delivery will impose no liability on the insurer, unless at the time the insured is in good health.

Volker v. Metropolitan Life Ins. Co., 21 N. Y. Supp. 456, 1 Misc. Rep. 374; *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 68 N. E. 4.

It is clear, too, that a delivery procured by fraudulent representations as to the condition of the insured's health at the time (*Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A.

365), or by concealments or statements calculated to prevent further inquiry (*Cable v. United States Life Ins. Co.*, 111 Fed. 19, 49 C. C. A. 216), is not a valid delivery.

A waiver of the condition as to delivery while the insured is in good health is implied by delivery to the insured while he is not in good health within the knowledge of the agent making the delivery.

John Hancock Mut. Life Ins. Co. v. Schlunk, 74 Ill. App. 181; *Ames v. Manhattan Life Ins. Co.*, 52 N. Y. Supp. 759, 81 App. Div. 180, affirmed on opinion below, 60 N. E. 1106, 167 N. Y. 584; *Northwestern Life Ass'n v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695; *Home Forum Ben. Order v. Varnado* (Tex. Civ. App.) 55 S. W. 364. The contrary doctrine is asserted in *McClave v. Mutual Reserve Fund Life Ass'n*, 55 N. J. Law, 187, 26 Atl. 78.

So, too, a waiver of delivery in good health may be established by showing that the association customarily, with knowledge, accepted persons not in good health (*Home Circle Soc., No. 1, v. Shelton* [Tex. Civ. App.] 81 S. W. 84).

But a delivery, even with notice that the insured is ill, will not operate as a waiver or create an estoppel, where material facts are concealed in regard to the condition of insured, or as to the nature and extent of his illness, or the statement made is of such character as to induce the agent to make no further inquiry.

Cable v. United States Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216; *Maloney v. Northwestern Masonic Aid Ass'n*, 40 N. Y. Supp. 918, 8 App. Div. 575.

If the policy is mailed to an agent, who, by reason of circumstances, must be regarded in all matters relating to the contract as the agent for the insurer, there is no such delivery to the insured as will support a waiver of the condition (*Mutual Life Ins. Co. v. Sinclair*, 71 S. W. 853, 24 Ky. Law Rep. 1543).

The important question arising under this condition is, of course, whether the insured is in "good health," or "sound health," at the time of the delivery. No definition can be given to these words that will apply in all cases. A mere temporary indisposition or ailment would not ordinarily be regarded as rendering the health unsound, within the meaning of the words. Speaking generally, they mean the absence of any vice in the constitution and of any disease of a serious nature that have a direct tendency to shorten life—the absence of a condition of health that is commonly regarded as disease, in contradistinction to a temporary ailment or

indisposition. Whether, in a given case, a person is of sound health, must, of course, depend upon the circumstances of the case.

Plumb v. Penn Mut. Life Ins. Co., 108 Mich. 94, 65 N. W. 611; *Packard v. Metropolitan Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599; *Woodmen of the World v. Locklin*, 67 S. W. 331, 28 Tex. Civ. App. 486.

It was said, in *Metropolitan Life Ins. Co. v. Moore*, 25 Ky. Law Rep. 1613, 1748, 79 S. W. 219, that the condition that the policy shall not be binding, unless on the date of delivery the insured is in sound health, applies only to unsoundness of health arising after the application and medical examination. Although insured had not been in sound health at that time, and there had been no material change since then and before the delivery of the policy, the clause would not render it void. When it is not shown that the unsoundness of health did not occur between the application and the medical examination and the delivery of the policy, the company must rely on the statements in the application to avoid a recovery on the policy, not upon the clause in question. If an insured receives the policy by mail, the time of delivery, within a provision requiring delivery while he is in good health, is the time of mailing (*Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850).

An applicant for life insurance, who from a time prior to his application until his death some years after delivery of the policy suffered from a disease which was the direct, though remote, cause of his death, was not "in good health" when the policy was delivered, within the meaning of a provision therein that it should not take effect until delivered while the applicant was in good health (*Austin v. Mutual Reserve Fund Life Ass'n* [C. C.] 132 Fed. 555).

(g) Same—Effect of death of insured or destruction of property before delivery.

Under the general principle that, if the contract is complete without delivery, delivery of the policy is not necessary to bind the insurer (*Union Cent. Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263), the death of the insured before delivery does not affect the contract, and a delivery after death is good.

Reference may also be made to *Phillips v. Union Cent. Life Ins. Co.* (C. C.) 101 Fed. 83; *Mutual Life Ins. Co. of New York v. Thomson*, 14 Ky. Law Rep. 800, 22 S. W. 87; *Dailey v. Preferred Masonic*

Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; Id., 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705.

If, however, the contract is not complete, as where the application was not approved (*Paine v. Pacific Mut. Life Ins. Co.*, 51 Fed. 689, 2 C. C. A. 459, 10 U. S. App. 256), or the policy had not been countersigned, as required (*Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584), or if the delivery is necessary to complete the contract (*Misselhorn v. Mutual Reserve Fund Life Ass'n* [C. C.] 30 Fed. 545), **there can be no delivery after the death of the insured which will be effective.** As said in *Roblee v. Masonic Life Ass'n*, 77 N. Y. Supp. 1098, 38 Misc. Rep. 481, there can be no delivery, either actual or constructive, to a person who is dead. Especially will these principles apply where, as in *Hawley v. Michigan Mut. Life Ins. Co.*, 92 Iowa, 593, 61 N. W. 201, the policy provides that the insurer shall not be liable unless the policy is delivered during the lifetime of the insured.

These principles are supported by *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Dickerson's Adm'r v. Provident Sav. Life Assur. Soc. (Ky.)* 52 S. W. 825; *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Mo. App. 589; *Busher v. New York Life Ins. Co.*, 58 Atl. 41, 72 N. H. 551; *Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 44 Or. 447; *McLendon v. Woodmen of the World*, 64 S. W. 86, 106 Tenn. 695, 52 L. R. A. 444.

So, where the agent received the membership fee and premium, and countersigned and sent the policy to the solicitor for delivery, in ignorance of the insured's death, the fact that the solicitor delivered the policy to the administrator of the insured did not render the company liable (*Newcomb v. Provident Fund Soc.*, 5 Colo. App. 140, 38 Pac. 61). But where a benefit certificate was issued and forwarded, to be delivered on the payment of additional dues, the acceptance and retention of the dues by the association with knowledge of the facts will render effective a delivery after the death of the insured (*Home Forum Ben. Order of Illinois v. Jones*, 48 S. W. 219, 20 Tex. Civ. App. 68).

The rules thus prevailing in the case of life policies are equally applicable to fire policies, and it is held in relation to such contracts that if the contract is otherwise complete, so that no delivery is necessary, a destruction of the property before delivery will not affect the liability of the insurer.

Howard Ins. Co. v. Owens, 13 Ky. Law Rep. 237; *Kelm v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Brownfield*

v. Phoenix Ins. Co., 35 Mo. App. 54; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18. See, also, *American Horse Ins. Co. v. Patterson*, 28 Ind. 17, where the insurance was against loss by sickness and death of animals.

An important phase of this question is presented where an attempt is made to substitute another policy for a prior one canceled. It is, of course, obvious that in such case, if the second contract is not complete before the property is destroyed, the second insurer is not liable (*Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615). And, moreover, such second insurer cannot be rendered liable by a delivery of the policy after the destruction of the property. The theory of the cases is that an agent of an insurance company has no authority to insure property already destroyed, and a policy written and intended as a substitute for a subsisting policy in another company cannot become a valid contract by delivery after the property is destroyed.

Kerr v. Milwaukee Mechanics' Ins. Co., 117 Fed. 442, 54 C. C. A. 616;
Stebbins v. Lancashire Ins. Co., 60 N. H. 65.

(h) Same—Questions of practice.

Where a life insurance policy is found in the possession of the beneficiary, the presumption is that it was duly delivered by the insurance company.

Massachusetts Benefit Life Ass'n v. Sibley, 158 Ill. 411, 42 N. E. 137;
Thum v. Wolstenholme, 61 Pac. 537, 21 Utah, 446; *Jones v. New York Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 723, 70 Am. St. Rep. 592.

But the presumption will not arise from possession, where the policy recites that it is to take effect only when countersigned by the agent, and it is not so signed (*Prall v. Mutual Protection Life Assur. Soc.*, 5 Daly [N. Y.] 298, affirmed without opinion, 63 N. Y. 608). Proof that the possession was obtained by fraud is sufficient to rebut the presumption arising from possession.

Pennsburg Mfg. Co. v. Pennsylvania Fire Ins. Co., 16 Pa. Super. Ct. 91; *New York Life Ins. Co. v. Babcock*, 30 S. E. 273, 104 Ga. 67, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Millville Mut. Marine & Fire Ins. Co. v. Collierd*, 38 N. J. Law, 480.

And, if delivery of the policy is refused, possession obtained by replevin will not support a presumption of delivery (*National Aid Ass'n v. Bratcher*, 91 N. W. 379, 65 Neb. 378).

Even though a prima facie case is made by proving that the

policy came from the insured's custody, yet the burden of proving the delivery is still on the plaintiff (*Coffin v. New York Life Ins. Co.*, 127 Fed. 555, 62 C. C. A. 415). If there is nothing to show a delivery in fact of the policy to the insured, or some person for him, the burden of proof is on the plaintiff to show that it was to go into effect without delivery (*Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 [Gil. 127], 10 Am. Rep. 154). On the other hand, if the policy has been delivered, and the insurer relies on the condition requiring delivery while in good health, the burden is on the company to show that the insured was not in good health when the policy was delivered (*Kelly v. Metropolitan Life Ins. Co.*, 15 App. Div. 220, 44 N. Y. Supp. 179).

The admissibility of evidence to show delivery is considered in *Jones v. New York Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *New York Life Ins. Co. v. Johnson's Adm'r*, 72 S. W. 762, 24 Ky. Law Rep. 1867; *Richardson v. Home Ins. Co.*, 47 N. Y. Super. Ct. 138.

The sufficiency of the evidence to show a delivery of the policy is considered in *Coffin v. New York Life Ins. Co.*, 127 Fed. 555, 62 C. C. A. 415; *Hoyt v. Mutual Ben. Life Ins. Co.*, 98 Mass. 539; *Markey v. Mutual Ben. Life Ins. Co.*, 118 Mass. 178; *Markey v. Mutual Ben. Life Ins. Co.*, 128 Mass. 158; *Jones v. New York Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *Star Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N. W. 1118; *Union Life Ins. Co. v. Haman*, 54 Neb. 599, 74 N. W. 1090; *Williams v. Metropolitan Life Ins. Co.*, 83 N. Y. Supp. 1119, 86 App. Div. 628; *McCarthy v. Mutual Reserve Fund Life Ass'n (Tex. Civ. App.)* 74 S. W. 921.

The sufficiency of the evidence to show that delivery was made while insured was in good health is considered in *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 802; *Packard v. Metropolitan Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Genung v. Metropolitan Life Ins. Co.*, 69 N. Y. Supp. 1041, 60 App. Div. 424; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599; *Woodmen of the World v. Locklin*, 67 S. W. 331.

Whether there has been a delivery at all is a question for the jury.

Smith v. Provident Sav. Life Assur. Soc. of New York, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163; *Snyder v. Nederland Life Ins. Co.*, 51 Atl. 744, 202 Pa. 161.

And so, too, it is a question for the jury whether delivery was made while the insured was in good health.

Packard v. Metropolitan Ins. Co., 72 N. H. 1, 54 Atl. 287. Sound health is for the jury. *Plumb v. Penn Mutual Life Ins. Co.*, 65 N. W. 611, 108 Mich. 94.

(1) Necessity of acceptance.

Whether or not delivery is essential to make the contract binding, the insured has a right to possession of the policy within a reasonable time. If the policy is to be delivered to him within a specified time, it is not necessary for him to make demand therefor. (*Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347.) Nor is he bound to accept the policy, unless the delivery is made within a reasonable time (*Armstrong v. Mutual Life Ins. Co.*, 96 N. W. 954, 121 Iowa, 362). Though it would seem to be intimated, in *Pierce v. Home Ins. Co.*, 45 Kan. 576, 26 Pac. 5, that the insured is bound to accept a proper policy offered in compliance with his application, it may be inferred, from the decision in *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, that no absolute obligation to accept rests on the applicant for insurance. It is certainly the rule that he is not bound to accept if the policy varies in any way from the terms proposed in the preliminary negotiations.

Jones v. Gilbert, 93 Ga. 604, 20 S. E. 48; *Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139; *Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68; *Mutual Life Ins. Co. of Kentucky v. Gorman* (Ky.) 40 S. W. 571; *Armstrong v. Mutual Life Ins. Co.*, 96 N. W. 954, 121 Iowa, 362; *American Ins. Co. v. Nelberger*, 74 Mo. 167; *Tift v. Phoenix Mut. Life Ins. Co.*, 6 Lans. (N. Y.) 198.

If he does refuse to accept the policy as executed and tendered, there is, of course, no completed contract of insurance (*Hogben v. Metropolitan Life Ins. Co.*, 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53). Though it is often stated as an abstract and general rule that acceptance of the policy is essential to constitute it a binding contract (*Lee v. Guardian Life Ins. Co.*, 15 Fed. Cas. 158), the better statement of the principle is that, if the applicant is not satisfied with the terms and conditions submitted in the policy, it is his duty to reject the policy. Formal acceptance is not usually necessary. The true rule is probably that stated in *Commonwealth Mutual Fire Ins. Co. v. Wm. Knabe & Co.*, 171 Mass. 265, 50 N. E. 516, where it was said that an insurance policy is binding when delivered, though it contains terms and conditions not included in the application, unless they are unusual or extraordinary, as the application is deemed to be for such insurance as, in view of the particulars submitted, the company sells, and with which the purchaser is presumed to be acquainted. On delivery of the policy the contract becomes complete, without any further assent on the

part of the insured. If, however, the policy delivered in response to the proposal for application is variant as to its terms from the terms proposed, it becomes in its turn a mere counter proposition, and, to constitute a binding contract, must be accepted by the applicant.

Mutual Life Ins. Co. v. Young, 23 Wall. 85, 23 L. Ed. 152; *Yore v. Bankers' & Merchants' Mut. Life Ass'n of United States*, 26 Pac. 514, 88 Cal. 609; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139; *Robinson v. United States Benev. Society*, 132 Mich. 695, 94 N. W. 211; *Wallingford v. Home Mut. Fire & Marine Ins. Co.*, 30 Mo. 46; *American Ins. Co. v. Nelberger*, 74 Mo. 167.

So, too, if the issuance of the policy is not on the application of the insured, but on the application of another for him (*Baldwin v. Pennsylvania Fire Ins. Co.*, 20 Pa. Super. Ct. 238), or if the policies were issued on general instructions to insure, without any agreement as to the terms or any selection of companies (*German Ins. Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213), the contracts will not become binding until accepted. As the applicant may reserve the right to reject the policy (*Blue Grass Ins. Co. v. Cobb*, 24 Ky. Law Rep. 2132, 72 S. W. 1099), if such right or the right of examination is specially reserved, the insured must signify his final acceptance, in order to complete the contract.

Westerfeld v. New York Life Ins. Co., 61 Pac. 667, 129 Cal. 68; *Roger's Adm'r v. Charter Oak Life Ins. Co.*, 61 Conn. 97; *Pennsburg Mfg. Co. v. Pennsylvania Fire Ins. Co.*, 16 Pa. Super. Ct. 91; *Atkins v. New York Life Ins. Co.* (Tex. Civ. App.) 62 S. W. 563.

The right thus reserved may, however, be waived, and a tender of premiums without such examination will be regarded as a waiver (*Going v. Mutual Ben. Life Ins. Co.*, 58 S. C. 201, 36 S. E. 556).

(j) Sufficiency and effect of acceptance.

The general effect of an acceptance of the policy tendered is to complete the contract and to render it binding on the parties.

National Mut. Church Ins. Co. v. Trustees of M. E. Church, 105 Ill. App. 143; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65.

Such an acceptance binds the insured as to the conditions of the policy, and even as to representations made by his agent in ap-

plying for the insurance (*Draper v. Charter Oak Fire Ins. Co.*, 2 Allen [Mass.] 569). This was also the doctrine of the leading case of *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. But such an acceptance will not bind the insured as to matter on the back of the policy not referred to on the face of the contract (*Stone's Adm'rs v. Casualty Co.*, 34 N. J. Law, 371). And even where there is a recital on the face of the benefit certificate that the certificate is accepted "subject to all the conditions therein contained," which is signed by the insured, such acceptance does not carry with it matters on the back of the certificate, so as to make them a part thereof (*Page v. Knights and Ladies of America* [Tenn.] 61 S. W. 1068). A conditional acceptance does not, of course, close the contract (*Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365); and, where the acceptance was conditioned on the policy proving satisfactory, a letter written by the insured, stating that he could not keep the policy because he was unable to make the payments, cannot be construed as a ratification (*Parker v. Bond*, 25 South. 898, 121 Ala. 529).

Where insured accepts a life policy pending the delivery of an endowment policy for which he pays the premium, he has the right to demand the delivery of the endowment policy within a reasonable time (*Calandra v. Life Ass'n of America* [Sup.] 84 N. Y. Supp. 498).

To be effective and binding upon the insurer, the acceptance of the policy must be before loss (*Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38). And, if the insured refuses to accept the policy until he has investigated the standing of the company, the property is at his own risk. It is too late for him to accept the policy after the property is destroyed (*Millville Mut. Marine & Fire Ins. Co. v. Collerd*, 38 N. J. Law, 480). If, however, the recital as to acceptance in a certificate of a mutual benefit association has been signed by the member, such acceptance will be regarded as applying to a new certificate, issued in lieu of the first, on a mere change of beneficiaries, though the certificate is not received for delivery until after the death of the member (*Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754).

An acceptance of the policy will be implied from a retention thereof for an unreasonable time without objection; and, though what is an unreasonable time is usually a question for the jury (*MacDonell v. Keller Mfg. Co.*, 96 N. W. 785, 90 Minn. 321), it may

be said as a matter of law that retention for a year, or even for five months, is unreasonable, so that an acceptance will be implied.

Adams v. Eldam, 42 Minn. 53, 43 N. W. 690; *American Ins. Co. v. Nelberger*, 74 Mo. 167; *Bostwick v. Mutual Life Ins. Co.*, 89 N. W. 538, 92 N. W. 246, 116 Wis. 392.

Retention of the policy for a month was, however, regarded as not unreasonable in *Guggenheimer v. Greenwich Fire Ins. Co.*, 9 N. Y. St. Rep. 316. So, too, where there was a balance due on the premium, and the policy was delivered with the request to return it if the terms were not satisfactory, it was held that merely keeping the policy, without complying with the terms and without paying the premium due, was not such an acceptance as would make the policy binding (*Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. 268, 67 Am. Dec. 462). Where the insured seasonably notified the agent that the policies were not satisfactory, and the agent promised to call and examine them, retention of the policies, awaiting such examination, does not amount to an acceptance (*New York Life Ins. Co. v. Easton*, 69 Ill. App. 479). If the policy is delivered to a third person, who for that purpose may be regarded as the agent of the insured, the fact of delivery and that there is a variance between the policy and the application being unknown to the insured, the retention of the policy does not imply an acceptance.

Snell v. Atlantic Ins. Co., 98 U. S. 85, 25 L. Ed. 52; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Bennett v. City Ins. Co.*, 115 Mass. 241.

Where an agent of the company, in response to his application therefor, received a policy of insurance on his goods, and on the day of its receipt he made an entry in his book of accounts with the company of the amount chargeable against him for the premium, his entry of indebtedness, being made on the receipt of the policy and in a book in which his accounts with his principal were regularly kept, sufficiently closed his contract, without the necessity of forwarding a letter of acceptance (*Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100). As an acceptance after loss is ineffectual, filing proofs of loss will not be considered as an acceptance (*Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38).

An allegation in the answer that the plaintiff procured to be issued to him a policy of insurance is equivalent to an allegation of delivery to and acceptance by plaintiff (*Sisk v. Citizens' Ins.*

Co., 16 Ind. App. 565, 45 N. E. 804). Any presumption of the acceptance of a policy, arising from its retention, is rebutted, where the agreement was that the insured should notify the company within 60 days if he decided not to take the policy, by evidence that during the 60 days insured endeavored to find the agent in order to return the policy, but was unable to do so (*Watkins v. Bowers*, 119 Mass. 383). The question whether there has been an acceptance of the policy by the insured is one of fact for the determination of the jury.

Equitable Life Assur. Soc. v. Mueller, 99 Ill. App. 460; *New York Life Ins. Co. v. Easton*, 69 Ill. App. 479.

The allowance by the insured's executor of a premium note presented by an assignee of the insurance company does not tend to show that the policy was accepted (*Mutual Life Ins. Co. v. Logan*, 87 Fed. 637, 31 C. C. A. 172).

8. COMPLETION OF CONTRACT—PAYMENT OF FIRST PREMIUM.

- (a) Necessity of payment of premium to bind company.
- (b) Same—Conditions requiring prepayment of premium.
- (c) Same—Deposit of premium note required by mutual companies.
- (d) Same—Payment of dues and advance assessments in mutual benefit associations.
- (e) Same—Payment before loss or during lifetime or good health of the insured.
- (f) What constitutes payment.
- (g) Effect of part payment—Time of payment.
- (h) Payment to agent or broker.
- (i) Giving credit for premium.
- (j) Payment by agent or broker.
- (k) Payment by note.
- (l) Same—Effect of failure to pay note at maturity.
- (m) Effect of payment.
- (n) Effect of receipt for premium.
- (o) Pleading and practice.

(a) Necessity of payment of premium to bind company.

Ordinarily the payment of premiums by an insured is a condition precedent to, or at least concurrent with, the assuming of any obligation by an insurance company (*Roberts v. Aetna Life Ins. Co.*, 101 Ill. App. 313). The making of a policy of insurance and

presentation thereof are simply evidence of a willingness to enter into a contract of insurance on payment of the premium, not of a contract of insurance (*Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 [Gil. 127], 10 Am. Rep. 154). Hence it may be stated as a general proposition that the payment of an advance premium is necessary to the consummation of an insurance contract, unless some other provision is made therefor.

Reference may be made to *Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 54 Atl. 952; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 6 Bush (Ky.) 450.

But, as indicated, the actual payment of the first premium in cash, or its equivalent, is not necessary to bind the company, in the absence of a provision to that effect in the policy or application.

Prudential Ins. Co. v. Sullivan, 59 N. E. 873, 27 Ind. App. 30; *Worth v. German Ins. Co.*, 64 Mo. App. 583, 2 Mo. App. Rep'r, 1048; *Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222.

This rule is also applicable to life insurance contracts. Thus it was held, in *Jones v. New York Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92, that an insurance policy may be delivered on the insured's promise to pay the premium in the future; payment in cash, or its equivalent, not being necessary to complete delivery, in the absence of a provision to that effect in the policy. So, if a life insurance company agrees to take the first year's premium in trade, as, for instance, in advertising, by the very nature of the contract the payment of the premium and its indorsement on the policy are not required to complete the insurance (*Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96). However, in the absence of any other arrangement in regard to the first premium, a payment thereof is necessary to bind the company (*Schaffer v. Mutual Fire Ins. Co.*, 89 Pa. 296). So, if an insured elects to avail himself of an option to renew a policy, and so notifies the company, such notification will not bind the company, unless accompanied by payment or tender of payment of the premium (*Boston & A. R. Co. v. Mercantile Trust & Deposit Co. of Baltimore*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97). But no payment of the premium on renewal is necessary until called for, if the insurance company has agreed that a policy for a year shall be a permanent risk and that the company's officers shall call for premiums as they become due (*Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 18 Barb. [N. Y.] 69), unless such agreement has been

abrogated, as, for instance, by a change in the rate of premium (*Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153).

Prepayment of the premium is not essential to the validity of a contract to issue a policy, in the absence of a demand for payment as a condition precedent.

Continental Ins. Co. v. Roller, 101 Ill. App. 77; *Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Firemen's Ins. Co. v. Kuessner*, 45 N. E. 540, 164 Ill. 275; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276.

Likewise, prepayment of a premium for a renewal term is not essential to the validity of a preliminary agreement to renew in the future (*McCabe v. Ætna Ins. Co.*, 81 N. W. 426, 9 N. D. 19, 47 L. R. A. 641). But in *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631, it is said that, though it is customary for fire insurance companies to make oral contracts of insurance, without the prepayment of premiums, in consideration of insured's promise to pay such premiums, the almost invariable custom of life insurance companies is to make no contract and incur no liability until a premium is paid. In view of this custom of life insurance companies, the court held that, where no policy has been issued and no premium paid, there is a strong presumption that there was no contract, and no intention to contract, otherwise than by a policy made and delivered upon the simultaneous payment of a premium. And in *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, it was intimated that, where there was no agreement that a policy should take effect before payment of premium, it did not become operative until the premium was paid.

In order that a contract of insurance shall be binding on the insurer without delivery of the policy, a promise to pay the premium is necessary (*Milwaukee Mechanics' Ins. Co. v. Graham*, 54 N. E. 914, 181 Ill. 158). However, it was held, in *Squier v. Hanover Fire Ins. Co.*, 46 N. Y. Supp. 30, 18 App. Div. 575, that a verbal agreement by an authorized insurance agent is binding on the insurer, though the premium has not been paid when the loss occurs, if the insured, in reliance on such agreement, took no further action in regard to the insurance, and the agent requested insured to "try and not let the premium run longer than 30 days." Still, if there is a special understanding between an insurance office and

the agent of the insured that no insurance shall be considered as effected in behalf of himself or others until the premium is paid, and a rule of the company is kept posted up in the office not to consider an insurance effected until the premium is paid, no agreement for insurance, when this condition is not complied with, can be perfected in equity (*Flint v. Ohio Ins. Co.*, 8 Ohio, 501). If a promise to pay the premium accompanies a request for a renewal policy, and such policy recites that it is issued in consideration of the receipt of the premium, and provides for a return of a pro rata part in case of cancellation, the premium is payable on delivery of the policy (*Babcock v. Baker*, 56 N. Y. Supp. 239, 37 App. Div. 558). So, too, if renewal can only be made "provided the premium be paid," payment is a condition precedent to the renewal taking effect (*O'Reilly v. Corporation of London Assurance*, 101 N. Y. 575, 5 N. E. 568).

Though an insurer, in the absence of a provision to that effect in the contract, cannot demand the premiums before the policy issues, in an action for breach of an oral contract to insure, the plaintiff must allege and prove payment or tender of the premium before he can recover (*Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840); and in an action to recover damages for a breach of a promise to renew a policy, a declaration which fails to allege that insured left the premium with the insurer's agent, or that, at the expiration of the policy, it was paid or tendered, is demurrable (*Croghan v. New York Underwriters' Agency*, 53 Ga. 109).

If a policy is issued for tender to a property owner, in renewal of a policy, a tender of the premium is necessary on demand of the policy (*New York Lumber & Woodworking Co. v. People's Fire Ins. Co.*, 96 Mich. 20, 55 N. W. 434). So, if an application is made for insurance in a mutual company, with the understanding that the applicant may accept or reject the policy, and he is to pay the fees if he accepts, a delivery of the policy and payment of the fees is necessary to the consummation of the contract (*Blue Grass Ins. Co. v. Cobb* [Ky.] 72 S. W. 1099). Likewise, if an application for a life policy is made under an agreement that, if the policy is satisfactory on receipt, the premium is to be paid (*Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 97), or that the contract, if the application is accepted, shall take effect from the delivery of the policy and payment of the premium (*McMaster v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119), the delivery of the policy and payment of the premium are essential to the consummation of the contract.

In *Collins v. Insurance Co.*, 7 Phila. (Pa.) 201, it was held that if a policy, duly executed, was withheld until payment of premium would be made, and such payment was not made when the applicant died, the contract was not complete. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524, involved an open policy. Insured knew it was the custom of insurers to fix the premium under such policies as each risk was declared. It was held that, on insured reporting a risk requiring an additional premium, such premium must be fixed, and paid or secured, before the policy attached.

(b) Same—Conditions requiring prepayment of premium.

In many instances provisions are inserted in an application or policy requiring prepayment of the first premium before the contract shall be binding. Such provisions are regarded as reasonable and enforceable.

Watrous v. Mississippi Valley Ins. Co., 35 Iowa, 582; *German Ins. Co. v. Shader*, 1 Neb. (Unof.) 704, 96 N. W. 604.

In *Mutual Reserve Fund Life Ass'n v. Simmons*, 107 Fed. 418, 46 C. C. A. 393, it was held that such a provision is valid and enforceable, at least to the extent of requiring that the insured shall pay or obligate himself to pay the first premium in full before the policy attaches. Where a provision of this tenor is contained in the application, and then carried into the policy, it must be presumed, in the absence of fraud, that the applicant has knowledge of the fact that the policy cannot take effect until the premium is paid (*Russell v. Prudential Ins. Co.*, 68 N. E. 252, 176 N. Y. 178, 98 Am. St. Rep. 656). Hence, if such a condition is contained in the application, the contract does not take effect until payment of the premium is made (*Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497), and the same is true if the condition is contained in the policy.

Reference may be made to *Diver v. London & Lancashire Fire Ins. Co.*, 9 N. Y. St. Rep. 482; *Hewitt v. American Union Life Ins. Co.*, 73 N. Y. Supp. 105, 66 App. Div. 80; s. c. 83 N. Y. Supp. 232, 85 App. Div. 279; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. 137; *German Ins. Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 549; *Kearney v. Aetna Life Ins. Co.*, 109 Ill. App. 609.

This rule applies to a renewal, if the original policy provides that a premium for renewal must be prepaid (*Taylor v. Phoenix Ins.*

Co., 47 Wis. 365, 2 N. W. 559, 3 N. W. 584); and it also applies to insurance by mutual companies, so that a policy executed and delivered by such a company is not valid until the cash premium has been actually paid at the office of the company, if the policy contains an express stipulation to that effect (*Mulrey v. Shawmut Mut. Fire Ins. Co.*, 4 Allen [Mass.] 116, 81 Am. Dec. 689).

But a condition of this import, usually contained in a policy of the kind to be delivered pursuant to a contract for a policy, forms no part of an oral contract of insurance in *præsenti*, entered into contemporaneously with the executory contract for a policy (*Kelly v. Commonwealth Ins. Co.*, 23 N. Y. Super. Ct. 82). So a provision in a policy that it shall not be binding unless the premium be paid does not render the policy invalid, where it is delivered before payment of such premium (*State Ins. Co. v. Hale*, 1 Neb. [Unof.] 191, 95 N. W. 473). In several cases it is intimated that, notwithstanding provisions requiring prepayment, an extension of time for the payment of the premium may be granted.

Such cases are *Hewitt v. American Union Life Ins. Co.*, 73 N. Y. Supp. 105, 86 App. Div. 80; *Id.*, 83 N. Y. Supp. 232, 85 App. Div. 279; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. 187.

The policy involved in *Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242, provided that it should not be binding on the company until countersigned by the agent and the advance premium was paid. The insured died before the policy was received by the agent, and before any premium had been paid. It was held that there could be no recovery on the policy. In *Bradley v. Potomac Fire Ins. Co.*, 32 Md. 108, 3 Am. Rep. 121, the policy contained a condition that the insurer should not be liable until the premium should be actually paid in full, and also a subsequent condition that the insured should be allowed a certain time to pay the premium, and that, if he did not pay within that time, the policy should be null and void. The court held that the latter condition merely made it optional with the insured to complete the contract or not, so that, until the premium was actually paid, there was no mutuality in the contract, and consequently no risk attached until the premium was actually paid. However, it was said, in *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. 285, 20 L. Ed. 398, that, fairly construed, a provision that, in case insured should not pay or cause to be paid the premium on or before a mentioned date, or fail to pay any note given in part payment, then his policy should cease

and be of no effect, was not an absolute condition that the policy should not attach, or be inoperative, unless the cash premium was paid by the insured.

(c) Same—Deposit of premium note required by mutual companies.

Mutual fire insurance companies generally have provisions in their charters or by-laws requiring an applicant to deposit a premium note and pay a part thereof before the policy shall take effect. Under such provisions, the deposit of the premium note and payment of the advance assessment are conditions precedent to the operation of the policy.

Wallingford v. Home Mut. Fire & Marine Ins. Co., 30 Mo. 46; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333. This rule seems to be supported, also, by *Buffum v. Fayette Mut. Fire Ins. Co.*, 3 Allen (Mass.) 360.

Under this rule, parties claiming as assignees of an insured who has not complied with the provision as to deposit of the premium note cannot recover for a loss, since assignees can have not greater rights than their assignor (*Bidwell v. St. Louis Floating Dock & Ins. Co.*, 40 Mo. 42). However, in *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333, it was held that, if the acts of the company's officers prevented the insured from depositing his note, the failure to make such deposit will not affect the insured's right to recover on his policy in case of loss; and in *Van Loan v. Farmers' Mut. Fire Ins. Ass'n*, 24 Hun (N. Y.) 132, it was held that if a contract of insurance was effected, but no policy was issued and no premium required at the time, the fact that a bond to pay all assessments, required by the company on delivery of a policy, was not executed until after loss, did not vitiate the insurance. So it was the opinion of the court, in *Farmers' Mut. Ins. Co. v. Mylin* (Pa.) 15 Atl. 710, that, though a charter of a company required every person who became a member, by effecting insurance therein, to pay a certain sum per \$1,000 before he received his policy, a payment of such sum was not a condition precedent to the obtaining of additional insurance by a person who already was a member and had a policy in the company.

(d) Same—Payment of dues and advance assessments in mutual benefit associations.

Mutual benefit insurance associations may stipulate that a certificate of insurance shall not become operative until all charges and

assessments are paid (*Modern Woodmen Acc. Ass'n v. Kline*, 50 Neb. 345, 69 N. W. 943), and if an application for a certificate in such an association declares on its face that payment of the first assessment and registry fee is a condition precedent to membership and to the issuing of a certificate, and the by-laws contain the same provision, the applicant does not become a member and the certificate is not in force until such payments are actually made.

National Aid Ass'n v. Bratcher, 65 Neb. 378, 91 N. W. 379; *Ormond v. Fidelity Life Ass'n*, 96 N. C. 158, 1 S. E. 796.

But if the constitution of a mutual benefit society, which requires persons, on becoming members, to pay the amount of an assessment, merely provides for a suspension on failure to pay assessments, and makes the local lodge liable for a defaulted assessment in case a member is not suspended, the payment of an advance assessment on an application to become a member is not an essential condition precedent to membership (*Baldwin v. Golden Star Fraternity*, 47 N. J. Law, 111). In *Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819, it was said that this advance assessment was in the nature of a membership fee, and not a payment in advance of assessments to be made in the future.

(c) Same—Payment before loss or during lifetime or good health of the insured.

Where the terms of a contract of insurance have been agreed upon, so that it commences to run before loss, a recovery may be had thereon, though the premium be not actually paid until after loss, if a credit therefor be given, either expressly or impliedly, and its actual payment is not by the contract made a condition precedent to the attaching of liability.

Reference may be made to *Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Keim v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Van Loan v. Farmers' Mut. Fire Ins. Ass'n*, 24 Hun (N. Y.) 132.

But, of course, there can be no recovery on a policy containing a provision that the insurer shall not be liable until the premium shall be paid or a valid receipt given therefor, duly impressed with

the seal of the company, if the premium is not paid until after loss (*Diver v. London & Lancashire Fire Ins. Co.*, 9 N. Y. St. Rep. 482).

If a policy of life insurance, which is duly executed and sent to an agent, is not delivered, but is withheld until payment of the premium, which is not made during insured's lifetime, the contract of insurance is not complete (*Collins v. Insurance Co.*, 7 Phila. [Pa.] 201). So, if a policy provides that it shall not be binding until countersigned by the designated agent and the advance premium has been paid, and the applicant dies before the policy is received by the agent and before the premium is paid, the insurer is not liable (*Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242). Likewise, if a policy provides that it shall not go into effect until the premium has been actually paid, the policy does not become operative where the premium is not paid before the applicant's death, unless payment is waived or credit given (*Hewitt v. American Union Life Ins. Co.*, 83 N. Y. Supp. 232, 85 App. Div. 279). But if credit for the premium is given when the policy is delivered, and payment is in fact made within the time named, the insured is not bound to disclose to the insurer the fact of a change for the worse in the condition of his health, which has taken place in the meantime (*De Camp v. New Jersey Mut. Life Ins. Co.*, 7 Fed. Cas. 313). Where there is a disagreement between the applicant and insurer in regard to the amount of the premium, a friend of the applicant cannot bind the company by paying the difference a few hours before the applicant's death and when he is in extremis without disclosing the applicant's condition to the agent (*Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610).

Where an application for a life insurance policy, or the policy itself, or both the application and the policy, contain a provision to the effect that the policy shall not become operative until the first premium thereon has been actually paid to the company or to an authorized agent during the good health of the applicant, actual payment of the first premium while insured is in good health is a condition precedent to the liability of the insurer, unless waived.

Reese v. Fidelity Mut. Life Ass'n, 111 Ga. 482, 36 S. E. 637; *Northwestern Mut. Life Ins. Co. v. Amos* (Mich.) 98 N. W. 1018; *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585, 87 N. W. 331; *McClave v. Mutual Reserve Fund Life Ass'n*, 55 N. J. Law, 187, 26 Atl. 78; *Ray v. Security Trust & Life Ins. Co.*, 126 N. C. 166, 35 S. E. 246; *Oliver v. Mutual Life Ins. Co. of New York*, 97 Va. 134, 33 S. E. 536.

Under this doctrine it is obvious that a policy requiring payment of first premium while insured is living and in "sound" health does not become binding by a payment of the premium, where the insured is suffering from an illness (*Langstaff v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 54, 54 Atl. 518). However, where a provision as to payment of first premium merely requires payment of such premium to be made during the lifetime of insured, a payment of the premium a few hours before the death of the insured, and when he is very ill, is a compliance with the condition, so as to render a policy already delivered effective (*Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592). So a tender of the premium during insured's lifetime is sufficient, though he is seriously ill at the time (*Going v. Mutual Ben. Life Ins. Co.*, 36 S. E. 556, 58 S. C. 201). But where payment is required to be made during the lifetime of insured, or while he is in good or sound health, the premium must, of course, in any event be paid before the insured's death.

Davis v. Massachusetts Mut. Life Ins. Co., 7 Fed. Cas. 141; *Giddings v. Northwestern Mut. Life Ins. Co.*, 102 U. S. 108, 26 L. Ed. 92; *Mutual Life Ins. Co. v. Lucas*, 25 Ky. Law Rep. 2052, 79 S. W. 279; *Ormond v. Fidelity Life Ass'n*, 96 N. C. 158, 1 S. E. 796; *Rossiter v. Aetna Life Ins. Co.*, 91 Wis. 121, 64 N. W. 876.

Where payment of the first premium is required to be made during the good health of insured, it sometimes becomes important to ascertain what is meant by the term "good health." In the leading case of *Barnes v. Fidelity Mut. Life Ass'n*, 191 Pa. 618, 43 Atl. 341, 45 L. R. A. 264, it is said that good health does not mean absolute perfection, but is comparative, and if insured enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he might with ordinary safety be insured and upon ordinary terms, the requirement of good health is satisfied. In that case it appeared that at the time of payment of the premium applicant was in bed with a cold, which developed into pneumonia, causing his death two days later. The court held that under these circumstances the question as to whether or not insured was in good health was for the determination of the jury. The policy involved in *Mutual Life Ins. Co. v. Sinclair* (Ky.) 71 S. W.

853, required the payment of first premium to be made while applicant was in good health. Before tender of premium was made, applicant was wounded by a pistol. Evidence was introduced to show that persons had lived many years after receiving wounds similar to those sustained by the applicant, but the court held this evidence insufficient to show that the applicant's life would not be shortened by reason of the wounds.

(f) What constitutes payment.

If an applicant mails a check for the first payment to an agent in accordance with the agent's instructions, the mailing of the letter, inclosing the check, constitutes a payment within the meaning of a by-law requiring payment before the contract shall become binding (*Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187). If the agent receives a check in payment and transmits it to the company, the time of mailing is the time of payment (*Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep 592). But the giving of a check will not constitute a payment of the premium, if there are no funds on deposit with which to meet the check (*Brady v. Northwestern Masonic Aid Ass'n*, 190 Pa. 595, 42 Atl. 962).

A premium may be paid by a third person for the insured (*Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56); but if a payment of an advance premium by a third person is made without insured's knowledge, though with his money, such payment is inoperative, and cannot be ratified by insured's administrator after his death (*Whiting v. Massachusetts Mut. Life Ins. Co.*, 129 Mass. 240, 37 Am. Rep. 317); and in *Hoyt v. Mutual Ben. Life Ins. Co.*, 98 Mass. 539, it was held that on a showing that an applicant had told an agent, who offered him a policy and requested payment of the premium, that if he would go to a third person the latter would pay, as an arrangement had been made with him to that effect, and that the agent agreed to go, but never went, and retained the policy in his own hands, it was erroneous to instruct the jury that they might find that these facts were equivalent to a delivery of the policy and payment of the premium.

If an authorized agent, on issuing a policy, agrees with the insured to deduct the premium out of money then in his possession belonging to the assured and apply it on the payment of a premium, such agreement is a receipt of the premium, and the com-

pany issuing the policy will be bound thereby (*Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97). Likewise, if there are mutual accounts between the agent of the applicant and the insurance agent, the amount of the premium may be charged or credited as the case may be, subject to the customary settlement, and the applicant's policy will not be affected by the nonpayment in fact; the same being paid to all intents, so far as the insurer is concerned (*Huggins Cracker & Candy Co. v. People's Ins. Co.*, 41 Mo. App. 530). So, if money is advanced by a subagent to a general agent, and the amount is charged to the company on premiums to be collected, this operates as payment of the premium on a policy applied for by the subagent (*Thompson v. American Tontine Life & Savings Ins. Co.*, 46 N. Y. 674). Likewise, if an agent who is owing an applicant money for rent tells such applicant, on being tendered the premium, that he has money belonging to him and will credit him for that amount, this is a valid payment of the premium (*Wooddy v. Old Dominion Ins. Co.*, 31 Grat. [Va.] 362, 31 Am. Rep. 732). And in *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244, it was said that evidence was admissible to show that an insurance agent had agreed with an applicant to take as an equivalent for the first premium his own board bill, due to the insured. But an insurance company may cancel a policy sent to an agent with only limited power, after notice has been given to the agent and the insured, notwithstanding such agent, without knowledge of the company, may have money in his hands belonging to the insured, out of which he has agreed to pay the premium (*Merchants' & Manufacturers' Mut. Ins. Co. v. Baker* [Neb.] 94 N. W. 627).

However, an agreement by an agent with a party holding his note that, as payment of a premium on a policy to be issued to a third person, an indorsement of the amount on his note shall be accepted, does not constitute payment, if such indorsement is not made during the lifetime of insured (*Hawley v. Michigan Mut. Life Ins. Co.*, 92 Iowa, 593, 61 N. W. 201). And an insured is not justified in paying a private debt of an agent in lieu of the premium, upon the agent's assurance that he has advanced the premium to the company (*Clingerman v. Pheasant*, 18 Pa. Co. Ct. R. 203).

It may be stated as a general rule that an agreement between an insurance agent and an applicant, whereby the former, without authority from the company, accepts personal property, or is to ac-

cept such property, or services in satisfaction of the first premium on a life policy, does not bind the company.

Such is the doctrine asserted in *Hoffman v. John Hancock Mut. Life Ins. Co.*, 92 U. S. 161, 23 L. Ed. 539; *Carter v. Cotton States Life Ins. Co.*, 56 Ga. 237; *Mutual Ben. Life Ins. Co. v. Nicoll*, 9 Ky. Law Rep. 719; *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244; *Tomasek v. Travelers' Ins. Co.*, 88 N. W. 1013, 113 Wis. 114, 57 L. R. A. 455, 90 Am. St. Rep. 846.

But an agent of a life insurance company, authorized to collect premiums, has the right to accept that portion which is equivalent to his commission in property, instead of cash (*John Hancock Mut. Life Ins. Co. v. Schlink*, 51 N. E. 795, 175 Ill. 284, affirming 74 Ill. App. 181). In *Walker v. Metropolitan Ins. Co.*, 56 Me. 371, an application for insurance was verbally accepted by the insurance company's agent, and corresponding entries were made upon the agent's blotter. The amount of the premium was not fixed, but its payment was provided for by means of money due the applicant from the company. It was not customary to pay premiums until the expiration of a month, before which time the property was destroyed. It was held that there was a complete contract of insurance. So, in *Bankers' & Merchants' Mut. Ben. Ass'n v. Stapp*, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772, it appeared that the company had forwarded the certificate to deceased, who was one of its agents; that the accounts between him and the company were confused; that on one occasion they had returned to him part of the remittance sent to them, on the ground that it was an overpayment; that they had published his name in the list of members, and had levied a mortuary assessment on him as if he were a member. This was held evidence warranting a finding that the fee had either been paid or waived. Where losses under a credit policy, which provides that, if it is renewed before expiration, then any losses occurring after its expiration on goods shipped between its commencement and expiration shall be provable under the renewal, as losses on goods shipped after the renewal, are not paid upon adjustment, but retained by the insurers under an agreement, made after the expiration of the policy, that upon cancellation thereof such losses shall answer as payment of a premium for a renewal policy, the retention of these losses under such an agreement constitute payment, "on or before the date of the expiration" of the original policy, of the premium of the renewal policy, though the

adjustment of the losses and cancellation of the policy and execution of the renewal occur after the expiration of the original policy (*Lauer v. Gray*, 55 N. J. Eq. 544, 37 Atl. 53). Whether proper payment of a small advance deposit required by a mutual company was shown by insured's testimony that he paid such sum to the company's secretary by paying for the drinks was, in *Farmers' Mut. Ins. Co. v. Mylin*, Pa., 15 Atl. 710, held to be a question for the jury. In *Merchants' & Manufacturers' Mut. Ins. Co. v. Baker* (Neb.) 94 N. W. 627, a member of a firm, who was also an insurance agent, was requested to procure insurance for another member of the firm. He took out an amount in cash from the money box which was in excess of the amount of the premium. This, it was insisted, constituted a payment of the premium. But the court held that, as it did not appear that the amount of the premium was ever segregated from the remainder of the funds in the hand of the agent, there was no payment of the premium. In *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591, plaintiff's husband testified to having given their son a sum of money to pay the premium, and afterwards, the premium having been raised, a further sum, and that no other premiums were owing by the family at the time, and the son testified to having paid such sums to defendant's agent, which the agent, however, denied, though the policy sent to plaintiff had indorsed thereon an acknowledgment of the latter sum. The court held this sufficient to establish payment. So, in *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277, it was held that a receipt signed for an agent by another agent, coupled with the fact that on the death of the insured liability was denied solely on the ground of suicide, was prima facie evidence of payment of the premium.

It may also be stated as a general rule that the delivery of a life or accident policy, and its possession by the insured in his lifetime and by his beneficiary after his death, constitute prima facie evidence of payment of the cash consideration recited in the policy, subject to proof to the contrary.

Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850; *Union Life Ins. Co. v. Parker*, 66 Neb. 395, 92 N. W. 604, 62 L. R. A. 390; *Page v. Life Ins. Co. of Virginia*, 131 N. C. 115, 42 S. E. 543; *Cole v. Preferred Acc. Ins. Co.*, 81 N. Y. Supp. 901, 40 Misc. Rep. 260; *Grier v. Mutual Life Ins. Co. of New York*, 132 N. C. 542, 44 S. E. 28; *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244; *Thum v. Wolstenholme*, 61 Pac. 537, 21 Utah, 446; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432.

This rule will particularly apply, if the policy recites that it is issued in consideration of the payment of the premium in advance or on delivery of the policy.

Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850; *Taylor v. Supreme Lodge of Columbian League* (Mich.) 97 N. W. 680; *Tomsecek v. Travelers' Ins. Co.*, 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. Rep. 846.

In the *Tomsecek* Case the court appears to take the position that the rule will not apply unless the policy contains such a recital; and if the policy contains a clause that it is "in further consideration" of a specified sum, "to be paid in advance," the possession thereof is not evidence of payment of the first premium (*Quinby v. New York Life Ins. Co.*, 71 Hun, 104, 24 N. Y. Supp. 593).

The presumption of payment arising from delivery of the policy was not considered as rebutted by the evidence in *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850, and *Taylor v. Supreme Lodge of Columbian League* (Mich.) 97 N. W. 680. The mere fact that an insured's agent has money to pay a premium in his hands does not show payment (*Croghan v. New York Underwriters' Agency*, 53 Ga. 109).

(g) Effect of part payment—Time of payment.

Where a fire insurance company has accepted without objection a part of the premium due on a policy, which is sufficient to carry the risk at customary short rates past the date on which a loss occurs, it cannot afterwards avoid liability for the loss by setting up that the whole premium was not paid, notwithstanding a condition of the policy that it shall not be in force until the premium is fully paid (*Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407). So, if an insured has an account with an insurer, and sends his check for an amount in excess of his old debt, coupled with a promise to send more, the insurer will be liable on a new policy, if the check is accepted to apply on the premium for such policy (*Mallette v. British American Assur. Co.*, 91 Md. 471, 46 Atl. 1005). However, if an applicant is, on paying part of the premium, informed that the remainder must be paid before the policy will be issued, and promises to do so, and fails, and no policy is in fact issued, there is no contract on which a recovery may be had (*Abel v. Phoenix Ins. Co.*, 62 N. Y. Supp. 218, 47 App. Div. 81).

With reference to life insurance policies, which require prepayment of premium as a condition precedent, it may be said that pay-

ment of a part of the premium is insufficient (*Barnes v. Peidmont & Arlington Life Ins. Co.*, 74 N. C. 22), unless the company assents to and receives such part payment (*Brown v. Massachusetts Mut. Life Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205). Still, if an application on which a part payment has been made is accepted, and the risk is taken, so that nothing remains but the delivery of the policy and payment of the remainder of the premium, which is not required to be paid till delivery, there is a valid contract for a policy (*Cooper v. Pacific Mutual Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705). In *Mutual Reserve Fund Life Ass'n v. Simmons*, 107 Fed. 418, 46 C. C. A. 393, the position is taken that an agent cannot accept less than the full amount of the premium on a life policy as payment, though he is entitled to retain his commission out of the premium and receive from the applicant more than the amount he is actually to forward to the company. But in *Triple Link Mut. Indemnity Ass'n v. Williams*, 26 South. 19, 121 Ala. 138, 77 Am. St. Rep. 34, it is held that an agent of an insurance company may bind the company by accepting an amount less than the first premium in payment thereof, even though insured knows that such amount is less than the customary premium, and the policy provides that it shall not be operative until the first premium is paid.

If no time is fixed by an insurance company within which a proposition to insure must be accepted and the premium paid, the law fixes a reasonable time for tender of premium (*Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. [N. Y.] 527); and, if a policy is held for the benefit of an insured until he shall have an opportunity to pay the premium and receive the policy, he must pay the money and accept the policy within a reasonable time (*Baxter v. Massasoit Ins. Co.*, 13 Allen [Mass.] 320). Three days was not regarded as an unreasonable time in *Carson v. German Ins. Co.*, 62 Iowa, 433, 17 N. W. 650. Where, under a verbal agreement to renew the risk, payment of the premium is to be made on the 1st day of the succeeding month, and such day falls on a Sunday, an offer to pay on Monday is sufficient, though a loss occurs on Sunday (*Taylor v. Germania Ins. Co.*, 23 Fed. Cas. 772).

(h) Payment to agent or broker.

The payment of the first premium to an authorized agent of an insurer entrusted with the delivery of a policy is sufficient to bind the latter. So, also, it is sufficient if payment is made to a broker

through whom the insurance is procured and to whom the policy is delivered by the insurer for further delivery to the insured.

Payment to an agent was regarded as sufficient in *Pulaski Mut. Fire Ins. Co. v. Dawson*, 87 Ill. App. 514; *Gosch v. State Mut. Fire Ins. Ass'n*, 44 Ill. App. 263; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527. In *Pennsylvania Ins. Co. v. Carter* (Pa.) 11 Atl. 102, emphasis was placed on the fact that the policy did not require actual prepayment, and that it was customary to treat the agent as debtor for premiums on policies delivered to him. Payment to a broker was held sufficient in *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Estes v. Home Manufacturers' & Traders' Mut. Ins. Co.*, 67 N. H. 462, 33 Atl. 515; *Same v. American Manufacturers' Mut. Ins. Co.*, Id.; *Same v. Aetna Mut. Fire Ins. Co.*, Id.; *Central Ohio Ins. Co. v. Lake Erie Provision Company*, 13 Ohio Cir. Ct. R. 661; *Universal Fire Ins. Co. v. Block*, 109 Pa. 535, 1 Atl. 523; *South Bend Toy Manufacturing Co. v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 17, 48 N. W. 310. In the following cases the policy delivered to the broker acknowledged payment of the premium: *Mayo v. Pew*, 101 Mass. 555; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8. A company giving a broker printed instructions to secure payment of premium when application is made is responsible for such premium paid the broker on a risk they refuse to take, though insured did not know of such instructions.—*Gentry v. Connecticut Mut. Life Ins. Co.*, 15 Mo. App. 215.

If payment of the first premium is made to an agent of an insurance company, the fact that the premium is not forwarded by the agent until after loss will not release the company.

Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Riley v. Commonwealth Mut. Fire Ins. Co.*, 110 Pa. 144, 1 Atl. 528.

Likewise an insurance company will be bound if the first premium is paid to its agent, though he never remits it to the company, but, instead, converts the money to his own use.

Oahill v. Andes Ins. Co., 4 Fed. Cas. 1001; *De Camp v. New Jersey Mut. Life Ins. Co.*, 7 Fed. Cas. 313; *Ide v. Phoenix Ins. Co.*, 12 Fed. Cas. 1168; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Bini v. Smith*, 55 N. Y. Supp. 842, 36 App. Div. 463.

Payment in good faith to a person who represents himself to an insured as an agent of the insurer, and who delivers the policy, will bind the insurer, though such person is only a broker (*Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545). So, also, payment to a

person soliciting insurance as an agent, but in fact procuring the policy from an insurance agent, is sufficient to bind the company, if the policy acknowledges payment of the premium and the solicitor promises the insurer's agent to pay such premium (*Chenoweth v. Phoenix Ins. Co.*, 12 Ky. Law Rep. 232). Likewise, payment to a surveyor, authorized to receive premiums, is sufficient, if the public has not been notified that such surveyor has no authority to bind the company (*Perkins v. Washington Ins. Co.*, 4 Cow. [N. Y.] 645). Similarly, payment to an agent of a broker, authorized to deliver a policy and collect the premium, will bind the insurer (*Arthurholt v. Susquehanna Mut. Fire Ins. Co.*, 159 Pa. 1, 28 Atl. 197, 39 Am. St. Rep. 659). But the payment of the advance fees in a mutual life insurance company to a mere solicitor will not bind the company, where the application provides that the company shall not be liable until it and the membership fee are received by the company's secretary at the home office (*Newcomb v. Provident Fund Soc.*, 5 Colo. App. 140, 38 Pac. 61). So payment of a premium to one who has made out an application for insurance in a company, but who is known by the insured not to have any power to bind the company, does not render the company liable for a loss of the property covered by the application, where it has previously rejected the risk, and the premium has never been remitted to it by the person writing the application (*More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, reversing 55 Hun, 540, 10 N. Y. Supp. 44).

The issuance of a life policy on an application reciting payment of the premium to an agent is sufficient proof of the agent's authority to receive the premium (*Porter v. Mutual Life Ins. Co.*, 70 Vt. 504, 41 Atl. 970). So giving of authority to an agent to receive premiums "on risks accepted" authorizes him to receive them on deposit, to become the property of the company eo instante that it accepts (*Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268).

If the policy provides that any broker or other person than the insured, who procures a policy, shall be deemed the agent of the insured, and not of the company, payment of the first premium to brokers who have procured a policy, and who are not in fact agents of the company, though they have previously placed a few risks with it, does not bind the company (*Peoria Sugar-Refinery v. Susquehanna Mut. Fire Ins. Co.* [C. C.] 20 Fed. 480); and especially is this true if the policy involved is the only one procured by the brokers from the company (*Wilber v. Williamsburgh City Fire*

Ins. Co., 122 N. Y. 439, 25 N. E. 926, reversing 48 Hun, 618, 1 N. Y. Supp. 312). So it was held, in *Mulrey v. Shawmut Mut. Fire Ins. Co.*, 4 Allen (Mass.) 116, 81 Am. Dec. 689, that a condition requiring prepayment of the first premium at the office of an insurance company is not complied with or waived by payment of the premium to an insurance agent through whom the application was made and the policy delivered, if the policy contains an express stipulation that every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant, and not of the company, though the company was in the habit of settling a monthly account with him, and he, after the loss, tendered the premium to it. But, in *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850, it was said that a by-law of a mutual life insurance company, making an agent effecting insurance insured's agent in receiving premiums, does not make him the insured's agent in receiving the first premium, where the contract between the agent and the company makes him its agent in collecting such premium by authorizing him to retain it as his fee. In *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814, it was held that an insurance broker, placing a risk refused by his companies with a company which had offered him a commission for risks refused by his regular companies, acted as agent for the insured in collecting the first premium.

Where the question at issue in an action on a policy is whether certain insurance brokers were authorized to receive payment of the first premium for the insurance company, the correspondence between such brokers and the company is admissible in evidence for the purpose of showing their previous relations and methods of doing business with each other (*Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99, 29 N. E. 477). So evidence that an insurance company has for years sent a broker policies on his applications, the premiums for which he collected and remitted, less his commissions, is proper to go to the jury on the question of whether or not the broker was in fact appointed to deliver the policy in suit and collect the first premium thereon (*Arthurholt v. Susquehanna Mut. Fire Ins. Co.*, 159 Pa. 1, 28 Atl. 197, 39 Am. St. Rep. 659). In *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373, it appeared that the insurer sent a renewal receipt to the broker who procured the insurance in the first instance and collected the premiums thereon, but whose employment by the insured extended only to the procurement of the policy; that such broker collected

the renewal premium, after delivering the receipt; and that the insurer subsequently wrote to the broker reminding him that he had not remitted the premium. The court held that it was properly left to the jury to say whether the broker was authorized to deliver the receipt and collect the premium. So, in *Wytheville Ins. & Banking Co. v. Teiger*, 90 Va. 277, 18 S. E. 195, where the payment of the premium to a broker was at issue, it appeared that insured had paid the amount of the premium to his agent, who claimed that it was included in the gross remittance to the broker "on account of miscellaneous companies." But this the company denied. The court, however, held that, if the insured's premium was included in the remittance by his agent to the broker, the jury was authorized to find that it had been paid to the broker.

(4) Giving credit for premium.

The actual payment of the first premium at the time of making the contract of insurance is not necessary. The company may extend a credit for a premium, and, if it does so, the contract will be binding without actual payment of the premium.

Baldwin v. Chouteau Ins. Co., 56 Mo. 151, 17 Am. Rep. 671; *First Baptist Church Trustees v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153, affirming 23 How. Prac. 448; *Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222; *Lum v. United States Fire Ins. Co.*, 104 Mich. 397, 62 N. W. 562. This rule also applies to life and accident insurance. *De Camp v. New Jersey Mut. Life Ins. Co.*, 7 Fed. Cas. 313; *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

The rule was applied to contracts to insure or renew in *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423; *King v. Cox*, 37 S. W. 877, 63 Ark. 204; *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902. So a contract to "hold" temporarily certain expired policies is valid, without prepayment of premium, if the insurer's agent gives credit (*Baker v. Westchester Fire Ins. Co.*, 162 Mass. 358, 38 N. E. 1124).

Credit for the first premium may be given by a general agent, and also by an agent authorized to negotiate and approve risks and to collect premiums.

Reference may be made to *O'Brien v. Union Mut. Life Ins. Co.* (C. C.) 22 Fed. 586; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Church v. La Fayette Fire Ins. Co.*, 66 N.

Y. 222; *Taylor v. Germania Ins. Co.*, 23 Fed. Cas. 772; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

An agent who has power to countersign and deliver policies, and is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, although he is expressly authorized to give such credit only for a shorter time (*Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233). So one who procures an application for insurance, which is approved by the company, and to whom the policy is delivered, with instructions to deliver it to the insured only on payment of the premium, thereby becomes the company's agent to receive the premium, and may grant a credit for its payment (*De Camp v. New Jersey Mut. Life Ins. Co.*, 7 Fed. Cas. 313). But a subagent, employed by the agent of an insurance company to solicit applications, collect premiums, and deliver policies, has not, by virtue of such employment, any general authority to give credit or receive anything but cash in payment (*Continental Life Ins. Co. v. Willets*, 24 Mich. 268); and a broker to whom a policy is transmitted for delivery to an applicant on payment of the premium does not have authority to extend credit therefor (*Charter Oak Life Ins. Co. v. Smith*, 6 Ohio Dec. 625), even if the receipt for the payment is given to the broker for delivery to the applicant on payment of the premium (*Marland v. Royal Ins. Co.*, 71 Pa. 393). However, in *Healy v. Insurance Co. of State of Pennsylvania*, 63 N. Y. Supp. 1055, 50 App. Div. 327, it was said that if an insurance company delivered a policy to a broker employed to obtain insurance on certain property, without the payment of the premium, and he delivered it to insured, the company cannot resist payment of loss because premium was not paid; and in *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326, the position was taken that if an insurance agent, who delivers a policy before the premium is paid, accounts to the company therefor, it is too late for the company to object to the credit, though the agent is without authority to give credit. An agent may extend credit for that portion of the premium which he is to retain as his commission, even though the policy requires prepayment of the premium at the home office of the insurer (*Terry v. Provident Fund Soc. of New York*, 13 Ind. App. 1, 41 N. E. 19, 55 Am. St. Rep. 217), and provides that no agent shall have authority to alter the contract or extend credit (*Pythian Life Ass'n*

v. Preston, 47 Neb. 374, 66 N. W. 445). Likewise, if an agent gives credit to the insured for the premium, the latter is not bound by a provision in the policy, of which insured has no knowledge until after loss, that the company shall not be liable until the premium is paid (*Home Ins. Co. v. Field*, 53 Ill. App. 119); but, in *Ormond v. Fidelity Life Ass'n*, 96 N. C. 158, 1 S. E. 796, the court took the position that where an application makes the payment of advance dues a condition precedent, so that this is an essential part of the contract, a general agent of the insurer cannot dispense with such prepayment.

If a policy is issued without payment of premium, the inference is that the insurer intends to give credit (*Latoix v. Germania Ins. Co.*, 27 La. Ann. 113). So, if a policy is delivered without the payment of the premium, the insurer must be held to have extended credit for such payment.

Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190; *Kollitz v. Equitable Mut. Fire Ins. Co.* (Minn.) 99 N. W. 892. And this applies also to indemnity insurance. *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

The rule that delivery of a policy without requiring payment of the premium raises a presumption that a credit is intended applies to life insurance, especially if the insurer is a stock company.

Brooklyn Life Ins. Co. v. Miller, 12 Wall. 285, 20 L. Ed. 398; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 156.

Likewise, if an insurance policy is sent by mail to the insured, with the statement that there is a small balance due on the premium, but without request for remittance, it is evident that the transaction is not intended to be a cash one (*Trundle v. Providence-Washington Ins. Co.*, 54 Mo. App. 188). And, even if a policy provides that no insurance shall be considered as binding until the actual payment of the premium, delivery of the policy without condition raises a presumption that a short credit is intended (*Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787). So evidence of a custom on the part of an agent to extend credit for premiums is admissible in an action on a renewal agreement made by the agent (*McCabe v. Aetna Ins. Co.*, 81 N. W. 426, 9 N. D. 19, 47 L. R. A. 641).

In *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, an agent had an arrangement with the

insured by which his insurance was to be paid up to a specified amount by renewals or new policies. It was the custom of the agent to charge premiums as policies were issued or renewed, and have periodical settlements with the insured when the premiums would be paid. The court held that under these facts a credit for a premium charged to the next period of settlement might be implied. So it was held, in *Porter v. Mutual Life Ins. Co. of New York*, 70 Vt. 504, 41 Atl. 970, that a life insurance company which received in cash at the end of each month remittances for all premiums received by its agent, and issued a policy on an application reciting payment of the premium to the agent, cannot complain that payment was not in fact made by insured, because, if the agent had not remitted the premium, the remittance would not correspond with the premiums due, and it would thus appear that credit was given, by which the insurer was bound. But an oral promise of the treasurer of an insurance company to an applicant for insurance that, if anything happens, he will see that the premium is paid, or that he will take it upon himself to keep the policy good, will not bind the company, where the policy is not delivered and requires prepayment of the premium (*Buffum v. Fayette Mut. Fire Ins. Co.*, 3 Allen [Mass.] 360).

In *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940, the court takes the position that, if credit is extended to an insured for the payment of the first premium, this premium becomes a debt to be collected in the usual manner, and the insurer cannot forfeit the policy for nonpayment of the premium, in the absence of a stipulation to that effect in the policy; but in *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113, the court holds that the insurance company may claim a dissolution of the contract by putting insured in default, though the company does not have the option to cancel the policy. Even if the policy provides that it may be canceled when a premium for which a credit has been given is not paid when due, the company cannot cancel it without demanding payment, where credit has been given for an indefinite time (*Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. 188). But, of course, a contrary rule prevails if the time for which credit is given is certain. In such a case, demand of performance by the company on the insured is not necessary before canceling the policy in case of nonpayment (*Redfield v. Paterson Fire Ins. Co.*, 6 Abb. N. C. [N. Y.] 456). Still, mere nonpayment of the premium on demand does not destroy the policy, where the company fails to

give notice of its election to rescind the contract (*Washoe Tool Mfg. Co. v. Hibernia Fire Ins. Co.*, 7 Hun [N. Y.] 74).

A tender of the full amount of the premium within the term of the credit allowed by the authorized agent is a sufficient compliance with the condition of payment to sustain an action on the policy (*Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233). But no tender is necessary where the agent had no authority to deliver the policy on the credit of the company, but only by assuming the risk, and thereafter looking to the policy holder for reimbursement (*Smith v. Provident Sav. Life Assur. Soc. of New York*, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163).

(j) Payment by agent or broker.

If an insurance agent, who grants an insured credit or takes his note for the first premium, advances the amount thereof to the company, there is a sufficient compliance with the condition requiring payment to be made before the company shall be liable.

Reference may be made to *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779; *Sun Mut. Ins. Co. v. Same*, Id.; *Herring v. American Ins. Co.*, 99 N. W. 130, 123 Iowa, 533; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Krause v. Equitable Life Assur. Soc.*, 99 Mich. 461, 58 N. W. 496; *Continental Life Ins. Co. v. Ashcraft (Pa.)* 3 Atl. 774; *Pittsburgh Boat Yard Co. v. Western Assur. Co.*, 118 Pa. 415, 11 Atl. 801; *United States Life Ins. Co. v. Ross*, 102 Fed. 722, 42 C. C. A. 601.

So, if an insurance company charges the premium to the agent or broker through whom the policy is obtained, such transaction is equivalent to payment so far as the company is concerned.

Bang v. Farmville Ins. & Banking Co., 2 Fed. Cas. 535; *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. 285, 20 L. Ed. 398; *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 38 Atl. 367; *Continental Life Ins. Co. v. Ashcraft (Pa.)* 3 Atl. 774; *Wytheville Insurance & Banking Co. v. Telger*, 90 Va. 277, 18 S. E. 195. In *Planters' Ins. Co. v. Ray*, 52 Miss. 325, it seems that stating to an agent that he would be held responsible for the premium was considered sufficient. This principle was applied to renewal receipts in *Willey v. Fidelity & Casualty Co. (C. C.)* 77 Fed. 961, affirmed in 80 Fed. 497, 25 C. C. A. 593.

In some cases it is said that if an agent charges himself with the amount of the first premium on his books, or in his account with

the insurance company, there is a sufficient payment of the premium.

Jones v. Aetna Ins. Co., 13 Fed. Cas. 938; *Lungstrass v. German Ins. Co.*, 57 Mo. 107. This was applied with reference to the renewal of a policy in *Mechanics' & Traders' Ins. Co. of New Orleans v. Mutual Real Estate & Building Ass'n*, 25 S. E. 457, 98 Ga. 262.

And if the amount so credited by the agent to the company is duly forwarded, the policy cannot be avoided, in the absence of fraud, notwithstanding a stipulation therein that "the company shall not be liable by virtue of the policy until the premium thereof be actually paid" (*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118). However, in *Dunham v. Morse*, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473, the court held that, where an insurance contract provides that it shall not take effect until the premium is "actually paid in cash," the action of the agents in charging themselves with the amount of premium and giving the insurance company credit on their books was not binding on the company, though they were authorized to keep money received for the company in their private bank account, as such authority was not an agreement that a credit on the agents' books would constitute a payment in cash to the company, where no money was received.

If an insurance agent, authorized by a property owner to obtain insurance for him, procures a policy from the company, which is accustomed to charge premiums to such agent, a premium is paid by such custom, notwithstanding the agent gives credit to the insured (*Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598, reversing 1 Hun, 527, 3 Thomp. & C. 777). So, in *White v. Connecticut Fire Ins. Co.*, 120 Mass. 330, it appeared that a policy was taken out through an insurance broker, who did not collect the premium therefor, but was usually charged with the amount of the premiums by the general agent of the company, who with the company's knowledge had been accustomed to allow such broker to settle monthly for all premiums due on policies, though the same had not been paid to him. It was held that the company accepted the individual credit of the broker as payment of the premium.

The lien of an insurance broker on a policy for the premium, although he has parted with the policy, revives, if it be again put in his hands to be put in suit, unless the manner of parting with it show his intention to abandon such lien (*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614). If an insurance agent is entitled to the advance premium as his commission, an order given on

the company by an applicant for the payment of such premium to the agent out of money due the applicant from the company cannot be countermanded without withdrawing the application (*Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819). So, if an insurance agent has countersigned a renewal receipt, and so made himself liable to the company for the premiums, and has at the insured's request paid the premium, the contract of renewal being binding as between him and the agent, in a suit by the latter for the money paid, the agent is not concluded by the recital of payment, though the receipt is full proof of the contract, and thus more than a mere receipt (*Baum v. Parkhurst*, 26 Ill. App. 128). In the *Baum Case* it was also held that, in the action by the agent to recover the premium advanced, evidence that the renewal receipt was taken and retained by insured on condition that it was to extend his policy, and to be paid for only in case another agent would not give him the same rates, was incompetent to change the contract of renewal, so as to relieve insured from liability to the agent; the renewal receipt never having been returned, nor offer made to return it.

(k) Payment by note.

In general, the acceptance by an insurer of an insured's note for the first premium will make the contract of insurance binding, even though the policy requires the premium to be paid before the contract shall become effective.

Lawrence v. Penn Mut. Life Ins. Co. (La.) 86 South. 898; *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *Little v. Eureka Ins. Co.*, 5 Ohio Dec. 285, 4 Am. Law Rec. 228; *Stringham v. Mutual Life Ins. Co. of New York*, 44 Or. 447, 75 Pac. 822; *East Texas Fire Ins. Co. v. Mims*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1323; *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537.

In *Union Cent. Life Ins. Co. v. Taggart*, 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474, it is said, with reference to the payment of the premium by a note, that, though the policy provides that it shall not be valid or binding until the first premium is paid to the company, the mode of payment of the premium is immaterial, if it be accepted by the company or its agent, and no special mode be provided for in the policy. So it was held, in *Stepp v. National Life & Maturity Ass'n*, 37 S. C. 417, 16 S. E. 134, that if an applicant gives his note for dues and assessments required to be paid

in advance, and receives the unconditional receipt of the company therefor, the giving of such note will be treated as payment. But, if a statute¹ requires advance charges in mutual insurance companies to be paid in "cash," payments must be made in current money, and a payment by a note is therefore insufficient (*State v. Moore*, 48 Neb. 870, 67 N. W. 876).

The agreement of an agent of an insurance company to take a note in payment of the premium is binding on the company (*Hughes v. Farmers' Ins. Co.*, 4 Ohio Dec. 412, 2 Cleve. Law Rep. 125); and an agent authorized to close the contract of insurance by delivering the policy and collecting premiums has, in general, implied authority to accept notes for the premium.

Mutual Life Ins. Co. v. Logan, 87 Fed. 637, 31 C. C. A. 172; *Tooker v. Security Trust Co.*, 165 N. Y. 608, 58 N. E. 1093.

But, in *Raub v. New York Life Ins. Co.*, 14 N. Y. St. Rep. 573, it is said that a district agent of an insurance company has no power to waive the requirement that the premium shall be paid in cash, and hence, if he takes a note for the premium, it is an act outside his authority and does not bind the company; and in *Baldwin v. Connecticut Mut. Life Ins. Co.*, 182 Mass. 389, 65 N. E. 837, it was held that there is no inference that a general agent of a life insurance company for one state, who has permission to solicit insurance in another state, has, in such latter state, any authority to make an oral agreement for life insurance to take effect immediately, before the medical examination, and without a payment of the premium otherwise than by a promissory note.

It is within the apparent scope of the authority of a local agent to accept a note for the payment of a premium in lieu of cash, and his action in so doing will bind the company, though the policy provides that agents are not authorized to modify any contract in behalf of the company, and cannot extend the time of payment of any premium or any note given therefor, or give credit, or waive forfeitures (*National Life Ins. Co. v. Tweddell*, 22 Ky. Law Rep. 881, 58 S. W. 699). But where an accident policy provided that it should not take effect unless the premium was actually paid prior to any accident on which claim was made, and that no waiver of the contract should be binding on the insurer unless indorsed on or attached to the policy, and signed by the president or secretary

¹ See *Laws Neb.* 1891, p. 274, c. 33, § 8.

of the company, and it was the custom of the insurer not to charge premiums on policies to its agents until they were actually received, a subagent had no authority to accept a note from deceased in lieu of cash for the first premium, and to thereby waive the provisions of the policy (*Pennsylvania Casualty Co. v. Bacon*, 67 C. C. A. 497, 133 Fed. 907). If a local agent of a life insurance company takes from an applicant a note for the first premium, contrary to the rules of the company, of which rules the applicant has no knowledge, and delivers the policy to the applicant, the company will be bound, though it has no knowledge that a note has been taken for the premium, and the policy requires payment in cash (*Michigan Mut. Life Ins. Co. v. Hall*, 60 Ill. App. 159). Likewise, the acceptance of a note for the premium on delivery of a policy by an agent authorized to receive the premium, and his procuring a discount of the same, though for his own account, will bind the insurer, in spite of a provision in the policy that the agent shall be deemed the agent of the insured, and that the insurer shall not be liable until it actually receives the premium (*Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584). If an insurance company which has taken a note in settlement with its agent, with knowledge that he has accepted it as part payment of a first premium, sends it to the insured's town for collection, and notifies insured that the second year's premium must be paid before a certain time to avoid a forfeiture, the insurer thereby ratifies the action of the agent in accepting the note in payment of the premium (*Imbrie v. Manhattan Life Ins. Co.*, 178 Pa. 6, 35 Atl. 556).

If a note given to an agent for the first premium is discounted by the agent and accounted for to the company, he reporting the premium as paid, and the policy recites payment of the first premium in cash, there is a cash payment of the premium, within a provision of the policy requiring that to be done before the policy takes effect (*Jacobs v. Omaha Life Ass'n*, 146 Mo. 523, 48 S. W. 462). So, if an agent takes a note himself and advances the amount thereof to the company there, this is a sufficient compliance with a condition requiring the premium to be actually paid before the company shall be liable (*Krause v. Equitable Life Assur. Soc.*, 99 Mich. 461, 58 N. W. 496). Likewise it was held, in *Baker v. Union Mut. Life Ins. Co.*, 37 How. Prac. (N. Y.) 126, 6 Abb. Prac. (N. S.) 144, that if a husband's notes are received and receipted as cash to his wife as the person to be benefited by a policy on her interest in his life, this is a receipt in payment as cash. But this decision was

reversed in 43 N. Y. 283; the court there holding that the wife could not recover if the notes were not paid at maturity.

If a note is not delivered, it will, of course, not operate as a payment of the premium (*Reese v. Fidelity Mut. Life Ass'n*, 111 Ga. 482, 36 S. E. 637). But, if the custom of the insurance company is to dispense with the signature of the insured to the premium note until after the policy is recorded, the omission to sign the note when the risk was taken does not render the policy void for want of consideration (*Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674). And in the case of a contract to insure it is not essential that the premium note be actually signed and delivered, as the promise of an applicant to give a note for a premium is a sufficient consideration for the promise to make the policy (*Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636).

If a policy is delivered and receipt for the premium is given an insured, and the insured's note accepted for a part of the amount, the insurer will be deemed to have accepted the notes in payment of the premium (*Union Cent. Life Ins. Co. v. Taggart*, 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474). And, if an authorized agent of an insurance company accepts a note for the first premium, the company will be bound, though the agent converts the note to his use (*Michigan Mut. Life Ins. Co. v. Hall*, 60 Ill. App. 159), or though he fails to pay the premium to the principal on discounting the note (*Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584).

(1) Same—Effect of failure to pay note at maturity.

Where notes of an insured are taken in lieu of cash payment of the first premium at the inception of an insurance contract, the insurance companies generally protect themselves against default of insured by inserting a provision in the policy to the effect that the company shall not be liable while any note for the premium remains past due, or that a default in the payment of any note at maturity shall operate as a revocation of the contract, or render the contract ipso facto void. Provisions of this nature are held to be valid and binding on the insured.

Watrous v. Mississippi Val. Ins. Co., 35 Iowa, 582; *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111, 20 Am. Rep. 35.

If a policy provides that the company shall not be liable for any loss happening during the time any order or note given for the pre-

mium remains due and unpaid, no recovery can be had for a loss occurring during default in payment of the order or note given for such premium.

Forest City Ins. Co. v. School Directors, 4 Ill. App. 145; *Robinson v. Continental Ins. Co.*, 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 96.

So, also, if a policy provides that, on nonpayment of a premium note when due, the claim on the policy shall be forfeited and the policy be void, a failure to pay the note at maturity defeats the policy (*Robert v. New England Mut. Life Ins. Co.*, 12 Ohio Dec. 668, 1 Disn. 355, affirmed in 2 Disn. 106). Likewise, if the policy and the note contain a stipulation that any default of the maker of the note to pay it at maturity shall operate as a revocation of the policy, a default in payment of the note revokes the contract *ipso facto* (*Fenn v. Union Cent. Life Ins. Co.*, 48 La. Ann. 541, 19 South. 623). Similarly, if a policy provides that a failure to pay when due moneys required to be paid shall render the policy *ipso facto* null and void, and a note given for the first annual dues contains a clause to the effect that if it is not paid at maturity the policy shall become *ipso facto* void, a failure to pay the note at maturity works an absolute forfeiture of the policy (*Laughlin v. Fidelity Mut. Life Ass'n*, 8 Tex. Civ. App. 448, 28 S. W. 411). Where the policy requires payment in advance of the first premium, and a note given in part payment thereof, provides that, if not paid at maturity, the policy shall be void, the policy ceases on failure to pay the note when due (*Manhattan Life Ins. Co. v. Myers*, 59 S. W. 30, 22 Ky. Law Rep. 875, 109 Ky. 372). Similarly, if the premium note stipulates that, if it is not paid at maturity, the policy shall be void, this operates as a modification of the policy, and a failure to pay the note when due releases the company from liability (*Kerns v. New Jersey Mut. Life Ins. Co.*, 86 Pa. 171). And, if a loss occurs while the policy is suspended for default in payment of the premium note, a tender of payment after the loss will not revive the company's liability, though the policy also provides that, on payment of the note after maturity, the policy shall be in force from such payment (*Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213). But if a policy does not provide for a failure on account of nonpayment of a note, and does not contain a condition that the policy shall not take effect until the premium is paid, a stipulation in the note that a nonpayment thereof at maturity shall work a forfeiture, "as provided in the policy" is nugatory, and liability on the

policy does not depend on the future payment of such note (*Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92). A note given to an agent in his representative capacity must be regarded as a note given to the company, within the meaning of a provision in the policy that it shall be void on failure to pay at maturity notes given to the company for premiums (*Union Cent. Life Ins. Co. v. Duvall*, 16 Ky. Law Rep. 398). Where the default of the insured to pay a note relieves the company from liability, this also operates to release the company from liability to the beneficiary, as well as to the insured.

Fenn v. Union Cent. Life Ins. Co., 48 La. Ann. 541, 19 South. 623;
Baker v. Union Life Ins. Co., 43 N. Y. 283.

If an insurance company discounts a note before maturity, this operates as a collection of the note (*Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537). And if an agent takes a note, advances the premium to the company, and negotiates it, the company cannot dispute its liability on the ground that the premium has not been actually paid (*Home Ins. Co. v. Curtis*, 32 Mich. 402). So, if an agent, who is entitled to the first premium as his commission, takes insured's note therefor and discounts it, the company cannot, by purchasing the note after insured's death, avoid liability on the policy, on the ground that he did not pay it before maturity (*Union Life Ins. Co. v. Parker*, 66 Neb. 395, 92 N. W. 604, 62 L. R. A. 390). Again, if a note for a premium is given by a third person, a failure to pay it when due will not release the insurer from liability, though the policy provides that a default in payment of any notes given the company for premiums shall avoid and nullify the policy (*Galvin v. Union Cent. Life Ins. Co.*, 115 Ky. 547, 74 S. W. 275).

Even if a receipt delivered to the insured (*Union Cent. Life Ins. Co. v. Duvall*, 16 Ky. Law Rep. 398), or his beneficiary (*Baker v. Union Life Ins. Co.*, 6 Abb. Prac. [N. S.] 144, reversed 43 N. Y. 283), acknowledges that the first premium has been paid in cash, the policy will nevertheless be avoided by a failure to pay at maturity a note given for the premium, if the policy contains a provision to that effect. If the policy stipulates that the company shall not be liable when any note for the premium remains past due, and a note is not made payable at any particular place, no demand by the company is necessary to make it due and payable, and mere nonpayment constitutes a default (*Robinson v. Continental Ins. Co.*, 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95). So, if a policy stipulates that all

notes shall be paid on or before the dates upon which they become due, and that upon violation of the condition the policy shall be null and void without any action on the part of the company or notice to the insured or beneficiary, a failure to pay the note when due renders the policy void, without any formal cancellation of the policy (*Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117). But if there is nothing in the terms of a policy to indicate that actual payment of the premium is made a condition precedent to liability, or default in payment a cause of forfeiture, the policy reserving to each party the right to cancel it, the insurer must cancel the policy on the insured's failure to pay the premium note at maturity in order to avoid liability (*Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543, 46 Am. Rep. 792). And this is true, even though the policy requires actual payment of the premium before liability attaches, if the note or policy does not provide for a forfeiture on default in the payment of the note at maturity (*East Texas Fire Ins. Co. v. Mims*, 1 White & W. Civ. Cas. Ct. App. [Tex.] § 1323).

(m) Effect of payment.

Payment to an insurance agent of a sum equal to the first premium, and the taking of a receipt therefor, which expressly declares that, if the application is accepted by the company, the insurance shall take effect from the date of the application or the receipt, but that, if the application is not accepted, the money will be returned and the receipt surrendered, does not amount to a contract of insurance until acceptance by the company, and, if the insured dies before acceptance, the company is not liable.

Steinle v. New York Life Ins. Co., 26 C. C. A. 491, 81 Fed. 489; *Union Cent. Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263. The same doctrine seems to be supported by *Ross v. New York Life Ins. Co.*, 124 N. C. 395, 32 S. E. 733, though only a note for the premium was given in that case.

And the same rule holds good where the receipt stipulates that the policy is to take effect and be in force from and after the date thereof, provided such application shall be accepted by the company, as a natural interpretation of this clause would seem to be that the word "provided" is used, as it generally is, in the sense of "if" (*Mohrstadt v. Mutual Life Ins. Co.*, 115 Fed. 81, 52 C. C. A. 675). So a receipt given by an agent for the first premium cannot be held to have effected a contract, contrary to the provisions of the application, taken contemporaneously, that no contract should be created

unless the application was accepted by the company (*Pace v. Provident Savings Life Assur. Soc.*, 113 Fed. 13, 51 C. C. A. 32).

The receipt and retention of a premium at the "home office" of an accident insurance company, after knowledge of facts and circumstances which called upon the company to elect whether it would recall the policy or assume the risk of an extrahazardous journey contemplated by the assured, is an election to ratify the contract and continue the policy (*Ætna Life Ins. Co. v. Frierson*, 114 Fed. 56, 51 C. C. A. 424). So, if an agent of a fire company is authorized to receive applications, examine premises, determine risks, agree on the amount to be insured and the amount of premium, receive the cash portion of the premium, and take the applicant's obligation for any future liability, and it is a rule of the company that policies are to be dated with the same date as the application, unless otherwise prohibited, and such agent examines a risk, fixes the premium, and receives the cash part thereof, together with the note and application, which he forwards to the company, but before the application is received at the office of the company the property is destroyed, the company is nevertheless bound from the time of receipt of the premium by their agent (*Palm v. Medina County Mut. Fire Ins. Co.*, 20 Ohio, 529). If, after a contract to insure the premium is accepted and the policy delivered, it relates back to the making of the contract, though a loss has occurred in the meantime.

Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 73; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276. And the insured need not voluntarily inform the insurer of the loss. *Worth v. German Ins. Co.*, 64 Mo. App. 583, 2 Mo. App. Rep'r, 1048; *Kelm v. Home Mut. Fire & Marine Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291.

(n) Effect of receipt for premium.

Though a receipt attached to a policy provides that it shall not be valid unless signed by a designated agent, yet, if the receipt is signed for such agent by another agent, it is prima facie evidence of payment of the first premium (*Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277); and, if a renewal is issued to an agent, it is presumptive evidence of payment, though not countersigned, as required, by such agent (*Norton v. Phoenix Mut. Life Ins. Co.*, 36 Conn. 503, 4 Am. Rep. 98). So an insured has the right to rely on the delivery of a policy and the execution of his note as a payment of the premium, without an examination of the receipt signed by the secretary, and hence is not bound by a provision therein

that it is not to be valid unless countersigned by the agent on receiving the premium (*Washington Life Ins. Co. v. Menefee's Ex'r*, 107 Ky. 244, 53 S. W. 260). But if the receipt attached to a policy sent to an insured is not countersigned by the insurance agent, and the receipt requires that it be countersigned by such agent at the time of payment of the premium, this is a declaration that the required payment has not been made, and must be made before the policy can become effectual (*Ormond v. Fidelity Life Ass'n*, 96 N. C. 158, 1 S. E. 796). Even if a receipt delivered to an insured or his beneficiary recites that the premium has been paid in cash, this will not prevent the insurer from claiming a release from liability both as to insured and the beneficiary by reason of insured's failure to pay a premium note given for the premium.

Union Cent. Life Ins. Co. v. Duvall, 16 Ky. Law Rep. 398; *Baker v. Union Life Ins. Co.*, 43 N. Y. 283.

So a receipt for a premium on an insurance policy will not estop the company, as against the assignee of the policy, from showing that the premium was not in fact paid before delivery of the policy, since such receipt is a voucher personal to the insured, between him and the company, and not a representation to his assignee (*Charter Oak Life Ins. Co. v. Smith*, 6 Ohio Dec. 625, 7 Am. Law Rec. 147).

In *Lord v. Bankers' Life Ins. Co.*, 45 N. Y. Supp. 935, 18 App. Div. 246, it was held a question for the jury whether the evidence in the case showed nonpayment of the premium, notwithstanding a receipt therefor was in the possession of the insured at his death.

(c) Pleading and practice.

A complaint alleging that defendant for a valuable consideration entered into a contract of insurance is sufficient on demurrer, without any allegation that any premium was ever paid or agreed to be paid (*Bank of River Falls v. German-American Ins. Co.*, 72 Wis. 535, 40 N. W. 506). So a complaint alleging that a policy was duly executed and delivered for value is sufficient on demurrer, as it must be presumed therefrom that the premium was paid in accordance with the conditions of the policy, or that a credit was given (*Stewart v. Union Mut. Life Ins. Co.*, 63 Hun, 328, 17 N. Y. Supp. 886).

Want or failure of consideration must be pleaded, in an action on a policy which imports a consideration, in order to admit evidence of the nonpayment of a premium for such policy (*Phoenix Ins. Co.*

v. Hague [Tex. Civ. App.] 34 S. W. 654). Under a statute providing that an insurance company which neglects to attach or indorse on its policies a copy of papers which, by the terms of the policy are made a part of the contract, or which may affect its validity, shall be precluded from setting up such representation in defense to an action on the policy,² an insurance company which fails to attach to or indorse on a policy a copy of the premium note given therefor will be precluded from setting up nonpayment of the note in defense, though the policy provides that it will be void if the premium is not paid when due (*Summers v. Des Moines Ins. Co.*, 116 Iowa, 593, 88 N. W. 326).

Though the answer, in an action on a life policy, which admits the execution thereof and the death of the insured before the falling due of the first renewal premium, is not put in evidence, such admission can be considered in determining whether the pleadings raise an issue; and, where the defendant makes such admission, he has the burden of proving that the first premium had not been paid (*Page v. Life Ins. Co. of Virginia*, 131 N. C. 115, 42 S. E. 543).

Where the payment of the first premium was an issue in an action between an insurance agent and the company, evidence that plaintiff had executed a bond to the company as agent was immaterial (*Moore v. Rockford Ins. Co.*, 90 Iowa, 636, 57 N. W. 597). So, if a policy provides for a forfeiture in case of nonpayment of the premium note, correspondence of one of defendant's officers after forfeiture, which does not tend to show waiver of such forfeiture clause, is immaterial (*Laughlin v. Fidelity Mut. Life Ass'n*, 8 Tex. Civ. App. 448, 28 S. W. 411). Where the undisputed evidence in an action against an insurance company shows that tender of premium has been made during the life of the insured, the introduction of the reply of attorneys, to whom defendant had written denying liability on the policy because of nonpayment of premium, that a tender of such premium had been made, and that in their opinion there was a valid claim, was not objectionable as the mere opinion of the attorneys, nor as a self-serving declaration (*Going v. Mutual Ben. Life Ins. Co.*, 36 S. E. 556, 58 S. C. 201). In *Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222, the evidence was considered sufficient to go to the jury on the question whether a credit was intended to be given insured. A receipt purporting to be for the premium for the renewal of an insurance policy is admissible to

² Code Iowa, § 1741.

establish the contract (*McCullough v. Hartford Fire Ins. Co.*, 2 Pa. Super. Ct. 233, 38 Wkly. Notes Cas. 567).

Where the question as to whether an insured paid the first premium while in good health is one of the issues presented, on which the evidence is conflicting, it is for the jury (*Union Life Ins. Co. v. Haman*, 74 N. W. 1090, 54 Neb. 599). Where a life policy, requiring the first premium to be paid before the company becomes liable thereon, is delivered before the payment of the first premium, an issue, in an action thereon, whether the delivery was absolute, or was with the understanding that the policy should not take effect till the premium was paid, is for the jury (*Snyder v. Nederland Life Ins. Co.*, 51 Atl. 744, 202 Pa. 161).

Where an insured's claim, in an action on the policy, was not based on the fact that a certain broker was the agent of the insurer, it was not error to refuse to instruct that the burden of proving such agency was on the insured (*Healy v. Insurance Co. of State of Pennsylvania*, 63 N. Y. Supp. 1055, 50 App. Div. 327).

Though payment of the membership fee was an ultimate fact which should have been found, in an action on an accident policy, where payment appeared from the record to have been treated as an admitted fact, it was unnecessary to make such finding (*North-western Benev. Soc. v. Dudley*, 61 N. E. 207, 27 Ind. App. 327). If it appears from the record on appeal that the premium was paid on issuance of the policy, in April, a defense that the premium was paid two days before death of insured, in August, when she was not in good health, is of no avail (*Speiser v. Phoenix Mut. Life Ins. Co.*, 119 Wis. 530, 97 N. W. 207).

9. ESTOPPEL AND WAIVER AS TO PAYMENT OF FIRST PREMIUM.

- (a) Estoppel and waiver in general.
- (b) Powers of officers and agents to waive payment.
- (c) Same—Conditions limiting the powers of agents.
- (d) Waiver by custom and course of dealing.
- (e) Waiver implied from acts, conduct, or statements of insurer.
- (f) Waiver by delivery of policy.
- (g) Effect of acknowledgment in policy of receipt of premium.
- (h) Pleading and practice.

(a) Estoppel and waiver in general.

It is well settled that a condition in a policy of insurance requiring prepayment or payment in cash of the premium as a condi-

tion precedent to the attaching of liability may be waived by an insurance company or its authorized agent.

This doctrine is asserted in *German Ins. Co. v. Orr*, 56 Ill. App. 637; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Commonwealth, etc., Ins. Co. v. Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Bowman v. Agricultural Ins. Co.*, 2 Thomp. & C. 261, affirmed 59 N. Y. 521; *Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222; *Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. 386, 6 Atl. 224; *Susquehanna Mut. Fire Ins. Co. v. Elkins*, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608; *Anders v. Life Ins. Clearing Co.*, 87 N. W. 331, 62 Neb. 585; *Stepp v. National Life & Maturity Ass'n*, 37 S. C. 417, 16 S. E. 134; *Snyder v. Nederland Life Ins. Co.*, 202 Pa. 161, 51 Atl. 744; *Gordon v. United States Casualty Co.* (Tenn. Ch. App.) 54 S. W. 98; *Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 78 S. W. 398.

This doctrine that prepayment of the premium may be waived applies also to renewals.

Hambleton v. Home Ins. Co., 11 Fed. Cas. 312; *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 18 Barb. (N. Y.) 69; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

The waiver of a condition requiring prepayment of the premium may be by parol (*Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566), and may, of course, be proved by parol (*Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30, 59 N. E. 873). In *Peoria Sugar Refinery v. Susquehanna Mut. Fire Ins. Co.* (C. C.) 20 Fed. 480, it was held that, where the policy required waivers to be in writing, a waiver of prepayment of the first premium could not be proved by parol testimony. But in *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233, it was held that a waiver was binding, though not indorsed on the policy, as required by its conditions; and a similar view was taken in *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784.

If an insured claims a waiver of the condition requiring prepayment, he must show either an express agreement to that effect (*Hambleton v. Home Ins. Co.*, 11 Fed. Cas. 312), or one arising by implication from acts and circumstances fairly showing that the insured did not intend to insist on the prepayment of the premium as a condition precedent (*Germania Fire Ins. Co. v. Muller*, 110 Ill. App. 190). But in *Equitable Life Assur. Soc. v. McElroy*, 83 Fed.

631, 28 C. C. A. 365, it was held that unless an insurance company does or omits some act whereby the insured has just ground to believe, and acts on the belief, that the company will make a contract without the payment of a premium, there is no estoppel, and no waiver. If the condition of the policy that it shall not take effect until the premium thereon is fully paid is waived by the insurer, such waiver is in no wise affected by the ability or inability of insured to pay the premium (*Nebraska & I. Ins. Co. v. Christiensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. Rep. 407).

In *Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 78 S. W. 398, the evidence was held sufficient to show a waiver; but in *National Aid Ass'n v. Bratcher*, 65 Neb. 378, 91 N. W. 379, it was held insufficient.

(b) Powers of officers and agents to waive payment.

By the weight of authority a general agent of an insurance company, or an agent with general powers to take applications, countersign policies, and collect premiums, has power to waive provisions requiring prepayment of the first premium, unless his authority is expressly limited.

This is supported by *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Jones v. Aetna Ins. Co.*, 13 Fed. Cas. 938. This rule also applies to life insurance. *O'Brien v. Union Mut. Life Ins. Co.* (C. C.) 22 Fed. 586; *Triple Link Mutual Indemnity Ass'n v. Williams*, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 Pac. 922; *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush (Ky.) 430; *Genung v. Metropolitan Life Ins. Co.*, 69 N. Y. Supp. 1041, 60 App. Div. 424; *Peck v. Washington Life Ins. Co.*, 87 N. Y. Supp. 210, 91 App. Div. 597; *Snyder v. Nederland Life Ins. Co.*, 51 Atl. 744, 202 Pa. 161. It also applies to indemnity insurance. *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

Likewise, local agents, agents authorized to make contracts and issue policies, to solicit applications, deliver policies, and collect the premiums thereon, have power to waive prepayment of the premium, though required by a condition in the policy.

Reference may be made to *Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co.* (C. C.) 20 Fed. 232; *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 585; *John Hancock Mut. Life Ins. Co. v. Schlink*, 74 Ill. App. 181; *Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. 386, 6 Atl. 224.

If a person who delivers a policy of insurance has all the apparent authority of a general agent, the insurer is bound by his waiver of the condition in the policy as to payment of the first premium (Standard Acc. Ins. Co. v. Friedenthal, 1 Colo. App. 5, 27 Pac. 88); and a general agent, or an agent having authority to take applications and collect premiums, may waive a condition requiring insured to be in good health when the premium is paid.

Connecticut Indemnity Ass'n v. Grogan's Adm'r (Ky.) 52 S. W. 959;
Ames v. Manhattan Life Ins. Co., 31 App. Div. 180, 52 N. Y. Supp.
759.

But in *Raub v. New York Life Ins. Co.*, 14 N. Y. St. Rep. 573, it was held that a district agent of a life insurance company has no authority to waive a requirement that premiums shall be paid in cash by taking a note therefor; and in *Hambleton v. Home Ins. Co.*, 11 Fed. Cas. 312, it was said that an insurance solicitor has no authority, simply from the nature of his business, to bind the company to a waiver of payment of the premium. Similarly, it was held, in *Baxter v. Chelsea Mut. Fire Ins. Co.*, 1 Allen (Mass.) 294, 79 Am. Dec. 730, that the president of a mutual insurance company has no authority to waive a provision in the by-laws requiring payment of premium before delivery of a policy, and a resolution of the directors that, if premiums are not paid within a certain time from the dates of the policies, the policies shall be considered as canceled.

A by-law of a mutual insurance company, providing that no insurance shall be binding until the cash premium shall have been actually paid to some "duly authorized and commissioned" agent of the company, is for the benefit of the company, and may be waived, and is waived when the company authorizes an agent to receive the premium, though he has not been "duly authorized and commissioned" (*Susquehanna Mut. Fire Ins. Co. v. Elkins*, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608). So, if an insurer intrusts policies to insurance brokers, who have no authority to collect premiums, and they deliver the policies and receive a premium of insured, who has no knowledge of their want of authority, there is a waiver of a provision requiring premiums to be paid only to an authorized agent of the insurer (*Greenwich Ins. Co. v. Union Dredging Co.*, 8 N. Y. St. Rep. 353). And if an agent employs an insurance broker in another city, with the knowledge of the company, to place insurance in that city for him and the company he represents, payment

to the broker on a policy sent to him for delivery estops the company to set up that the premium has not been received by it as stipulated for in the policy of insurance (*Universal Fire Ins. Co. v. Block*, 109 Pa. 535, 1 Atl. 523).

(c) Same—Conditions limiting the powers of agents.

In order to avoid waiver by agents, insurance companies generally insert in their application blanks or policies, or both, conditions which expressly inhibit the power of agents to waive conditions in the contract. The effect of such conditions is largely dependent upon the exact language employed, and whether they are found in the application or policy; also, whether the applicant has actual knowledge of the limitations. Thus, it was held, in *Miller v. Brooklyn Life Ins. Co.*, 17 Fed. Cas. 312, that a recital in a policy that agents have no power to waive any of its provisions, one of which is that the policy shall be void on nonpayment of premiums when due, does not refer to the first premium, recited in the policy as paid; and in *State Ins. Co. v. Hale*, 1 Neb. (Unof.) 191, 95 N. W. 473, the court took the position that a provision that no person should have power to waive any conditions of the contract, except the secretary or chief officer of the company, in writing, relates entirely to changes in the contract after it was executed and became binding, and not to the blank form on which it was written. So, in *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201, it was held that the company would be estopped from relying on a similar condition in the policy, if the applicant was not informed of the limitation when the agent waived prepayment of the premium. Likewise it was held, in *Bowman v. Agricultural Ins. Co.*, 2 Thomp. & C. 261, affirmed 59 N. Y. 521, that a provision that the premium should be due within a certain time, and, if not paid within that time, the company would not be liable, might be waived by an authorized agent, though the policy also stipulated that no agent could "waive any stipulation or condition contained therein"; and in *John Hancock Mut. Life Ins. Co. v. Schlink*, 51 N. E. 795, 175 Ill. 284, the court was of the opinion that an agent, empowered to solicit applications, deliver policies, and collect premiums, has authority to waive conditions requiring prepayment of the premium, notwithstanding a provision in the policy that no person, except the president or secretary, is authorized to make alterations, discharge contracts, or waive forfeitures. Similarly, it was said, in

Bankers' & Merchants' Mut. Ben. Ass'n v. Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772, that, though a benefit certificate provides that agents shall not have power to make, alter, or discharge contracts, waive forfeitures, or extend credits, the secretary and general manager thereof have power to waive the payment of the fee required as a condition precedent to membership; and in *Hewitt v. American Union Life Ins. Co.*, 70 N. Y. Supp. 1012, 34 Misc. Rep. 738, the court took the view that an agent could waive prepayment, notwithstanding a provision in a policy that no person, except certain officers of the company, not including such agent, could give credit.

But in *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. 137, the court held that an agent had no power to waive prepayment of the premium, where the policy expressly limited waivers to those signed by the secretary, and denied authority to agents to waive any conditions; and a similar doctrine was asserted in *Wilkins v. State Ins. Co.*, 43 Minn. 177, 45 N. W. 1, on the ground that the insured must be held to have had knowledge of the limitation, as the policy was delivered to him. So, if the application and the policy itself both stipulate that the policy shall not become binding on the association until the first premium has been actually paid, an agent cannot waive prepayment of the premium (*Reese v. Fidelity Mut. Life Ass'n*, 36 S. E. 637, 111 Ga. 482); and this is true, where the policy is actually delivered, though only the policy contains the limitation on the agent's authority (*Russell v. Prudential Ins. Co.*, 68 N. E. 252, 176 N. Y. 178, 98 Am. St. Rep. 656, reversing 76 N. Y. Supp. 1029, 73 App. Div. 617).

However, if the company has, by its actions, ratified former acts of the agent prior to the limitation, the agent will be held to have power to waive prepayment (*Provident Sav. Assur. Soc. of New York v. Oliver*, 53 S. W. 594, 22 Tex. Civ. App. 8); and, more especially, if the company acquiesces in the particular waiver, it will be bound thereby (*Stewart v. Union Mut. Life Ins. Co.*, 49 N. E. 876, 155 N. Y. 257, 42 L. R. A. 147).

(d) Waiver by custom and course of dealing.

A waiver of a condition in a policy requiring payment of the premium may be established by showing that it is the custom of the insurer to receive payment of premiums on its policies so conditioned long after insurance has been effected and policies delivered (*Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec.

529), and a custom of collecting premiums monthly operates as a waiver of immediate payment when no special demand is made.

Potter v. Phenix Ins. Co. (C. C.) 63 Fed. 382; *Lungstrass v. German Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100.

So a waiver of prepayment of the premium on a contract to insure may be shown by a usage to consider a contract as binding when the terms thereof have been agreed upon and entered on the company's books, though the premium has not been paid (*Baxter v. Massasoit Ins. Co.*, 13 Allen [Mass.] 320). And an agreement to renew an existing policy is valid, though no premium be tendered on the day when the renewal policy should issue, if the course of dealing between the parties has been such as to justify the belief on the part of insured that credit is to be extended for the premium, and that he is to pay only on demand (*Baldwin v. Phoenix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. Rep. 362). Similarly, an intent to waive cash payment of the premium may be shown by previous dealings between the same parties in similar transactions (*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423). But prior dealings between the parties, in which insured has obtained policies without paying for them, are by no means controlling on the question of intent to waive prepayment of the premium (*Church v. La Fayette Fire Ins. Co.*, 66 N. Y. 222). If the course of business on the part of an agent has been to extend credit to an insured for the payment of premiums, the insurer will be estopped to deny liability because of insured's failure to pay the premium.

Ætna Life Ins. Co. v. Fallow, 77 S. W. 937, 110 Tenn. 720. Especially is this true if the agent remits the premium to the company (*Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511), or the company holds him liable therefor (*Frankie v. Pennsylvania Fire Ins. Co.*, 9 Fed. Cas. 706).

So a condition requiring prepayment of the premium may be waived by the methods of the company in dealing with the agent procuring the insurance.

Peoria Sugar Refinery v. Susquehanna Mut. Fire Ins. Co. (C. C.) 20 Fed. 480; *Universal Fire Ins. Co. v. Block*, 109 Pa. 535, 1 Atl. 523.

Thus, where the course of business between a company and one of its agents tends to show that the company was accustomed to substitute the personal liability of the agent for premiums received

in the place of the security which the suspension clause in the policy afforded, it is for the jury to determine whether prepayment was waived (*Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. 386, 6 Atl. 224). So, where agents are accustomed, with the company's apparent acquiescence, to deliver policies without prepayment, and they are held personally liable to the company for the premiums, a delivery of the policy is a waiver of prepayment (*Frankle v. Pennsylvania Fire Ins. Co.*, 9 Fed. Cas. 706). Likewise, if it is the custom of agents to give credit on premiums, and the company, with knowledge of the facts, receives and retains premiums paid at the expiration of such credits, there is a waiver by a delivery of a renewal receipt to an insured (*Tennant v. Travelers' Ins. Co.* [C. C.] 31 Fed. 322). So, if the general agent of an insurance company has knowledge of frequent violations by a subagent of a rule of the company prohibiting the acceptance of notes for premiums, and makes no serious objection, the company must be deemed to have waived the application of the rule (*Mutual Life Ins. Co. v. Logan*, 87 Fed. 637, 31 C. C. A. 172).

A custom tending to show waiver of a condition requiring prepayment of the first premium may, of course, be proved by parol (*Peoria Sugar Refinery v. Susquehanna Mut. Fire Ins. Co.* [C. C.] 20 Fed. 480). But it was further held in this case that the waiver could not in this instance be proved by parol, as the policy required waivers to be in writing.

Moore v. Rockford Ins. Co., 90 Iowa, 636, 57 N. W. 597, involved a policy on an agent's property which required actual prepayment of the premium. A letter from the agent to the company showed a promise to "remit" if the policy was sent, and the answer of the company, inclosing the policy, asked the agent to remit. It was held that the condition of the policy, taken with such letters, rendered immaterial all evidence as to the course of past dealings between the parties in respect to extending time in previous years for the payment of the premium. So it was held, in *Berthoud v. Atlantic Marine & Fire Ins. Co.*, 13 La. 539, that a company, though previously accustomed to deliver policies to an applicant without payment of the premium, is not bound until its payment, where the policy is not delivered, though filled up, and the rate, though marked on the written application, is not signed by the secretary, who states that the risk will not be taken without payment of the premium. In *Zigler v. Phoenix Ins. Co.*, 82 Iowa, 569, 48 N. W. 987, it appeared

that it had been the custom of an agent to make out renewals, deliver them, and collect the premium. Ten days before a policy expired the insured asked the agent to attend to its renewal, and he promised to do so. Nothing more was done until the property was burned, six months afterwards. It was held that, under the facts, the agent had not waived prepayment of the premium, and hence the insurance company could not be compelled to issue the renewal.

(e) Waiver implied from acts, conduct, or statements of insurer.

A waiver of a condition requiring prepayment of the premium on a policy of insurance need not, as a general rule, be based on an express agreement to that effect, but may be inferred from acts, conduct, or statements on the part of the insurance company or its authorized agents (*Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566), except possibly in the case of a mutual fire insurance company (*Cannon v. Farmers' Mut. Fire Ass'n of Warren County*, 58 N. J. Eq. 102, 43 Atl. 281). In the *Cannon Case*, it was held that under a by-law of a mutual insurance company, attached to a policy, authorizing the directors to receive as a member an assignee thereof on his giving a new note, no acts or declarations of theirs tending to create a membership without his giving such note can operate as an estoppel against the company.

Whether or not a waiver may be implied in a particular case depends, of course, on the nature of the particular facts relied on, and it is very seldom that the facts on which a waiver is claimed are similar in any two cases. The question of implied waiver has been passed on in numerous cases. In some the facts have been held sufficient to sustain the claim of waiver, while in others they have been held insufficient. If the company accepts and retains the premium, with knowledge of a loss or insured's death, it will be held to have waived prepayment.

Schoneman v. Western H. & C. Ins. Co., 18 Neb. 404, 20 N. W. 284; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597; *Home Forum Ben. Order of Illinois v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219. But there is no waiver if the company has no knowledge of the facts. *Stringham v. Mutual Ins. Co.*, 75 Pac. 822, 44 Or. 447. Nor is there a waiver if an insurance association, subsequent to an injury sued for, receives a sum necessary to constitute an applicant a member from that date; he being then informed that the certificate does not cover the injury. *Modern Woodmen Acc. Ass'n v. Kline*, 50 Neb. 345, 69 N. W. 943.

So a condition requiring prepayment of the first premium is waived by extending credit to insured, or accepting his note for the amount of the premium.

Reference may be made to *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *New York Life Ins. Co. v. McGowan*, 18 Kan. 300; *Lawrence v. Penn Mut. Life Ins. Co. (La.)* 36 South. 898; *Kelly v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 554; *German Ins. Co. v. Shader (Neb.)* 93 N. W. 972, 60 L. R. A. 918; *Little v. Eureka Ins. Co.*, 38 Ohio St. 110; *Thum v. Wolstenholme*, 61 Pac. 537, 21 Utah, 446.

Thus it was held, in *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612, that if an agent effects a contract for intermediate insurance and for a policy, delivers a certificate thereof to the applicant under an agreement to give time for the payment of the premium, and is charged by his principal for the amount thereof, which is settled and paid after loss, a condition requiring prepayment of premium must be deemed to have been waived, although the agent had no express authority to give time for the payment. But granting credit for a specified time only for a part of the cash payment required by a mutual fire insurance company only amounts to a waiver of payment for such time, and does not convert the amount for which credit is given into a deferred payment, precluding the company from declaring a forfeiture on the ground that the policy provides for delinquencies only in case of assessments, and not of deferred payments (*Palmer v. Fidelity Mut. Fire Ins. Co.*, 3 Neb. [Unof.] 741, 92 N. W. 575). So, if a premium is required to be paid during good health, and a receipt for a note given for the premium states that it is in full for the first premium, if paid when due, there is no waiver of a stipulation requiring payment during good health of insured, and the applicant must be in such health when the note is paid in order to comply with the stipulation (*Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 44 Or. 447). Likewise, an agreement by an insurance company or its agents with an applicant to hold a policy until it is accepted and the premium paid will not constitute a waiver.

Mutual Life Ins. Co. v. Sinclair, 71 S. W. 853, 24 Ky. Law Rep. 1543;
Mutual Life Ins. Co. v. Lucas, 79 S. W. 279, 25 Ky. Law Rep. 2052.

However, in *Sheldon v. Atlantic Fire & Marine Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 231, a majority of the court held that if an insurance agent sent a policy by mail to an applicant, with the request:

"Should you decline the policy, please return it by return mail. If you retain it, please send me the amount" of the premium—constituted a waiver of a condition that the policy should not be binding until actual payment of the premium.

In the following cases it has been held that prepayment was waived:

By an agent's assurance on delivery of a policy that it "made no difference, and that the company would take a note" (*East Texas Fire Ins. Co. v. Mims*, 1 White & W. Civ. Cas. Ct. App. [Tex.] § 1323); by an agent's statement, on being told the money was ready for him in the bank, that he would draw for it when wanted (*New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. [N. Y.] 468); by accepting application, making out policy in duplicate, and entering it on insurer's books without requiring prepayment (*Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529); by delivering to agent a renewal receipt, and he delivering it to the insured, expressly waiving the payment of the premium at the time (*Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566); by an agent's statement, on offer of payment when application was taken, that he would be responsible for payment till delivery of policy (*Gordon v. United States Casualty Co.* [Tenn. Ch. App.] 54 S. W. 98); by sending policy to applicant, with statement that the agents will call for the cash portion of the premium (*Miller v. Brooklyn Life Ins. Co.*, 17 Fed. Cas. 312, affirmed 12 Wall. 285, 20 L. Ed. 398); by delivering certificate and agent treating applicant as a member on part payment sufficient to cover fees outside of those of the agent and the examining physician (*Healy v. Sovereign Camp Woodmen of the World*, 112 Iowa, 137, 83 N. W. 785); by delivering policy to insured's broker and charging premium to him (*Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. 386, 6 Atl. 224), especially if the broker is credited with a commission and thus made an agent of insurer (*Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 Atl. 367), and the premium is paid to him by the insured (*Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co.* [C. C.] 20 Fed. 232); by insurer's failing to repudiate the contract (*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* [Del. Super.] 54 Atl. 952). So evidence of an agreement by insured with the company's agent that the latter was to provide for the premium is admissible to show a waiver (*Sheldon v. Connecticut Mut. Fire Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565). Likewise, an insurer is not in a position to insist that tender by check, where the tender was not refused because it was not in cash, but on other grounds, was insufficient (*Kollitz v. Equitable Mut. Fire Ins. Co.* [Minn.] 99 N. W. 892). The evidence was held to show a waiver in *Bankers' & Merchants' Mut. Ben. Ass'n v. Stapp*, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772. In *Dean v. Aetna Life Ins. Co.*, 62 N. Y. 642, it was held that, where an insurer's agent informed the insured that his premium notes were duly signed, the

insurer is estopped from denying that such notes were signed, where the signing of some of them was inadvertently omitted.

On the other hand, there is no waiver: By insurer's failure to urge applicant to pay the premium (*Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190); by reporting policy to insurance commissioner, subject to correction by later reports (*Poste v. American Union Life Ins. Co.*, 59 N. E. 1129, 165 N. Y. 631, affirming 32 App. Div. 189, 52 N. Y. Supp. 910); by handing to a third person, with instructions to deliver to the insured in case he should pay the premium within a stated time, a policy not applied for by insured (*Home Ins. Co. v. Field*, 42 Ill. App. 392); by leaving policy with the applicant for inspection (*Quinby v. New York Life Ins. Co.*, 71 Hun, 104, 24 N. Y. Supp. 593); by requesting payment of required advances in a mutual fire company (*Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray [Mass.] 203). So the fact that the agent of the company told the insured that he might pay the dues upon making application for the policy, or when the policy should be delivered, was no waiver of a condition that the dues should be paid before the policy became effectual (*Ormond v. Fidelity Life Ass'n*, 96 N. C. 158, 1 S. E. 796). Nor is an insurance company estopped to show nonpayment by parol evidence of a contemporaneous agreement between the insured and the agent of the company that the policy was to be "a cash policy," and that the agent would make the premium good to the company (*Dircks v. German Ins. Co.*, 34 Mo. App. 31). In the following cases the evidence was held not to show a waiver: *Hambleton v. Home Ins. Co.*, 11 Fed. Cas. 312; *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529; *Zigler v. Phoenix Ins. Co.*, 82 Iowa, 569, 48 N. W. 987; *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584; *McDonald v. Provident Sav. Life Assur. Soc.*, 84 N. W. 154, 108 Wis. 213, 81 Am. St. Rep. 885.

(2) Waiver by delivery of policy.

The weight of authority supports the proposition that a delivery of a policy without requiring prepayment of the payment waives its prepayment as a requisite of the contract's taking effect, though the policy contains a condition making payment of the premium a condition precedent to the attaching of insurer's liability.

Reference may be made to *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Daft v. Drew*, 40 Ill. App. 266; *Gosch v. State Mut. Fire Ins. Ass'n*, 44 Ill. App. 263; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 156; *Germania Fire Ins. Co. v. Muller*, 110 Ill. App. 190; *Travelers' Life & Acc. Ins. Co. v. Cash*, 14 Ind. App. 3, 42 N. E. 246; *Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30; *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Taylor v. Supreme Lodge of Columbian League (Mich.)* 97 N. W. 630; *Kollitz v. Equi-*

table Mut. Fire Ins. Co. (Minn.) 99 N. W. 892; New York Life Ins. Co. v. Stone, 42 Mo. App. 383; Union Life Ins. Co. v. Parker, 66 Neb. 395, 92 N. W. 604, 62 L. R. A. 390; Washoe Tool Mfg. Co. v. Hibernia Fire Ins. Co., 7 Hun (N. Y.) 74; Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Bowman v. Agricultural Ins. Co., 59 N. Y. 521, affirming 2 Thomp. & C. 261; Grier v. Mutual Life Ins. Co., 132 N. C. 542, 44 S. E. 28; Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; Equitable Ins. Co. v. McCrea, 8 Lea (Tenn.) 541; German Ins. Co. v. Everett (Tex. Civ. App.) 36 S. W. 125; Wytheville Insurance & Banking Co. v. Teiger, 90 Va. 277, 18 S. E. 195; Mason v. Citizens' Fire, Marine & Life Ins. Co., 10 W. Va. 572; Eagan v. Aetna Fire & Marine Ins. Co., Id. 583.

An express agreement to extend credit was coupled with the delivery in *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *German Ins. Co. v. Shader* (Neb.) 98 N. W. 972, 60 L. R. A. 918; and in *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566, a renewal receipt delivered to an agent was by the agent delivered with an express waiver of payment of the premium. In *Rowswell v. Equitable Aid Union* (C. C.) 13 Fed. 840, it was held that the issuing of a certificate of membership in a union estops the union from relying on applicant's failure to make a required advance payment. And in *Smith v. Provident Sav. Life Assur. Soc. of New York*, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163, it was held that a contract, between a life insurance company and its general agent, providing that agents crediting premiums before payment would do so at their own risk, shows that a delivery of a policy by an agent without receiving the premium would constitute a waiver of a provision in the policy that it should not take effect unless the premium is prepaid. In *Henschel v. Oregon Fire & Marine Ins. Co.*, 4 Wash. 476, 31 Pac. 332, 765, it was held that possession of a policy reciting that the consideration was a named sum is prima facie evidence of payment. And in *Fidelity & Casualty Co. v. Willey*, 80 Fed. 497, 25 C. C. A. 593, affirming (C. C.) 77 Fed. 961, it was held that prepayment was waived where a company charged the agent with the amount of the premium, according to custom, and he delivered the policy to the insured without exacting prepayment.

The doctrine stated is to a certain extent disapproved in *Tomseck v. Travelers' Ins. Co.*, 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. Rep. 846. The court there takes the position that a waiver of prepayment will not be presumed, unless the policy contains a receipt acknowledging payment of the premium.

The waiver of prepayment implied from delivery of the policy only amounts to an extension of credit for a short time, at best an indefinite time, and does not estop the insurer from collecting the premium at any time after delivery (*Babcock v. Baker*, 56 N. Y.

Supp. 239, 37 App. Div. 558). But, in order to cancel a policy for nonpayment of the premium thus waived, the insured must be put in default, as, for instance, by a demand for the premium (*Latoix v. Germania Ins. Co.*, 27 La. Ann. 113), and a mere failure to pay on demand does not terminate the waiver, if the insurer fails to give insured notice that the policy will be void unless payment is made (*Washoe Tool Mfg. Co. v. Hibernia Fire Ins. Co.*, 66 N. Y. 613, affirming 7 Hun, 74).

The sending of the policy to an assured at his request, coupled with directions to remit the premium, does not estop the insurer from setting up nonpayment of the premium against a mortgagee, to whom insured has subsequently sent the policy without giving notice of his failure to pay the premium (*Union Bldg. Ass'n v. Rockford Ins. Co.*, 83 Iowa, 647, 49 N. W. 1032, 14 L. R. A. 248, 32 Am. St. Rep. 323). Likewise, the insurer is not estopped to insist on nonpayment, if possession of the policy is obtained by a tort (*Charter Oak Life Ins. Co. v. Smith*, 6 Ohio Dec. 625, 7 Am. Law Rec. 147), or it is delivered to insured merely for inspection, to be paid for if accepted.

Quinby v. New York Life Ins. Co., 71 Hun, 104, 24 N. Y. Supp. 593;
Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619.

In *Tennant v. Travelers' Ins. Co.* (C. C.) 31 Fed. 322, it appeared that before expiration of a renewal an agent of a company, under direction of an insured, filled out and countersigned a receipt purporting to renew the policy for another year, and also at the request of the insured retained the receipt in his office, where it remained to the time of the death of insured. It was held that there was a delivery of the renewal receipt, which continued the policy in force.

Whether sending a policy to an applicant operated as a waiver was, under the evidence, considered a question for the jury in *Cross v. Security Trust & Life Ins. Co.*, 69 N. Y. Supp. 189, 58 App. Div. 602. And in *Mutual Life Ins. Co. v. Sinclair*, 24 Ky. Law Rep. 1543, 71 S. W. 853, and *Coffin v. New York Life Ins. Co.*, 127 Fed. 555, 62 C. C. A. 415, it was held that, under the evidence, there was no delivery to the applicant.

(g) Effect of acknowledgment in policy of receipt of premium.

There appears to be some difference of opinion among the authorities as to the effect of a recital in a policy acknowledging payment of the premium, but the decided weight of authority unquestionably supports the rule that, if a policy which has been duly ex-

recited and delivered recites that the premium has been paid, this is conclusive, and will estop the insurer to deny payment in order to avoid liability on the policy.

In *re Ins. Co. (D. C.)* 22 Fed. 109; *Massachusetts Ben. Life Ass'n v. Sibley*, 57 Ill. App. 246; *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22; *Same v. Anderson*, Id. 384; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Consolidated Real Estate & Fire Ins. Co. v. Cashow*, 41 Md. 59; *Dobyns v. Bay State Ben. Ass'n*, 144 Mo. 95, 45 S. W. 1107; *Basch v. Humboldt Mut. Fire & Marine Ins. Co.*, 35 N. J. Law, 429; *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Kendrick v. Mutual Ben. Life Ins. Co.*, 32 S. E. 728, 124 N. C. 315, 70 Am. St. Rep. 592; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344. In *Baum v. Parkhurst*, 26 Ill. App. 128, this rule was held, also, to apply to a renewal receipt, as such renewal receipt is evidence of a contract, and more than a mere receipt for money.

A contrary rule is asserted in *Miller v. Brooklyn Life Ins. Co.*, 17 Fed. Cas. 312, affirmed, without discussion of this point, *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. 285, 20 L. Ed. 398, where it is said that the recital will not estop the insurer to deny payment, unless the rights of innocent third parties have intervened.

In some states it is by statute provided that an acknowledgment in a policy of the receipt of a premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulations therein to the contrary.¹ Under this provision it was held, in *Palmer v. Continental Ins. Co.*, 132 Cal. 68, 64 Pac. 97, that an insurance company is liable on a policy reciting that it is issued in consideration of a named amount paid, though it provides that there shall be no liability thereon if any promissory note given for premium remains past due and unpaid, and a note given for the amounts mentioned in the policy is in fact due and unpaid. And a similar rule was asserted in *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251, without reference to any statutory provision. But in *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32, the position was taken that the acknowledgment of payment in the policy does not estop the insurer from denying payment of a note in fact given for the premium, even as against an assignee of the insured. And in *Robert v. New England Mut. Life Ins. Co.*, 12 Ohio Dec. 668, 1 Disn. 355, affirmed 13 Ohio Dec. 66, 2 Disn. 106, the court was of opinion that the acknowledgment was not conclusive on the insurer, when an indorsement on the policy showed that one half of the

¹ See Civ. Code Cal. § 2598; Code Mont. § 3462.

premium had been paid in cash and that a note had been given for the other half. So it was held, in *Mooney v. Home Ins. Co.*, 72 Mo. App. 92, that a company was not estopped from showing that payment of the premium was in fact made by a note, which had not been paid, though the policy acknowledged the receipt of a cash payment. However, in *Dobyns v. Bay State Beneficiary Ass'n*, 144 Mo. 95, 45 S. W. 1107, it was said that a condition of a life insurance policy making nonreceipt by the insurer of any payment by the insured, therein required, for 30 days after the same shall become due, conclusive evidence of an abandonment by the latter of his policy, it providing for certain assessments and charges to be paid on call and notice, in addition to the regular premiums, does not control, and open for disproof by parol evidence, a recital in the body of the policy acknowledging receipt of the premiums by the insurer, but refers to such additional assessments.

In the early case of *Lee v. Fraternal Mut. Ins. Co.*, 12 Ohio Dec. 109, 1 Handy, 217, some doubt appears to have been entertained as to whether an insurer was estopped from denying payment of the premium when the receipt thereof was acknowledged in the policy. But later cases in Ohio take the position, assumed by most courts, that an acknowledgment of the receipt of the premium is conclusive for the purpose of giving effect to the policy as binding from the time of delivery, so that subsequent nonpayment of the premium will not terminate the insurance, unless expressly so provided.

Madison Ins. Co. v. Fellowes, 12 Ohio Dec. 584, 1 Disn. 217; *Robert v. New England Mut. Life Ins. Co.*, 12 Ohio Dec. 668, 1 Disn. 355, affirmed 13 Ohio Dec. 66, 2 Disn. 106; *Fellowes v. Madison Ins. Co.*, 13 Ohio Dec. 79, 2 Disn. 128, reaffirming *Madison Ins. Co. v. Fellowes*, 12 Ohio Dec. 584, 1 Disn. 217.

In Wisconsin the acknowledgment in a policy that a premium has been received is regarded as only prima facie evidence of payment, and hence subject to contradiction by competent evidence.

Whiting v. Mississippi Val. Mfrs.' Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. A similar view, also, appears to be asserted in *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

A recital in a fire insurance policy that the company, "in consideration of the amount of the premium, do insure," etc., is not an acknowledgment of the receipt of the premium, and does not estop the company from showing nonpayment (*Dircks v. German Ins. Co.*, 34 Mo. App. 31). So an acknowledgment of payment of the premium,

leaving a blank for the amount, which is not filled in, does not estop the insurer from proving nonpayment of the premium, though it would do so if the blank were filled in.

Mooney v. Home Ins. Co., 72 Mo. App. 92; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594.

(h) Pleading and practice.

A waiver of a condition requiring prepayment of premium must be pleaded, in order to be available (*German Ins. Co. v. Daniels* [Tex. Civ. App.] 33 S. W. 549); and an allegation that insured gave a check before loss, which was afterwards paid, and that the insured has ever since retained the premium, is insufficient (*German Ins. Co. v. Shader*, 1 Neb. [Unof.] 704, 96 N. W. 604).

Monthly reports of an insurance agent, not showing when the policies in suit were delivered, are inadmissible to show that the company knew of the agent's practice of delivering policies in advance of the payment of the premiums (*Smith v. Provident Sav. Life Assur. Soc. of New York*, 65 Fed. 765, 13 C. C. A. 284, 31 U. S. App. 163). Where the insured admitted in his pleadings that the note given for the premium was unpaid, and asked that it be deducted from the amount of the recovery, admission of testimony to contradict the recitals in the policy of payment of the premium, and to contradict the receipt acknowledging payment, was harmless (*Laughlin v. Fidelity Mut. Life Ass'n*, 8 Tex. Civ. App. 448, 28 S. W. 411). So, where the execution or delivery of the policy is not put in issue, evidence as to the execution of the policy and the agent's authority to deliver it without payment of premiums is immaterial, in the absence of an allegation of collusion between the agent and the insured (*Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122). And, in an action on a policy claimed to have been void because insured was not in good health when he paid his first premium, it is error to allow an answer to a question whether the corporation has ever returned the premium (*Thompson v. Travelers' Ins. Co.*, 11 N. D. 274, 91 N. W. 75).

The question as to the waiver of the right of an insurance company to immediate payment of the premium as a condition precedent to the attaching of a policy is one of fact for the jury (*Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Rep. 671), and where the evidence is conflicting it is error to direct a verdict (*Farmers' & Merchants' Ins. Co. v. Graff*, 1 Neb. [Unof.] 790, 96 N. W. 605).

10. MATTERS RELATING TO THE FORM AND CONTENTS OF THE POLICY IN GENERAL.

- (a) Requisites of the contract in general.
- (b) Policy defined.
- (c) Kinds of policies.
- (d) Same—Valued and open policies.
- (e) Same—Running policies.
- (f) Same—Blanket, floating, and specific policies.
- (g) Same—Voyage and time policies.
- (h) Same—Life policies.
- (i) Form and contents of policy.
- (j) Standard policies.
- (k) Size and style of type used in policies.
- (l) Contracts of mutual benefit associations and changes therein.

(a) Requisites of the contract in general.

In order that a contract of insurance shall be valid, it must possess all the essential elements requisite to the validity of any contract (*People's Ins. Co. v. Paddon*, 8 Ill. App. 447). That is to say, there must be a mutual agreement, founded on an offer and acceptance thereof. This agreement must be in the form required by law, must be made between parties legally capable of contracting, must be legal in purpose, and must be supported by a valuable consideration.¹ It must be made fairly, the consent of the parties being founded on full knowledge of all material facts.² In addition to these essentials, common to all contracts, there are certain elements which are recognized as essential to all contracts of insurance. There must be a proper subject of insurance, a risk insured against, the amount of indemnity must be fixed, the duration of the risk must be expressed, and the premium or consideration to be paid must be agreed on. (*Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 161.)

That a valuable consideration is necessary to the validity of a contract of insurance does not need the citation of authority. Usually the consideration is the premium paid.

Hodgson v. Marine Ins. Co., 5 Cranch, 100, 3 L. Ed. 48; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940; *Viele v.*

¹ As to completion of contract, see ante, pp. 407-496. As to parties, see ante, pp. 39, 70. As to validity, see post, p. 542.

² As to the effect of misrepresentation or concealment of facts, see post, vol. 2, pp. 1154, 1203.

Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Sullivan v. Spring Garden Ins. Co.*, 54 N. Y. Supp. 629, 34 App. Div. 128.

So a premium note executed by the insured is a sufficient consideration for the policy (*Farmers' & Merchants' Ins. Co. v. Wiard*, 81 N. W. 312, 59 Neb. 451). And, though the custom of an insurance company is to dispense with the signature to a premium note until after the policy is recorded, the failure to sign the note when the risk is taken does not render the contract void for want of consideration (*Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674). As a discharge in bankruptcy will release an insured from liability on his premium note, there results a failure of consideration, which destroys the mutuality of the contract (*Reynolds v. Mutual Fire Ins. Co.*, 34 Md. 280, 6 Am. Rep. 337). The surrender of an existing policy may be the consideration for the issuing of another policy (*Kantrener v. Penn Mut. Life Ins. Co.*, 5 Mo. App. 581). Though it is often recited in the policy that the insurance is made "in consideration of the representations in the application," such representations cannot be regarded as consideration in a technical sense (*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644).

A complaint on a life insurance policy which avers the consideration substantially as it was recited in the policy is sufficient against the objection that a part of the consideration was secured to be paid by separate obligations which are not disclosed in the complaint (*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264). Making the policy an exhibit will prevent the complaint from being defective for want of a direct averment therein of the consideration (*Ætna Ins. Co. v. Strout*, 16 Ind. App. 160, 44 N. E. 934).

(b) Policy defined.

A contract of insurance is a mercantile contract, having its origin in and deriving its incidents from the usages and laws of commercial nations. In many of the countries of Europe, the contract is required to be in writing by positive ordinances, which set forth minutely the circumstances and stipulations which it ought to express. The same is true of marine insurances in Great Britain, a written policy being required by statute (St. 35 Geo. III, c. 63). Such is also the usage in different countries; and, indeed, the very term "policy" imports that the party insured holds a written instrument to which that name has been given (*Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305). With the excep-

tion of one or two states, there are no positive laws in this country requiring contracts of insurance to be in writing;³ but oral contracts are recognized as valid. It must therefore be borne in mind that technically there is a distinction between a contract of insurance and a policy of insurance. A policy is necessarily a contract (*Baldwin v. Pennsylvania Fire Ins. Co.*, 20 Pa. Super. Ct. 238), but all contracts of insurance are not necessarily policies. Just as there is a recognized distinction between a contract "to insure" and a contract "of insurance," on the one hand (*Scranton Steel Co. v. Ward's Detroit & Lake Superior Line [C. C.]* 40 Fed. 866), so we must recognize a distinction between the contract of insurance and the policy of insurance, on the other hand. Therefore, in the present discussion of matters relating to the form and execution of the policy, the term "policy" must be understood as referring to the final instrument, the technical policy, and does not include intermediate contracts of insurance, which are, rather, contracts for policies (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612). It is the formal written instrument in which the contract of insurance is embodied (*London & Lancashire Fire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. 424).

Reference may also be made to *Hicks v. British America Assur. Co.*, 13 App. Div. 444, 43 N. Y. Supp. 623; *State v. Pittsburg, C., C. & St. L. R. Co.*, 68 Ohio, 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435; *Corporation of London Assurance v. Paterson*, 32 S. E. 650, 106 Ga. 538.⁴

See, also, *Manny v. Dunlap*, 16 Fed. Cas. 658, where it was held that a direction by a principal to his agent to procure a "policy of insurance" means a written policy, and not a verbal contract; the court saying that the form of expression is not satisfied by any verbal contract, though such a contract may possibly be a valid one.

▲ policy of insurance is a contract in writing of such nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Liverpool & London & Globe Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okl. 585, 69 Pac. 938.

(e) Kinds of policies.

In addition to the division of policies of insurance into general classes, such as fire policies, marine policies, life policies, etc., in-

³ See ante, p. 398.

§ 2586; Civ. Code Mont. § 8450; Civ.

⁴ See, also, Civ. Code Cal. 1903, Code S. D. 1903, § 1837.

dicative of the subject-matter of the contract or the risk assumed, some policies have received designations, descriptive of some particular or peculiar feature differentiating them from other policies of the same general class. For instance, a fire policy may be called a valued policy, or a blanket policy. A life policy may be described as a participating policy, or as an endowment policy. These designations are usually expressive of some distinctive feature, more or less important in determining the rights of the parties, and will be more particularly explained hereafter.

There are, however, scattered through the decisions other designations, which are not in fact descriptive of any peculiar feature, and do not indicate that the policy differs from others of its class in any important particular. For instance, a policy on goods shipped in a certain named vessel is sometimes called a "named policy." Where the insurance is from year to year, until terminated by express notice by one of the parties, the policy may be designated as a "permanent policy" (*First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. Prac. [N. Y.] 448). In some of the early cases a distinction is sometimes drawn between interest policies and wager policies. An interest policy is one which shows by its form that the insured has a real, substantial interest, and that the contract of insurance embodied in the policy is a contract of indemnity, and not a wager. On the other hand, a wager policy is one which shows on the face of it that the contract it embodies is really not an insurance, but a wager, a pretended insurance founded on an ideal risk, where insured has no interest in the subject of insurance (*Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503). In marine insurance there was for some time a disregard of the gaming character of the contract, and policies, interest or no interest, were tolerated. On the other hand, in fire insurance, there has always been a disposition to limit the gaming character of the contract, and to confine it to indemnity by requiring an interest or property in the thing insured at the time of insurance and at the time of loss (*Freeman v. Fulton Fire Ins. Co.*, 38 Barb. [N. Y.] 247).⁵

Policies in renewal have in some instances been called "reinsurance policies" (*Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235). Though it is true that, under a renewal of the contract of insurance, the property is, in the ordinary meaning of the word,

⁵ Necessity of insurable interest, see ante, p. 134.

reinsured, this term has acquired a technical significance, and a mere renewal is not properly a reinsurance contract. In its technical sense a contract of reinsurance is one by which one insurer causes the sum which he has insured to be reinsured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility (*Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873).⁶ Thus, where one company assumes all the risks of another company retiring from business, entering into a contract to protect the retiring company from liability on the policies assumed, this is properly a reinsurance contract or policy.

Glen v. Hope Mut. Life Ins. Co., 56 N. Y. 379; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; *Twiss v. Guaranty Life Ass'n*, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418; *Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964.

Though a contract for reinsurance need not differ in form from one of original insurance, yet when a policy in a first insurer is canceled, and there is substituted therefor a policy in a second insurer, issued direct to the original insured, it is not a contract of reinsurance (*Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271).

(d) Same—Valued and open policies.

Policies are sometimes designated as "valued policies," or as "open policies." A valued policy is one in which a definite valuation is, by the agreement of both parties, put upon the subject-matter of the insurance and written in the face of the policy. Such valuation, in the absence of fraud or mistake, is conclusive on the parties.

Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. Ed. 200; *Williams v. Continental Ins. Co. (D. C.)* 24 Fed. 767; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Schaefer v. Baltimore Marine Ins. Co.*, 33 Md. 109; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Cox, Maitland & Co. v. Charleston Fire & Marine Ins. Co.*, 3 Rich. Law (S. C.) 331, 45 Am. Dec. 771; *Natchez Ins. Co. v. Buckner*, 4 How. (Miss.) 63.⁷

⁶ See, also, Civ. Code Cal. 1903, § 2646; Civ. Code Mont. § 3530; Rev. Codes N. D. 1899, § 4533.

⁷ See Civ. Code Cal. § 2596; Civ. Code Mont. § 3460; Civ. Code S. D. 1903, § 1847; Rev. Codes N. D. 1899, § 4497.

Though valued marine policies were very common, there was not, at first, any form of fire policy corresponding to the valued policy as known in marine insurance (*Niblo v. North America Fire Ins. Co.*, 3 N. Y. Super. Ct. 551). The valued policy was, however, gradually introduced into fire insurance, and is now a common form of contract.

An open policy is one in which the value of the subject insured is not fixed or agreed in the policy, but is left to be estimated in case of loss; and, though a certain sum is written in the face of the policy, this is not agreed on as the value of the property, but as the maximum limit of recovery in case of destruction by the peril insured against. In case of total destruction, the insurer may show that the property was not really worth the amount written.

Williams v. Continental Ins. Co. (D. C.) 24 Fed. 767; *Wallace v. Insurance Co.*, 4 La. 289; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Schaefer v. Baltimore Marine Ins. Co.*, 33 Md. 109; *Laurent v. Chatham Fire Ins. Co.*, 1 N. Y. Super. Ct. 45; *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128; *Riggs v. Home Mutual Fire Protection Ass'n*, 61 S. C. 448, 39 S. E. 614; *Fire Ins. Ass'n v. Miller*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 332.⁸

Generally, to constitute a valued policy, the property insured must be described as "valued at," or "of the agreed value of," or "worth," an expressed amount (*Luce v. Springfield Fire & Marine Ins. Co.*, 15 Fed. Cas. 1,071). But if the phrase "valued at" is used, and no amount expressed, the policy is an open one (*Snowden v. Guion*, 101 N. Y. 458, 5 N. E. 322). So, if the policy contains no words showing that the property is valued at or worth the sum insured, it will be regarded as an open, and not a valued, policy (*Ulmer v. Phoenix Fire Ins. Co.*, 61 S. C. 459, 39 S. E. 712). While it cannot be said that any particular form of words is necessary to constitute a valued policy, there must be some language used indicating an intent not to require proof of value in case of loss (*Riggs v. Home Mut. Fire Protection Ass'n*, 39 S. E. 614, 61 S. C. 448). That is to say, a valued policy is not one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of loss (*Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367). Thus, a fire policy reciting

⁸ See, also, Civ. Code Cal. 1903, § 1899, § 4496; Civ. Code S. D. 1903, § 2595; Civ. Code Ga. 1895, § 2129; Civ. 1846. Code Mont. § 3459; Rev. Codes N. D.

that the amount insured is not more than three-fourths of the value of the property, "as appears by the proposal of the insured," is a valued policy (*Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen [Mass.] 63). A policy on profits, the goods from which the profits are expected being valued, must be regarded as a valued policy on the profits also (*Mumford v. Hallett*, 1 Johns. [N. Y.] 439). But a policy insuring \$2,000 on freight is an open policy, differing in this respect from a policy insuring a specified amount on profits (*Riley v. Hartford Ins. Co.*, 2 Conn. 368).

Life policies have been regarded as valued policies in some cases. *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268; *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 215, 14 Am. Rep. 414.

A policy may be both open and valued; that is to say, it may be a mixed policy. Thus, where insurance is on a vessel and freight, the policy may be valued as to the vessel and open as to the freight (*Riley v. Hartford Ins. Co.*, 2 Conn. 368). So a policy covering a dwelling and household furniture may be valued as to the dwelling, but open as to the furniture (*Post v. Hampshire Mut. Fire Ins. Co.*, 12 Metc. [Mass.] 555, 46 Am. Dec. 702).

In some states statutes known as "valued policy laws" have been passed, the effect of which is to make a policy on real estate a valued policy in case of total loss. Thus, in Missouri, the statute⁹ provides that, in all actions on policies of fire insurance, the insurer shall not be permitted to deny that the property insured was worth, at the issuance of the policy, the full amount insured thereon. The Iowa statute¹⁰ makes the sum insured merely *prima facie* evidence of the value of the property, while in Ohio the statute¹¹ provides that the building insured shall be examined and the value thereof fixed by the insurer's agent, and that the value so determined by him shall be regarded as the insurable value of the property. The statutes of other states are more or less similar to these examples. As the effect of these statutes is discussed in briefs relating to the extent of the liability of the insurer, a merely general reference to them is deemed sufficient at this time.

(c) Same—Running policies.

Policies are sometimes issued, in which an aggregate amount of insurance is expressed, to cover specific risks to be thereafter indorsed on the policy. They contemplate successive insurances, and

⁹ Rev. St. 1899, § 7969.

¹⁰ Code 1897, § 1742.

¹¹ Bates' Ann. St. 1900, § 3643.

provide that the object of the policy may be from time to time defined, especially as to the subject of insurance, by additional statements or indorsements. These are known as "running policies."

Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; *Banco De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232.¹²

They were brought into use to enable merchants to insure their goods shipped at distant ports when it is impossible for them to know the precise quantity or character of the goods or the particular ship in which they were shipped, and thus unable to describe accurately or particularly the subject of insurance. They are an apparent exception to the general rule that the property insured must be specified in the policy (*Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7). But these policies generally, if not universally, require that the risk shall be declared or reported to the underwriter as soon as known to the assured (*Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524). Strictly speaking, there are, under running policies, as many contracts of insurance as there are indorsements on the policy of separate shipments of goods (*State v. Williams*, 46 La. Ann. 922, 15 South. 290).

As the value of the property covered by these policies is seldom fixed, as between the parties, running policies are usually open policies, as distinguished from valued policies. This has led to some confusion in terms, in that the policies are designated as "open policies," when "running policies" are meant, and, on the other hand, policies have been designated as "running policies" when policies open as to value are intended (*Corporation of London Assurance v. Paterson*, 106 Ga. 538, 32 S. E. 650). The better use of the two terms would seem to be to confine the term "open" to those policies which are not valued, and designate as "running" only those policies which are open as to the risk; for it must be remembered that a running policy may be a valued policy (*Schaefer v. Baltimore Marine Insurance Co.*, 33 Md. 109). The confusion that may result from an indiscriminate use of these terms is illustrated in *Howes v. Union Insurance Co.*, 16 La. Ann. 235.

The term "running policy" has no reference to the duration of the risk. *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777.

¹² See Civ. Code Cal. 1903, § 2597; Mont. § 3461; Rev. Codes N. D. 1899, Civ. Code Ga. 1895, § 2129; Civ. Code § 4498; Civ. Code, S. D. 1903, § 1848.

(2) Same—Blanket, floating, and specific policies.

It is often important, especially in apportioning the loss between co-insurers, to distinguish the policies as blanket or specific policies. A policy covering several different articles or classes of property in a lump sum is known as a "blanket policy" (*American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73, 49 Atl. 738). So a policy by which all merchandise belonging to the insured should be insured from the moment it became their property until 48 hours after the discharge from the steamer was a "blanket policy" (*Peabody v. Liverpool & London & Globe Ins. Co.*, 171 Mass. 114, 50 N. E. 526). Policies covering several different articles, but limiting the insurer's liability to a fixed sum on each separate article, are called "specific policies" (*American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73, 49 Atl. 738). And where the policy covers specific articles, designated by name or specific marks, or described as located in a specific place, such as a designated warehouse, it is a "specific," as distinguished from a "blanket," policy.

United Underwriters' Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 55 Ill. App. 329. A policy covering a specified number of bales of cotton, deposited in a warehouse, for which a numbered receipt is given, the number of the receipt being indorsed also on the policy, is specific. *Hough v. People's Fire Ins. Co.*, 36 Md. 398.

The distinction between specific and blanket policies is well illustrated in *Schmaelzle v. London & L. Fire Ins. Co.*, 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233, where it is said that a policy insuring building, machinery, and stock as a whole, without distributing the amount of insurance among the several items, is a blanket or compound policy. If the amount is distributed among the several items, a specified amount to each item, the policy is specific, though it covers the whole property. The distinction lies in the fact that it is distributive.

Very similar to blanket policies, so called, are what are known as "floating" policies. In fact, the terms are to a certain extent interchangeable, as in the case of policies issued to factors or warehousemen, intended only to cover the margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge (*Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868). There are, therefore, two kinds of floating policies—one of which does not attach at all to goods covered by specific

insurance, and the other of which insures goods covered by specific insurance for the excess in value above the amount of the specific insurance (*Peabody v. Liverpool & London & Globe Ins. Co.*, 171 Mass. 114, 50 N. E. 526). As said in *Fairchild v. Liverpool & London Fire & Life Ins. Co.*, 51 N. Y. 65, a floating policy is intended to cover property or value which cannot well be covered by specific insurance, from the circumstance that it is changing in quantity or location. The ordinary purpose of such a policy is to supplement specific insurances and to cover values not covered by them. The insured property may sometimes be in one warehouse and sometimes in another, and sometimes on wharves or in transitu over the streets, and sometimes above the specific insurances and sometimes under them in value. Hence the necessity for a floating policy, to attach to the property wherever it might be, and in all cases where it happened to exceed the specific insurances. So, too, a policy covering a stock of goods which "during the continuance of the policy might be in store," since it applies to a constantly changing stock of goods, is in all essentials a floating or shifting policy.

Hooper v. Hudson River Fire Ins. Co., 17 N. Y. 425; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337.

(g) Same—Voyage and time policies.

Policies of marine insurance are distinguished as voyage or as time policies. A voyage policy is one in which the limits of the risk are designated in the policy by specifying a certain place at which the voyage is to begin, called the "terminus a quo," and another at which it is to end, called the "terminus ad quem." Usually the voyage must follow the course generally taken by vessels between such termini, and, though this course is not set out or described in the policy, it is as binding on the insured as if it were actually detailed. A voluntary variation from the prescribed course is a deviation terminating the policy as an abandonment of the voyage insured (*Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455). A voyage policy is not, however, necessarily on a single voyage. It may cover several separate and distinct voyages, and still be a voyage policy. (*Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. [Md.] 293, 28 Am. Dec. 319.)

A time policy is one granting insurance from a specified date until another specified date, as, for instance, from January 1, 1901, to January 1, 1902, or for a period of five years from July 1, 1900. It insures no specific voyage, but covers any voyage within the pre-

scribed time. It is of the nature of a policy on time that it limits the vessel to no geographical track, and deviation is therefore not predicable of it. (*Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25.)

There is another class of policies, besides voyage and time policies, which partake of the nature of both, which may be called "mixed policies," as "at and from A. to B. for six months," or "at and from Liverpool to New York from January 1, 1847, to January 1, 1848." In a voyage policy there is usually no reference to the time when a risk commences or terminates. On the other hand, in a time policy, the termini of the risk are the day and hour specified when the insurance commences and the day and hour when it terminates. And it is unusual that a time policy should describe any particular voyage, but, if a policy for a specified period of time does recite that it is at and from a certain port, it is nevertheless a time policy, and not a voyage policy.

Grousset v. Sea Insurance Co., 24 Wend. (N. Y.) 209. This view of these policies is founded on the decision in *Manly v. United Marine & Fire Ins. Co.*, 9 Mass. 85, 6 Am. Dec. 40, and *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 82 Am. Dec. 220.

These mixed policies agree with time policies in this: that the underwriter cannot be liable for any loss unless it occurred within the limits of the time specified in the policy; and, on the other hand, they are so far similar to voyage policies that the ship must have originally sailed on the voyage prescribed in the policy, and the underwriter will not be liable for any loss, though incurred within the limits of the time, unless the ship at the time of the occurrence be sailing on the prescribed course between the termini of the voyage (*Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455).

(h) Same—Life policies.

There are numerous kinds or forms of life policies, devised to meet competition between the companies and to attract purchasers. All of these, however, fall within a few well-recognized general classes. The common form is that known as the "regular" or "straight" life policy, under the terms of which the insured is required to pay a certain fixed premium annually throughout life. Life insurance is not, however, necessarily insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the insured shall arrive at a certain age (*Briggs v. McCullough*, 36 Cal. 542). Policies of this character are known as "term

policies." A policy may be a joint life policy, under which there is an agreement that the premium shall be paid during the joint lives of the persons insured, the policy maturing and becoming payable on the death of any one of those jointly insured. A survivorship policy is one that is payable upon the death of the survivor of several joint lives (*Universal Life Ins. Co. v. Bachus*, 51 Md. 28).

A policy for the full term of life may, however, provide that the premiums shall be paid only for 10 years or 20 years, as the case may be. These are known as "ten payment" or "twenty payment" life policies, and at the expiration of the period the policy becomes a "paid-up" policy. (*Moses v. Brooklyn Life Ins. Co.*, 50 Ga. 196.)

Recent forms of policies, known as "nonforfeitable," are policies under which, after a certain number of years, on default in the payment of premiums, the insurer issues a paid-up policy for such proportion of the amount originally insured as the premiums received will pay for. *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; *McDonnell v. Alabama Gold Life Ins. Co.*, 82 Ala. 401, 5 South. 120; *Hull v. Northwestern Mut. Life Ins. Co.*, 39 Wis. 397.

Though there are marked and important differences between them, a certificate of membership in a mutual benefit association is essentially a policy of life insurance (*Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192, 10 N. E. 79).

Some life policies are contracts of investment, as well as of insurance, and in addition to the insurance feature provide that the insured shall pay the premium annually for a stated number of years, and, if he survives that number of years, he receives the face of the policy. Such contracts are known as "endowment policies."

Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669; *State ex rel. Clapp v. Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028; *Briggs v. McCullough*, 36 Cal. 542.

A participating policy is one in which the insured shares in the profits arising from the premiums paid by himself and all others belonging to his class (*Fry v. Provident Sav. Life Assur. Soc.* [Tenn. Ch. App] 38 S. W. 116). A tontine policy is one in which the insured participates in the dividends, but, in case of death before the period fixed in the policy, known as the tontine period, derives no benefit from the dividends, which are divided only among the survivors in the particular class to which the policy holder belongs. If the survivors share in the reserves of lapsed policies, the

policy is a full tontine. If only the dividends are shared, the policy is a semitontine.

For an illustration of a tontine policy, reference may be made to *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433.

As, in the case of life insurance, the amount of loss is not determinable by any known standard, proof of the amount of loss is dispensed with, and life policies may be regarded as valued policies.

Stockhold v. Canton Masonic Mut. Benefit Soc., 21 N. E. 794, 129 Ill. 440; *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 215, 14 Am. Rep. 414; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.) 268.

It was, however, remarked in the *Miller Case* that a policy held by a creditor on the life of his debtor is not necessarily a valued policy, as it may be required that the creditor shall prove the extent of his interest in order to recover

(1) Form and contents of policy.

No precise form of words is necessary to constitute a policy of insurance (*Scriba v. Insurance Co. of North America*, 21 Fed. Cas. 874), and, indeed, it was formerly a common complaint that policies were very loosely drawn (*Maryland Ins. Co. v. Woods*, 6 Cranch, 45, 3 L. Ed. 143), the most informal instruments, which were brought into the courts (*Yeaton v. Fry*, 5 Cranch, 342, 3 L. Ed. 117).

But it is necessary that the essential elements of a contract should be set out in the policy. It must at least specify the parties, the subject-matter insured, the rate, the risk, and the duration of the risk.

Cleveland v. Union Ins. Co., 8 Mass. 308; *White v. Hudson River Ins. Co.*, 7 How. Prac. (N. Y.) 341; *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777. But see *Petrie v. Phenix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380, affirming 57 Hun, 591, 11 N. Y. Supp. 188.¹⁸

An error in naming the parties will not defeat the rights of the one actually intended to be insured (*Akin v. Liverpool & London & Globe Ins. Co.*, 1 Fed. Cas. 264). So, an error in naming the beneficiary cannot be taken advantage of by the insurer (*Phillips*

¹⁸ Civ. Code Mont. § 3451.

v. Union Central Life Ins. Co. [C. C.] 101 Fed. 33). It is no defense to a policy that the beneficiaries' names were inserted by the insurer's agent after the death of assured, where they were omitted by the fault of the insurer at the time the policy was issued (*International Order Knights and Daughters of Tabor v. Boswell* [Tex. Civ. App.] 48 S. W. 1108).

A policy of insurance, though executed without any written date, is nevertheless valid, so long as the duration of the risk is fixed.

Lee v. Massachusetts Fire & Marine Ins. Co., 6 Mass. 208; *Imboden v. Detroit Fire & Marine Ins. Co.*, 31 Mo. App. 321. A discrepancy between the date of the policy and the application, when the latter calls for insurance from its date, cannot be taken advantage of by the company. *Porter v. Mutual Life Ins. Co.*, 41 Atl. 970, 70 Vt. 504. But see *Germania Fire Ins. Co. v. Lieberman*, 58 Ill. 117.

Mere clerical errors in a policy are immaterial (*Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440), such as an error in spelling the name of the insured (*Jones v. Methvin*, 97 Ga. 449, 25 S. E. 318). So, an indorsement stating in figures an amount different from that written on the face of the policy will not affect the contract (*Bushnell v. Farmers' Mut. Ins. Co.*, 91 Mo. App. 523).

An error in the copy of a policy as to the number, or in the marginal figures indicating the amount, the true amount being stated in the body of the copy, is immaterial. *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100.

The policy is not defective, because all the essential elements do not appear on its face, if they appear on the back and are duly signed by the necessary officers (*Bushnell v. Farmers' Mut. Ins. Co.*, 91 Mo. App. 523). Where a policy appears as one large sheet embracing four pages, on one sheet of which is the main contract, on another printed conditions, on another a copy of the application and certain agreements of the applicant, and on the fourth the general indorsement that the folded paper contains a life insurance policy, the main contract referring in terms to the conditions and to the application, the entire sheet and the contents of the same will be considered the policy (*Grevenig v. Washington Life Ins. Co.*, 36 South. 790, 112 La. 879). But a mere indorsement on the back of a policy of the name and place of business of the company by which it is issued forms no part of the policy (*Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416).

It is provided by statute in some states that every mutual company shall embody the word "mutual" in its title, which shall appear on

the first page of every policy; and every company doing business as a cash stock company shall, upon the face of its policies, express in some suitable manner that such policies were issued by stock companies.¹⁴

In the absence of any statute specifying the form of insurance policies, the company may insert therein any conditions it may see fit, so long as they do not contravene general principles of law (*Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114). As a general rule, a company is bound in good faith to furnish a policy in the usual form and with the usual clauses (*Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708, 48 Am. Dec. 465); and, in the absence of proof to the contrary, it will be presumed that the policy issued contained the usual clauses and conditions.

Lee v. Union Central Life Ins. Co. (Ky.) 56 S. W. 724; *Agricultural Ins. Co. v. Fritz*, 61 N. J. Law, 211, 39 Atl. 910.

It is undoubtedly the general rule that the insured is not bound to accept a policy that does not conform to the application (*Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277). But when application is made for insurance to the amount of \$25,000, and the amount was divided among several policies, the fact that one policy for the whole amount was not issued, instead of separate policies, is not such a departure from the application as will relieve the applicant from agreements made therein (*Home Life Ins. Co. v. Myers*, 112 Fed. 846, 50 C. C. A. 544). It has been held in Indiana (*Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495) that where the applicant applied for insurance on certain conditions, which were in direct conflict with the conditions of the policy issued under and pursuant to the application, it must be assumed that the conditions in the policy were waived by the company when it issued the policy. The rule adopted by the Massachusetts court is to the contrary, and it has been held in that jurisdiction that an insurance policy is binding when delivered, though it contains terms and conditions not included in the application, unless they are unusual or extraordinary, as the application is deemed to be for such insurance as, in view of the particulars submitted, the com-

¹⁴ *Consol. St. Neb.* 1891, § 399; *Comp. Laws N. M.* 1884, § 1472; *Rev. St. Ohio* 1890, § 3653.

pany sells, and with which the purchaser is presumed to be acquainted (*Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516). So it has been held, in Kentucky (*Western Ins. Co. v. Meuth*, 10 Ky. Law Rep. 718), that an accepted application for insurance imports an agreement to issue the policy in general use by the insurer in execution of the contract, and the provisions of this policy control the right of recovery in case no policy is issued.

(j) Standard policies.

The rapid growth of the business of fire insurance made manifest at a comparatively early day the evils consequent on the use of numerous different forms of policies. In a number of states the advisability of securing uniformity in contracts of insurance, by whatever insurer made, was recognized, with the result that laws were passed providing for a standard form of policy. The first standard policy was that adopted by Massachusetts in 1873, the present form being adopted in 1886. Other states followed the example of Massachusetts, and there are now standard policy laws in 16 states.¹⁵ The forms are substantially the same in New York, Connecticut, Louisiana, Maine, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and South Dakota; and there are very minor differences in the forms adopted in Michigan, Wisconsin, Maine, Massachusetts, Minnesota, and New Hampshire. In some of these states, as, for instance, Louisiana, North Carolina, and South Dakota, the statute expressly provides that the New York standard form shall be used. In the other states the standard form was prepared by the legislature or by a commission appointed for that purpose. In the states which have no standard policy law, the New York standard form is in general use.

The object of the statute prescribing a standard policy is to have but one form of policy, instead of having a different form for each company doing business. As said in *Bourgeois v. Northwestern*

¹⁵ Gen. St. Conn. 1902, § 3497 et seq.; Laws La. 1898, Act No. 105, p. 151, § 22; Laws Me. 1895, c. 18, § 1; Rev. Laws Mass. 1902, c. 118, § 60; Comp. Laws Mich. 1897, § 5170 et seq.; Gen. Laws Minn. 1895, c. 175, § 53; Rev. St. Mo. 1899, § 7979; Pub. St. N. H. 1901, c. 170; Laws N. J. 1902, c. 134, § 77;

Laws N. Y. 1892, c. 690, § 121; Pub. Laws N. C. 1893, c. 299, § 6; Rev. Codes N. D. 1899, § 4608; P. & L. Dig. Pa. p. 2384, par. 95 et seq.; Gen. Laws R. I. c. 183, § 4 et seq.; Ann. St. S. D. 1901, § 4025 et seq.; Sanb. & B. Ann. St. Wis. 1898, § 1941-42 et seq.

Nat. Insurance Co., 86 Wis. 609, 57 N. W. 348, when one contracts for insurance, he knows that he is contracting for a standard policy, and nothing else. The law was not passed solely for the protection of the insured. It provides in clear and distinct terms that other conditions may be printed or written upon or attached to the policy, but that they shall not be inconsistent with nor a waiver of any of the provisions and conditions of the standard policy. The intent plainly was and is that, so far as the conditions and provisions of the standard policy go, they shall govern, and that they shall not be omitted, changed, or waived in any manner. Other provisions not conflicting with them may be added in writing or printing, but the conditions of the standard policy itself must remain unimpaired. (*Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752.)

In nearly all the states having a standard policy it is provided that the use of any other form shall be a misdemeanor, or shall cause a forfeiture of the license to do business in the state. The policy is, however, binding on the company. The standard policy laws usually provide that such alterations in the terms may be made as may be necessary in the case of mutual companies (*Commonwealth Mut. Fire Ins. Co. v. Edwards*, 32 S. E. 404, 124 N. C. 116), or except such companies from the operation of the law altogether (*Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 81, 78 N. W. 165).

The right of the legislature to prescribe the form of contract which an insurance company may make may be sustained under the general power to regulate corporations (*Opinion of the Justices*, 97 Me. 590, 55 Atl. 828). It has, however, been held in several of the states that a standard policy law which delegates to a commissioner the power to prescribe a form of standard policy is unconstitutional. Thus, in *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400, the Minnesota statute of 1889 (Gen. Laws 1889, c. 217), delegating to the insurance commissioner and attorney general power to prescribe a standard policy and making the use of such form compulsory, was declared invalid as an attempt to delegate legislative power, and this, notwithstanding the provision of the statute, that "such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known," left no discretionary powers vested in the officers named.

In 1891 the Legislature of Wisconsin passed an act to provide for a uniform policy of insurance (Laws 1891, c. 195), requiring the insurance commissioner to prepare a printed form of a contract or policy of insurance, which should be known as the Wisconsin standard policy, and to be as near as the same could be made applicable to the type and form of the New York standard policy. The validity of the form of policy thus prepared was questioned in *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112, and it was held to be invalid by the court, on the ground that the Legislature could not, under the Constitution, delegate to the commissioner the power to prescribe such a form of policy; such power being vested exclusively in the Legislature. To obviate such objection the Legislature in 1895 passed an act wherein and whereby the Legislature itself prescribed a form of policy. That act made no change in the form prepared and filed by the insurance commissioner in 1891, but simply gave vitality and force to such form by direct action of the Legislature. The act does not undertake to revise the law on the subject of insurance, but merely to prescribe one form of policy, which is to be uniform, and all other forms of fire insurance policies, with certain exceptions, are thereby forbidden (*Vorous v. Phenix Ins. Co.*, 102 Wis. 76, 78 N. W. 162).

Reference may also be made to *Goss v. Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. 1036; *Flatley v. Phenix Ins. Co.*, 95 Wis. 618, 70 N. W. 828; *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160.

The standard policy law of Pennsylvania was declared unconstitutional (*O'Neil v. American Fire Ins. Co.*, 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650), on grounds similar to those urged in the Wisconsin cases; and so, too, was the standard policy law of South Dakota (*Phenix Ins. Co. v. Perkins* [S. D.] 101 N. W. 1110). The validity of the standard policy law of Missouri was called in question in *Business Men's League v. Waddill*, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501, which was a suit to enjoin the superintendent of the insurance department from approving a uniform policy of insurance, to be used to the exclusion of all other forms by the fire insurance companies doing business in the state; this duty being imposed on the superintendent by Act March 18, 1895. The basis of the suit was the allegation that the act was unconstitutional, as an attempt to delegate legislative powers; but the court held that the constitutionality of the act could not be decided in this manner, and that the suit could not be maintained.

The fact that the standard policy is prescribed by statute does not change its character as a contract (*Chichester v. New Hampshire Fire Ins. Co.*, 74 Conn. 510, 51 Atl. 545). It is put forward by the Legislature as a contract, to be entered into by the parties and to derive its validity from their consent (*Reed v. Washington Fire & Marine Ins. Co.*, 138 Mass. 572). But it is at the same time more than a contract, in that it is statutory law (*Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752). Either as a statute or as a contract, it is equally binding on the parties.

For further discussion of the nature of the standard policy, reference may be made to *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400; *Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; *Bourgeois v. Northwestern Nat. Insurance Co.*, 86 Wis. 606, 57 N. W. 347; *Flatley v. Phenix Ins. Co.*, 95 Wis. 618, 70 N. W. 828; *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160; *Temple v. Niagara Fire Ins. Co.*, 109 Wis. 372, 85 N. W. 361.

A standard policy of insurance containing the usual conditions is a compliance with a parol agreement by an insurance agent on payment of premium to write a policy (*Young v. St. Paul Fire & Marine Ins. Co.*, 47 S. E. 681, 68 S. C. 387).

While the form of marine policy established at Lloyd's has been recognized as the standard in Great Britain, no standard form has been adopted in the United States. The necessities of the business of life insurance demand great variation in the forms used, and, though the tendency is to simplify the policy as much as possible, inserting only such conditions as are imperatively necessary, no effort has been made to prepare a standard form of life or accident policy.

(k) Size and style of type used in policies.

Though it was said, in *Whitehouse v. Travelers' Ins. Co.*, 29 Fed. Cas. 1038, that an intention to deceive on the part of an insurance company cannot be presumed from the fact that some portions of the policy are printed in smaller type than other portions, the attention of the insured being called to such portions of the policy in other provisions, the courts have severely criticised the printing of prohibitive clauses in type too small to attract the attention of the insured (*Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 South. 899), and have been disposed to regard them, as said in *Reaper*

City Ins. Co. v. Jones, 62 Ill. 458, as traps for the insured.¹⁶ The Supreme Court of the United States, in *Insurance Co. v. Slaughter*, 79 U. S. 404, regarded the custom unfavorably; and it was criticised, also, in *Kelley v. Home Ins. Co.*, 14 Fed. Cas. 243.

See, also, *Girard Life Ins., Annuity & Trust Co. v. Mutual Life Ins. Co.*, 97 Pa. 15; *Mudd v. German Ins. Co. (Ky.)* 56 S. W. 977; *Sun Mut. Ins. Co. v. Crist (Ky.)* 39 S. W. 837; *Bassell v. American Fire Ins. Co.*, 2 Fed. Cas. 1007; *Minnock v. Eureka Fire & Marine Ins. Co.*, 90 Mich. 236, 51 N. W. 367—where the use of small type is commented on.

These views as to the methods pursued by insurance companies in preparing their policy forms undoubtedly influenced the framers of the standard policy laws to provide that the policy itself and all conditions or riders attached thereto, if not written, should be printed in type not smaller than long primer, or at least to make some provision regulating the size of type to be used. Even when long primer is not designated, it is usually provided that the same size and style of type shall be used as is used in the standard form on file in the office of the secretary of state or insurance commissioner.

Virginia, though having no standard policy law, has declared by statute (Code 1887, § 3252) that no failure to perform any condition of the policy or violation of any restrictive provision thereof shall be a defense, unless it appears that such condition or provision is printed in type as large or larger than that commonly known as long primer, or is written with pen and ink in and upon the policy. The object of the statute is recognized to be the protection of applicants for insurance who are inexperienced and unacquainted with the stipulations usual in policies (*Sulphur Mines Co. v. Phenix Ins. Co. of Brooklyn*, 94 Va. 355, 26 S. E. 856). The constitutionality of the statute was upheld in *Dupuy v. Delaware Ins. Co. (C. C.)* 63 Fed. 680. It applies to the application, when that is made a part of the policy (*Burruss v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49), so that restrictive conditions therein will be inoperative unless printed in the prescribed manner. So, too, the whole condition must be in type of the prescribed size, or in writing, and it is not sufficient that a sentence or clause thereof is in

¹⁶ As to the use of small type in telegraph blanks, express receipts, etc., see *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Blossom v.*

Dodd, 43 N. Y. 264, 3 Am. Rep. 701; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575.

conformity with the statute (*National Life Ass'n of Hartford v. Berkeley*, 34 S. E. 469, 97 Va. 571). The statute applies, however, only to conditions imposing on the insured the performance or non-performance of some act, and not to conditions which are in effect exceptions of risk (*Cline v. Western Assur. Co.*, 44 S. E. 700, 101 Va. 496).

(1) Contracts of mutual benefit associations and changes therein.

In the case of ordinary life insurance the policy contains the whole contract, and is conclusive on the rights of the parties. Neither the insurer nor the insured has any power to change the contract without the consent of the other. The status of certificates of membership in mutual benefit associations is materially different. While such certificates are in legal contemplation policies of insurance, and to be construed as such (*Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235), they are manifestly different from policies in some respects. They are not usually complete expressions of the contract, but the contract is to be found in its complete form only by reading the certificate in connection with the charter, constitution, and by-laws of the association (*Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192, 10 N. E. 79). They are, therefore, subject to change at the instance of the member under the laws of the association (*Brown v. Grand Lodge A. O. U. W.*, 80 Iowa, 287, 45 N. W. 884, 20 Am. St. Rep. 420), and may provide that the member shall be bound by changes in the by-laws or constitution of the association (*Fullenwider v. Supreme Council of Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239). Similar provisions usually exist in the contracts of mutual companies (*Borgards v. Farmers' Mut. Ins. Co.*, 44 N. W. 856, 79 Mich. 440).

The right of the association to change the terms of its contract is, therefore, merely a question of the extent to which a member of the association is bound by subsequently enacted by-laws or changes in the constitution of the society. This question is discussed in a subsequent brief,¹⁷ and it is therefore deemed sufficient to refer here to a few of the leading cases in which the controlling principles are laid down. The question as to the right to change the contract was very fully discussed in *Supreme Commandery of Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332,

¹⁷ See post, p. 703.

where the court said that it cannot be claimed that there is an inherent power of the association by the adoption of a by-law to work a material change in its existing contracts, so as to relieve the association from an existing liability. The power is derived from and depends upon the stipulations in the contract. The parties may contract with reference to laws of future enactment, and agree to be bound and affected by them as they would be bound and affected if such laws existed. They may consent that such laws enter into and form parts of their contracts, modifying or varying them. These stipulations imply no more than that the insured shall observe the requirements of the association, such as are reasonable and intended to promote the harmony of the association and the purpose and object for which it was formed. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice. But subsequent or existing by-laws are valid only when consistent with the charter and confined to the nature and objects of the association. While a subsequent law, because of the assent of the member, may add new terms or conditions to the certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate, or the deprivation of all rights under it, would be of any force.

These principles are also supported by *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pac. 1125; *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924; *Fullenwider v. Supreme Council of Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Hobbs v. Iowa Mutual Benefit Ass'n*, 82 Iowa, 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1208, 20 South. 712, 55 Am. St. Rep. 310; *Startling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; *Grand Lodge A. O. U. W. v. Sater*, 44 Mo. App. 445; *State ex rel. Schrempp v. Grand Lodge A. O. U. W.*, 70 Mo. App. 456; *Weiler v. Equitable Aid Union*, 92 Hun, 277, 36 N. Y. Supp. 734; *Graftstrom v. Frost Council*, No. 21, 43 N. Y. Supp. 266, 19 Misc. Rep. 180; *Farmers' Loan & Trust Co. v. Aberle*, 46 N. Y. Supp. 10, 19 App. Div. 79; *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; *Becker v. Berlin Benefit Society*, 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624.

See, also, the following cases relating to policies in mutual fire companies: *Montgomery County Farmers' Mut. Ins. Co. v. Milner*, 90

Iowa, 685, 57 N. W. 612; *Morris v. Farmers' Mut. Fire Ins. Co.*, 63 Minn. 420, 65 N. W. 655; *Stewart v. Lee Mut. Fire Ins. Ass'n*, 64 Miss. 499, 1 South. 743; *Fire Insurance Co. of Northampton County v. Connor*, 17 Pa. 136; *McKean v. Biddle*, 181 Pa. 361, 37 Atl. 528; *Borgards v. Farmers' Mut. Ins. Co.*, 44 N. W. 856, 79 N. W. 440.

11. BINDING SLIPS, RECEIPTS, OR MEMORANDA.

- (a) Validity of binding slips, receipts, or memoranda.
- (b) Nature and requisites.
- (c) Conditions embraced in contract—Payment of premium.
- (d) Power of agents.
- (e) Pleading and practice.

(a) Validity of binding slips, receipts, or memoranda.

There is another class of insurance contracts which resemble the oral contracts in many respects, though they are evidenced by writings. These contracts are usually for a short time, while negotiations for the policy are pending, and are effected by what are known as binding slips, or receipts, and memoranda. Some of the earlier cases proceeded on the theory that the binding slip was merely an agreement to issue the policy.

Such appears to be the rule in *Delaware State Fire & Marine Ins. Co. v. Shaw*, 54 Md. 546; *Lipman v. Niagara Fire Ins. Co.*, 1 N. Y. Supp. 384, 48 Hun. 503; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305.

The same principle was asserted in *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645, in regard to a binding receipt. It was there said, that receipts of that nature are as binding as policies; the only difference being that suits thereon must be brought in equity. But, in *Kerr v. Union Marine Ins. Co.* (D. C.) 124 Fed. 835, the court says that it has long since been established that the binding slip is itself a contract of insurance.

(b) Nature and requisites.

It is, of course, essential to a contract of this kind, as well as to an ordinary contract of insurance, that there be a meeting of the minds as to the terms of the contract; but, as said in *Smith & Wallace Co. v. Prussian National Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458, some of the terms may be understood, and need not be expressly agreed upon. They may be inferred from former dealings, or

custom or usage. A binding receipt, good for thirty days, which stated that the insured was to have a renewal policy for three years, was, in *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. 486, held to entitle him to recover for a loss occurring after the expiration of the thirty days, as he had not been notified of the insurer's refusal to renew and the premium had not been returned. In a separate concurring opinion, Bunn, C. J., states that he regarded the insurer bound to renew if the conditions were the same as when the original policy was executed. In *Fitton v. Phoenix Assur. Co.* (C. C.) 25 Fed. 880, a binding slip named certain companies as bound for a gross amount. A loss occurred before any policies were delivered. It was held that the companies designated were bound for an equal proportion of the loss, though a different apportionment had been made in policies written out by the insurance agents, but not delivered. A binding slip continuing an insurance for another year was sustained as valid in *Van Tassel v. Greenwich Ins. Co.*, 25 N. Y. Supp. 301, 72 Hun, 141; *Id.*, 51 N. Y. Supp. 79, 28 App. Div. 163; *Id.*, 151 N. Y. 130, 45 N. E. 365; but, on a subsequent appeal (*Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413, 55 N. E. 936), it was held that, as no consideration was mentioned in the slip, it was an incomplete contract subject to explanation by parol evidence. An indorsement on an application that it was "binding," with the agent's initial thereunder, was held a valid insurance in *Kerr v. Union Marine Ins. Co.* (D. C.) 124 Fed. 835. So, in *Belt v. American Cent. Ins. Co.*, 29 App. Div. 546, 53 N. Y. Supp. 316, affirmed in 163 N. Y. 555, 57 N. E. 1104, a binding slip containing a memorandum of the terms "accepted" was held to constitute a present contract of insurance; and in *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93, an entry of a risk on an agent's binding book was held sufficient. A memorandum attached to the policy was, in *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169, held to show an insurance on additional property. In *Clark, Rosser & Co. v. Brand & Hammons*, 62 Ga. 23, an unsigned binding slip, which did not express the duration of the risk, was considered too vague and uncertain to be a contract under the statute¹ defining insurance as a contract of indemnity according to the terms thereof and requiring it to be in writing. It was held that the statute required the terms of the contract to be in writing.

A receipt for a premium on an application for life insurance,

¹ Code Ga. § 2794.

which distinctly states that no obligation is assumed by the insurer unless the application is accepted, is not a binding contract.

Todd v. Piedmont & Arlington Life Ins. Co., 34 La. Ann. 63; *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851; *Marks v. Hope Mutual Ins. Co.*, 117 Mass. 528. A similar principle appears, also, to be asserted in *Lawrence v. Griswold*, 30 Mich. 410, which was an action to recover the premium without a previous tender or delivery of the policy.

In *Pace v. Provident Sav. Life Ins. Soc.*, 113 Fed. 13, 51 C. C. A. 32, it was held that a binding receipt must be construed together with the application; but in *Cole v. Union Central Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201, a receipt wholly in writing was considered as controlling the application in regard to conflicting terms. In *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48, the application provided that it must be passed on by the home office, but the receipt given by the agent purported to bind the company until a policy was received. It was held that the receipt did not make a binding contract on the company to issue a policy, nor did it bind the company after the application was rejected. Whether or not the company was bound from the time of the giving of the receipt until the rejection of the application the court did not feel called upon to decide.

(c) Conditions embraced in contract—Payment of premium.

In the early case of *State Fire & Marine Ins. Co. v. Porter*, 3 Grant, Cas. (Pa.) 123, it was said that a contract contained in a memorandum and receipt for the premium would be assumed to be in conformity with the policy issued in the office where the memorandum was made. Similarly, it is stated, in *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, that a binding slip constitutes a contract of insurance, subject to the conditions contained in the ordinary policy in use by the company.

This principle is also asserted in *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921; *Home Ins. Co. v. Favorite*, 46 Ill. 286; *Hubbard & Spencer v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125.

In *Van Tassel v. Greenwich Ins. Co.*, 28 App. Div. 163, 51 N. Y. Supp. 79, it is said that, if a binding slip renews an existing policy, it is subject to the conditions of that particular policy; but, if it is an independent agreement, it is subject to the conditions of the

usual policy issued by the insurer. On a subsequent appeal, reported in 161 N. Y. 413, 55 N. E. 936, the majority of the court held the binding slip subject to conditions imposed by usage; but it is now settled by *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, that a binding slip is subject to the conditions in the standard policy. In *Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458, a promise to pay a premium was held a sufficient consideration for a binding slip. As the rate of premium had not been distinctly agreed upon when the loss occurred, the insured was considered bound to pay a reasonable rate for the protection afforded him.

(d) Power of agents.

A general agent of a foreign insurance company was, in *Cole v. Union Cent. Life Ins. Co. of Cincinnati*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201, held authorized to bind his company by a receipt which was at variance with the conditions in the policy which was to be issued. And a similar doctrine was asserted in *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush (Ky.) 430. If an agent has held himself out as having general authority, and this has been acquiesced in by the insurer, the latter will be bound by binders given by the agent.

Such is the doctrine of *Schlesinger v. Columbia Fire Ins. Co.*, 37 App. Div. 531, 56 N. Y. Supp. 37; and a similar rule appears to be asserted in *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

In *Shakman v. United States Credit Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, it was held that a soliciting agent had authority to issue binders, under Rev. St. Wis. 1878, § 1977, which makes a solicitor an agent for all intents and purposes. A life insurance agent had no authority to enter into contracts of insurance and issue binding receipts, unless specially authorized thereto, according to *Todd v. Piedmont & Arlington Life Ins. Co.*, 34 La. Ann. 63.

(e) Pleading and practice.

Admiralty has jurisdiction of an action on a binder, according to *Kerr v. Union Marine Ins. Co.* (D. C.) 124 Fed. 835, as a direct action at law will lie on the contract. In *Delaware State Fire & Marine Ins. Co. v. Shaw*, 54 Md. 546, it was held that an action could not be maintained directly on a certificate referring to the

policy for the terms and conditions, evidently on the old theory that the certificate only amounted to a contract for the policy. The return of void policies is not necessary to enable the insured to avoid a release executed on their delivery and maintain an action on a binding slip (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612). An action for half the amount of a binding slip was held (*Van Tassel v. Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365) not to amount to an election to treat the binding slip as canceled; the insurer having written the insured that, unless he consented to the reduction of the insurance to one-half, it would be canceled. *Home Ins. Co. v. Favorite*, 46 Ill. 263, was an action on a certificate designating a policy by number. As the insured did not demur to the insurer's plea setting up the conditions of the policy, but, instead, replied thereto, the insurer was held entitled to the admission of the blank copy of the policy. In *State Fire & Marine Ins. Co. v. Porter*, 3 Grant, Cas. (Pa.) 123, parol evidence was held inadmissible to show an agreement outside a memorandum limiting the risk usually insured against in policies issued by the insurer. As no consideration was expressed in the binding slip involved in *Underwood v. Greenwich Insurance Co.*, 161 N. Y. 413, 55 N. E. 936, parol evidence was held admissible to show a usage to the effect that binding slips were issued for temporary insurance, to be terminated by the rejection of an application, though the binder stated that it was for a year. On a subsequent appeal, reported in 54 App. Div. 386, 66 N. Y. Supp. 651, evidence was considered admissible to show that a letter written the insured's brokers was sufficient notice of cancellation, and was so treated by the insured, though it did not comply with the requirements of the said policy; and on another appeal, reported in 66 App. Div. 531, 73 N. Y. Supp. 251, it was held a question for the jury whether the binder was a temporary arrangement, and was so understood by the parties.

V. VALIDITY OF THE CONTRACT.

1. **Validity of the contract in general.**
 - (a) General principles.
 - (b) Validity dependent on considerations of public policy.
 - (c) Legality of object.
 - (d) Same—Property used in illegal business.
 - (e) Same—Nonpayment of privilege tax.
 - (f) Same—Insurance against carrier's liability.
 - (g) Same—Marine risks.
 - (h) Mistake and fraud in general.
 - (i) Fraud—Intent to commit suicide.
 - (j) Fraud of company or agent.
 - (k) Policy procured without the knowledge of insured.
 - (l) Alteration of application or policy.
2. **What law governs in determining the validity of the contract.**
 - (a) The general rule—Validity determined by the law of the place where the contract is made.
 - (b) Exceptions—Law of place of performance—Law of domicile of insurer.
 - (c) Contract valid where made is valid everywhere.
 - (d) Same—Modification of rule on considerations of public policy.
 - (e) Intent of parties.
 - (f) What is the place of contract—Approval of risk.
 - (g) Same—Delivery of policy.
 - (h) Same—Payment of premium.
 - (i) Same—Countersigning by agent.
 - (j) Same—Stipulations as to place of contract.
 - (k) Questions of practice.
3. **Limitations on the powers of insurers.**
 - (a) General limitations.
 - (b) Same—Mutual companies.
 - (c) Territorial limitations.
 - (d) Limitations as to character of property and extent of interest therein.
 - (e) Limitations as to amount of insurance.
 - (f) Life and accident companies.
 - (g) Limitations peculiar to mutual benefit associations.
 - (h) Same—Limitations as to age.
 - (i) Same—Power to write endowment policies.
 - (j) Same—Power to reinsure.
4. **Validity of policy and collateral contracts as affected by failure to comply with statutes regulating insurance companies.**
 - (a) General principles.
 - (b) Validity of contracts based on doctrine of estoppel.
 - (c) Validity of contracts under general laws.

4. **Validity of policy and collateral contracts as affected by failure to comply with statutes regulating insurance companies—(Cont'd).**
 - (d) **Validity of contracts when statute does not expressly declare them void.**
 - (e) **Same—Contracts valid notwithstanding prohibition of the statute.**
 - (f) **Contrary doctrine—Contracts void when business is prohibited and penalty provided.**
 - (g) **Right of insurer to recover money paid on policy or to enforce subrogation.**
 - (h) **Validity as dependent on place of contract.**
 - (i) **Questions of practice.**
5. **Right to insure in company not complying with the laws regulating insurance companies.**
 - (a) **Scope of discussion.**
 - (b) **The Pennsylvania rule—Commonwealth v. Biddle.**
 - (c) **The doctrine of the Hooper Case.**
 - (d) **Same—Dissenting opinion of Mr. Justice Harlan.**
 - (e) **The Louisiana Cases—State v. Williams.**
 - (f) **Same—The Allgeyer Case.**
 - (g) **Same—Comment on the Allgeyer Case.**
 - (h) **The Massachusetts rule—Commonwealth v. Nutting.**
 - (i) **The question in other states.**
 - (j) **Conclusion.**
6. **Estoppel and waiver as to defects and objections in general.**
 - (a) **In general.**
 - (b) **Estoppel by acts of agents or officers.**
 - (c) **Estoppel by receiving and retaining premium.**
 - (d) **Ratification by insurer.**
 - (e) **Estoppel of insured.**
 - (f) **Same—As to form and contents of policy.**
7. **Estoppel to plead ultra vires as to the insurance contract.**
 - (a) **Estoppel of insurer—Early doctrine.**
 - (b) **Same—Later doctrine.**
 - (c) **Same—Reception of benefits.**
 - (d) **Same—Insured's knowledge of limitation.**
 - (e) **Same—Character of ultra vires acts.**
 - (f) **Estoppel of insured.**
 - (g) **Questions of practice.**

1. VALIDITY OF THE CONTRACT IN GENERAL.

- (a) General principles.
- (b) Validity dependent on considerations of public policy.
- (c) Legality of object.
- (d) Same—Property used in illegal business.
- (e) Same—Nonpayment of privilege tax.
- (f) Same—Insurance against carrier's liability.
- (g) Same—Marine risks.
- (h) Mistake and fraud in general.
- (i) Fraud—Intent to commit suicide.
- (j) Fraud of company or agent.
- (k) Policy procured without the knowledge of insured.
- (l) Alteration of application or policy.

(a) General Principles.

The validity of a contract of insurance may be affected by a variety of circumstances occurring before, at the time of, or subsequent to the execution of the contract. These circumstances may affect the form, the execution, or the inducement to the contract. The present discussion is confined to those facts and circumstances which relate to the form and execution of the policy and the effect of fraud and mistake in general. Matters of inducement which are peculiar to the contract, such as false statements or concealment as to facts relating to the risk, are treated separately.

Generally speaking, the presumption is that a contract of insurance is valid (*Hale v. Life Indemnity & Investment Co.*, 65 Minn. 548, 68 N. W. 182). It does not affect the principle that the contract is unusual in its subject-matter (*Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38), or in the conditions under which it is to take effect, so long as no positive law is infringed (*Parker v. Bond*, 121 Ala. 529, 25 South. 898). A life policy provided for payment of its amount at issuance. Assured was to pay an agreed monthly premium for a fixed period, secured by mortgage. His death was to extinguish the mortgage, and failure to pay the premium gave insurer the option to collect either the premiums or the amount originally advanced, less the surrender value of the policy. It was held that the contract was not unenforceable, as an unconscionable agreement. (*United Security Life Insurance & Trust Co. v. Ritchey*, 40 Atl. 978, 187 Pa. 173.) Though a contract which is incapable of execution is, of course, invalid, a policy otherwise valid will not

be declared void merely because the means adopted to execute it are impracticable (*Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311, 55 Am. St. Rep. 326).

The mere fact that an insurance company was insolvent when it issued a policy does not make the policy void. *Ewing v. Coffman*, 12 Lea (Tenn.) 79; *Clark v. Brown*, 12 Gray (Mass.) 355.

The fact that a contract of insurance is invalid in part does not necessarily render it invalid as a whole, so long as the invalidity does not affect the entire risk.

Perry v. Mechanics' Mut. Ins. Co. (C. C.) 11 Fed. 478; *Thurber v. Royal Ins. Co.*, 2 Del. Term R. 14; *Agricultural Ins. Co. v. Montague*, 88 Mich. 548, 31 Am. Rep. 326.

Thus the existence of an invalid stipulation in the policy, restricting the right to sue on the contract, will not affect the insurer's contractual obligation to pay in the event of loss (*Knorr v. Bates*, 12 Misc. Rep. 395, 33 N. Y. Supp. 691).

Mere noncompliance by the agent with a rule of the company in the negotiation of the contract will not render the policy invalid, where it does not appear that the insured had knowledge of the requirement. *Phillips v. Union Cent. Life Ins. Co.* (C. C.) 101 Fed. 33.

Generally, contracts of insurance must conform to the statutes of the state where the policy is made or by which the company is incorporated (*Montgomery v. Whitbeck*, 96 N. W. 327, 12 N. D. 385). Nevertheless, the fact that certain stipulations in a policy contravene the statute will not render the whole contract void, but merely the particular stipulations will be disregarded.

Thompson v. Liverpool, London & Globe Ins. Co., 23 Fed. Cas. 1060; *Wheeler v. Mutual Reserve Fund Life Ass'n*, 102 Ill. App. 48; *Sachs v. London & L. Fire Ins. Co.*, 67 S. W. 23, 23 Ky. Law Rep. 2397; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; *Russell v. Milwaukee Mechanics' Ins. Co.*, 6 Ohio N. P. 325.

It has, however, been held, in Massachusetts (*Hewins v. London Assur. Corp.*, 184 Mass. 177, 68 N. E. 62), that a policy not conforming to the standard form is nevertheless binding on the insurer, though the company is liable to a fine for issuing such policy.

In most of the states having a standard form of policy, it is provided by statute that a policy not conforming to the standard form shall

be binding on the insurer, though the company is liable to some form of penalty for issuing such a policy. In other states the stipulations not conforming to the standard form are declared void.¹

The failure of the company to comply with statutes not directly affecting the contract, such as a provision requiring notice of the annual meetings to be given to every policy holder in a mutual company, does not affect the validity of the contract (*Dwinnell v. Felt*, 90 Minn. 9, 95 N. W. 579).

(b) Validity dependent on considerations of public policy.

The policy of insurance is a contract of indemnity, in which the parties have a legal right to insert any conditions and stipulations which they may deem reasonable or necessary, provided no principle of public policy is thereby contravened (*Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503). It is, of course, elementary that a policy which in any manner contravenes public policy is void (*Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770), and neither party to such contract is estopped to deny its legality (*Spare v. Home Mut. Ins. Co.* [C. C.] 15 Fed. 707). As it is against public policy for an agent to act for both his principal and an adverse party, an insurance agent, though having general authority to issue policies, cannot issue a policy to himself.

Zimmermann v. Dwelling House Ins. Co. of Boston, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698; *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 17 South. 282, 28 L. R. A. 220, 48 Am. St. Rep. 558.

It is not against public policy for the insurer to limit its liability by a provision that the policy shall be void if the insured is guilty of concealment or false representation (*Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149), or by conditions depending on the ownership of the property (*Dumas v. Insurance Co.*, 12 App. D. C. 245, 40 L. R. A. 358). A stipulation, in a certificate of membership in a benefit association organized by a railroad company, to which it contributes, and the expenses of which are paid by it, that, in case suit is brought against the railroad company by the member or by

¹ Gen. St. Conn. 1902, § 3499; Comp. Laws Mich. 1897, § 5184; Rev. St. Mass. 1902, c. 118, § 105; Laws Minn. 1895, c. 175, § 54; Laws N. J. 1902, c. 134, § 77; Pub. St. N. H. c. 170, § 1;

Laws N. Y. 1892, c. 690, § 121 (Insurance Law); Laws N. C. 1899, c. 54, § 44; P. & L. Dig. Pa. 1894, "Insurance," par. 98; Gen. Laws R. I. 1896, c. 183, § 6; Ann. St. S. D. 1901, § 4029.

his representatives to recover for injuries or death, and it is prosecuted to judgment or compromised, recovery under the certificate shall be precluded, is not against public policy (*Donald v. Chicago, B. & Q. Ry. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492).

Nor is a stipulation in the certificate that acceptance of the benefit shall release the railroad company from liability. *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. 854, 163 Pa. 127; *Lease v. Pennsylvania Co.*, 37 N. E. 423, 10 Ind. App. 47.

A condition limiting the liability under a life policy in case of suicide is not against public policy (*Northwestern Mut. Ins. Co. v. Churchill*, 105 Ill. App. 159). So a provision in a beneficiary certificate that no time of absence or disappearances on the part of the member, without proof of actual death, shall entitle his beneficiary to recover, is not invalid, as repugnant to law or against public policy, though setting aside the rule of evidence as to presumption of death from absence for seven years (*Kelly v. Supreme Council of Catholic Mut. Ben. Ass'n*, 61 N. Y. Supp. 394, 46 App. Div. 79).

On the other hand, a condition in an accident policy which avoids liability for injuries sustained by the insured while performing the necessary acts of his classified occupation will not be sustained (*Richards v. Travelers' Ins.* [S. D.] 100 N. W. 428).

A policy of insurance, stipulating that no dividend shall be apportioned or paid before the end of the accumulation period, is not violative of Hurd's Rev. St. 1899, c. 38, § 131, in respect to gaming contracts, on the ground that by the provision as to the accumulation period each policy holder bets with all the others that he will survive such period, since section 134 directs that the prior sections shall not be so construed as to prohibit or in any way affect any insurance made in good faith for the security or indemnity of the party insured. *Rothschild v. New York Life Ins. Co.*, 97 Ill. App. 547.

(c) Legality of object.

Reinsurance is a valid contract at common law, in fire as well as marine cases, and is not against public policy (*New York Bowery Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. [N. Y.] 359). The insurance of owners, lessees, or tenants against loss of life or damage to health or property caused by imperfect plumbing, bursting pipes or leaks, is not contrary to public policy or good morals (*People v. Rosendale*, 5 Misc. Rep. 378, 25 N. Y. Supp. 769). A contract guarantying the honesty of employes is not void as against public policy (*Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464). Nor is a con-

tract to indemnify against loss by the insolvency of debtors (*Hayne v. Metropolitan Trust Co.*, 67 Minn. 245, 69 N. W. 916). A contract to insure the performance of a contract is valid (*Samuels v. Fidelity & Casualty Co.*, 49 Hun, 122, 1 N. Y. Supp. 850). But where an accused secures bail in the person of his prosecutor, a contract insuring the bail against loss from a forfeiture of the recognizance is against public policy and void (*Mayne v. Fidelity & Deposit Co. of Maryland*, 198 Pa. 490, 48 Atl. 469).

A policy in express terms permitting a recovery in case of conviction of insured of a capital crime by a court of competent jurisdiction, and execution pursuant to the sentence thereof, would in effect be one insuring against the risk of a miscarriage of justice, and void as against public policy; and a policy is to the same extent void and unenforceable if it can be construed to cover such a risk, because not excluding it in terms (*Burt v. Union Central Life Ins. Co.*, 105 Fed. 419, 44 C. C. A. 548, affirmed in 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216).

(d) Same—Property used in illegal business.

The question of validity, as dependent on the policy of the law, often arises where the property insured is used in an illegal business. Thus, in *Springfield Fire & Marine Ins. Co. v. Cannon* (Tex. Civ. App.) 46 S. W. 375, the question was raised as to the validity of a policy on the stock of one who is the member of a trust organized to control the price of the goods composing the stock, and it was held that the policy was nevertheless valid. So, in *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261, it was held that a policy on store fixtures is not void because they were used by insured, an unregistered pharmacist, in carrying on a drug business, though the statutes prohibit persons not registered pharmacists from conducting drug stores. On the other hand, it has been held, in *Massachusetts (Campbell v. Charter Oak Fire & Marine Ins. Co.)*, 10 Allen [Mass.] 213, that a policy on a building to be used and occupied as a public hotel, the insured not being licensed to keep such hotel, is void as an insurance on an unlawful business. In the early days, before lotteries were regarded as illegal, the insurance of lottery tickets was a valid form of the contract; but it was, by the New York act of April 7, 1807, forbidden by law (*Mount v. Waite*, 7 Johns. [N. Y.] 434). The question has also been raised as to houses used for the purposes of prostitution. In *White v. Western Assur. Co.*, 52 Minn. 352, 54 N. W. 195, where the house insured was de-

scribed as used as a "sporting house," the Supreme Court of Minnesota said that, as the term "sporting house" has an innocent as well as guilty meaning, it cannot be said, without proof of the sense in which it was used, that the policy shows conclusively that the occupancy of the house was for unlawful purposes. This justifies, perhaps, the inference that, had the meaning been clear, the court would have held the policy void. It has, however, been held, in Georgia (*Phenix Ins. Co. v. Clay*, 101 Ga. 351, 28 S. E. 853, 65 Am. St. Rep. 307), that the fact that a house is let to and occupied by a lewd person, which, with the knowledge of the owner, is to be used by her for purposes of prostitution, does not of itself avoid a policy of insurance issued thereon in favor of the owner. The theory of the court is that, to defeat the action on the policy, it must be shown, either that the policy is itself illegal, as promoting or tending to promote the maintenance of a lewd house, or that the contract of insurance, while in itself legal, is so connected with the illegal act or business, or with the contract of rental, that the courts, on grounds of public policy, will not lend their aid in its enforcement.

Perhaps the most common phase of this question is presented where the insurance covers a stock of liquors kept for sale in violation of the statutes regulating the sale of liquors. In Massachusetts such policies have been pronounced invalid.

Kelly v. Home Ins. Co., 97 Mass. 288; *Johnson v. Union Marine & Fire Ins. Co.*, 127 Mass. 555; *Lawrence v. National Ins. Co.*, 127 Mass. 557, note.

On the other hand, the weight of authority is that the validity of a policy covering liquors depends on the intent with which the property is insured. In a number of cases, where liquors constituted a part of the stock insured, the courts have laid down the rule that, as the liquors were capable of legitimate use and sale, it must appear that the policy was issued for the purpose of protecting the illegal traffic, in order that it shall be declared invalid. If the illegal sale of liquors is but an incident to the business carried on by the insured, the policy cannot be declared invalid on the ground that it covers an illegal traffic.

Such seems to be the rule governing *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; *Insurance Co. of North America v. Evans*, 64 Kan. 770, 68 Pac. 623; *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124; *Carrigan v. Lycoming Fire Ins. Co.*, 53

Vt. 418, 38 Am. Rep. 687. See, also, *Felbelman v. Manchester Fire Assur. Co.*, 19 South. 540, 108 Ala. 180; *Manchester Fire Assur. Co. v. Felbelman*, 28 South. 759, 118 Ala. 308.

(c) Same—Nonpayment of privilege tax.

In Mississippi a statute (Code, §§ 3390, 3401) provides for an annual privilege tax to be paid by merchants, and the question has been raised whether insurance of a stock of goods on which the tax has not been paid is valid. The statute declares that all contracts made with any person who shall violate the act, in reference to the business carried on in disregard thereof, shall be null and void, so far as such person may base any claim on them. It has been held that contracts of insurance are within this provision, and are, therefore, invalid, if covering stock on which the tax has not been paid.

Pollard v. Phoenix Ins. Co., 63 Miss. 244, 56 Am. Rep. 805; *American Fire Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 South. 931.

But the policy is not void because the privilege tax was in arrears prior to the issuance of the policy, if it was fully paid at the time the policy was issued (*Springfield Fire & Marine Ins. Co. v. Fowler* [Miss.] 31 South. 810). The statute (section 3408), requires the tax collector to date the privilege license from the 1st day of the month of its issuance, and declares that such license shall be good for one year from that date. The payment of the privilege tax at any time during the month of the issuance of the license has a retroactive effect, so that a policy of insurance made during the month of issuance of the license is valid, though the privilege tax was not paid until after the policy was made (*American Fire Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 South. 931). That the important factor is the relation of the date of issuance of the policy to the date of payment of the tax is illustrated in *Sun Mut. Ins. Co. v. Searles*, 73 Miss. 62, 18 South. 544, where it was held that, even if a merchant has paid the proper privilege tax, but subsequently the stock exceeds the limit covered by the license, his business becomes eo instante illegal, and a contract of insurance thereafter issued on the stock is one made in reference to a business illegally carried on and therefore invalid. So, if the tax paid was sufficient at the time the policy was issued, the validity of the contract is not affected by the fact that at the time of the loss the tax was insufficient, because of an increase in the value of the stock (*Sneed v. British America Assur. Co.*, 72 Miss. 51, 17 South. 281).

(f) Same—Insurance against carrier's liability.

Among the contracts of insurance to which objection has been made on grounds of public policy are those insuring carriers of passengers or of goods against liability for injury or loss. Though not directly involved in the case, the Supreme Court of the United States, in *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, took occasion to assert the principle that no rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. The question was extensively discussed in the leading case of *Boston & A. R. Co. v. Mercantile Trust & Deposit Co. of Baltimore*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97, which involved a policy indemnifying a carrier against its liability for injuries to passengers. The contention was that, as the law exacts from the carrier the exercise of the utmost care and diligence to avoid an injury, any contract relieving him of his duty to the public in this regard, or lessening his liability, is detrimental to the interest of the public, and therefore repugnant to public policy. The court said that, though a carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the neglect of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently he may by insurance indemnify himself against loss of or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servants' negligence. This was decided in *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 324, 6 Sup. Ct. 750, 29 L. Ed. 873, and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance, a carrier remains liable to the owner or shipper of the goods, and by his insuring them he merely contracts, as in every other instance of reinsurance, with some one else for reimbursement for such loss. The doctrine announced in the *Phoenix Insurance Company's Case* was regarded by the court as the settled law of the land.

The doctrine of these two cases has also been approved in *Orient Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63; *Liverpool*

& *G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; *Trenton Pass. Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213; *Kansas City, M. & B. R. Co. v. Southern Railway News Co.*, 52 S. W. 205, 151 Mo. 373, 45 L. R. A. 380, 74 Am. St. Rep. 545. Reference may also be made to *Ursula Bright S. S. Co. v. Amsinck (D. C.)* 115 Fed. 242, and *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132, where a carrier's liability for goods carried was regarded as a proper subject of insurance.*

In *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, already referred to, the court said that, as a carrier may lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter.* On the other hand, the insurer may stipulate in the policy that the insurance shall not inure to the benefit of any carrier, and such stipulation does not contravene public policy (*Insurance Co. of North America v. Easton*, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424). Conversely, a clause in a policy on goods, that, in case of loss, the insured shall proceed against the carrier in the first instance, is valid (*Inman v. South Carolina R. Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612).

(g) Same—Marine risks.

A contract of insurance on a voyage which is illegal according to the law of nations or the law of the country where the contract is made is invalid.

Craig v. United States Ins. Co., 6 Fed. Cas. 733; *Gray v. Sims*, 10 Fed. Cas. 1039; *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Russell v. De Grand*, 15 Mass. 35; *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141. And, though the contract is legal

* Right of carriers to limit their liability for negligence, see Cent. Dig. vol. 9, "Carriers," cols. 551-662, §§ 637-733; cols. 835-858, §§ 983-949; cols. 1192-1203, §§ 1252-1263. See, also, American Digest Annuals 1897-1904, subd. II (H), III, IV (D).

* Right of carrier to benefit of insurance, see Cent. Dig. vol. 9, "Carriers," cols. 448-451, §§ 552-556. See, also, American Digest Annuals 1897-1904, subd. II (F).

when it is made, it may be rendered illegal by a subsequent law (Gray v. Sims, 10 Fed. Cas. 1039).

Insurance on a voyage under a British license during the war between this country and Great Britain was invalid (Craig v. United States Ins. Co., 6 Fed. Cas. 733); but insurance that a license unfilled shall not be destroyed or rendered useless is not an illegal contract (Perkins v. New England Marine Ins. Co., 12 Mass. 214).

But a contract insuring against loss by a breach of foreign trade laws is valid, if the facts are disclosed and the risk expressly assumed.

Richardson v. Marine Fire & Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Parker v. Jones, 13 Mass. 173; Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141.

Losses resulting from an embargo may be properly made the subject of insurance, as such insurance does not invite to a violation of law, but reconciles the insured to the detention by rendering him safe in that event, and thereby removing the temptation to escape from the arrest.

Odlin v. Insurance Co. of Pennsylvania, 18 Fed. Cas. 583; McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 299; Lorent & Steinmiltz v. South Carolina Ins. Co., 1 Nott & McC. (S. C.) 505.

A policy on a ship is not necessarily void because the ship is liable to forfeiture.

Clark v. Protection Ins. Co., 5 Fed. Cas. 909; Ward v. Wood, 13 Mass. 539; Polleys v. Ocean Ins. Co., 14 Me. 141; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. Ed. 105. But see Benton v. Hope, 19 La. Ann. 463.

Insurance on seamen's wages is regarded as opposed to public policy (Hancox v. Fishing Ins. Co., 11 Fed. Cas. 409).

(h) Mistake and fraud in general.

To render a contract of insurance void because of mistake, the mistake must be mutual and relate to a material fact.

Hazard v. New England Marine Ins. Co., 11 Fed. Cas. 934; Wilson v. Queen Ins. Co. (O. C.) 5 Fed. 674.

Where there is no mistake as to fact, and the property is properly represented, the policy is binding, though the insurer is mistak-

en as to the extent of its liability to fire (*Camden Consol. Oil. Co. v. Ohio Ins. Co.*, 4 Fed. Cas. 1126).⁴

Fraud on the part of the insured will render the contract void without any express provision to that effect in the policy (*Moore v. Virginia Fire & Marine Ins. Co.*, 28 Grat. 508, 26 Am. Rep. 373). And even when the policy provides that it "shall be incontestable for any cause, except misstatement of age," it may, nevertheless, be contested for actual fraud entering into it (*Welch v. Union Central Life Ins. Co.*, 78 N. W. 853, 108 Iowa, 224, 50 L. R. A. 774). Whether fraud exists is a question for the jury (*Quirk v. Metropolitan Life Ins. Co.*, 12 Pa. Super. Ct. 250), and a preponderance of evidence is sufficient to justify a finding of fraud (*Orient Ins. Co. v. Weaver*, 22 Ill. App. 122). If, however, the fraud is shown, the policy is thereby rendered invalid.

Alsop v. Commercial Ins. Co., 1 Fed. Cas. 564; *Supreme Conclave Knights of Damon v. O'Connell*, 107 Ga. 97, 32 S. E. 946; *Henshaw v. Insurance Co. of State of New York*, 73 N. Y. Supp. 1, 36 Misc. Rep. 405.⁵

Thus, where a person falsely represents himself as an authorized agent of a property owner for the purpose of procuring insurance against fire, the policy issued to him is void (*American Fire Ins. Co. v. Hart*, 75 Pac. 334, 141 Cal. 678). Fraud cannot be based on mere ignorance, and the fact that the agent who issued the policy was ignorant of the fact that the person to whom it was issued was a woman does not render the policy void on the ground of fraud (*Mechanics' & Traders' Ins. Co. v. Floyd* [Ky.] 49 S. W. 543).

The insurer cannot take advantage of a fraud on a third person, as where the insured and the beneficiary in a life policy by a collateral agreement committed a fraud on insured's heirs (*Reed v. Provident Sav. Life Assur. Soc. of New York*, 55 N. Y. Supp. 292, 36 App. Div. 250). So, too, it has been held that fraud on the part of an insurance agent, misleading the insured, cannot be taken advantage of by the company to declare the policy invalid (*Rivara v. Queen's Ins. Co.*, 62 Miss. 720).

But see *Seybert v. Aetna Life Ins. Co.*, 4 Luz. Leg. Reg. (Pa.) 219, where a contrary doctrine seems to have been relied on.

⁴ Effect of mistake in general, see Cent. Dig. vol. 11, "Contracts," cols. 376-384, §§ 415-419.

⁵ Effect of fraud on contracts in general, see Cent. Dig. vol. 11, "Contracts," cols. 384-397, §§ 420-430.

While an insurer cannot take advantage of the individual fraud of its agent (*Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647), collusion between the agent and the insured to defraud will, of course, render the policy invalid.

United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 508; *Pomerooy v. Rocky Mountain Ins. Co.* [Colo. Sup.] 7 Pac. 295; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *New York Life Ins. Co. v. Hord*, 78 S. W. 207, 25 Ky. Law Rep. 1531. See, also, *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494.

The holder of a policy of life insurance, procured through the fraud of the company's agent, is not justified in retaining such policy after having knowledge of the fraud, simply because such knowledge did not come to him until after payment by him of the first premium, and the delivery to him of the policy (*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, reversing [C. C.] 14 Fed. 846).

Proof of a conspiracy to defraud the insurer is, of course, sufficient to show the policy to be invalid as to those participating in the conspiracy; but it will not prevent a recovery by one not participating in and ignorant of the conspiracy.

Palmer v. Great Western Ins. Co., 54 N. Y. Super. Ct. 503; *Voisin v. Providence Washington Ins. Co.*, 65 N. Y. Supp. 333, 51 App. Div. 553; *Same v. Commercial Mut. Ins. Co.*, 70 N. Y. Supp. 147, 60 App. Div. 144.

A defense based on a conspiracy to defraud must be pleaded. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 107 Fed. 834, 46 C. C. A. 668. Evidence relating to an alleged conspiracy was considered in *Fidelity Mut. Life Ass'n v. Mettler*, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922; *Nassl v. Metropolitan Life Ins. Co.*, 44 N. Y. Supp. 261, 19 Misc. Rep. 413; *Given v. Prudential Ins. Co.*, 60 N. Y. Supp. 959, 44 App. Div. 549.

(1) Fraud—Intent to commit suicide.

Irrespective of the question whether suicide is an excepted risk, the procuring of insurance with intent to commit suicide is a fraud on the insurer, rendering the policy void in its inception.

Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826; *Campbell v. Supreme Conclave Improved Order of Heptasophs*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576.

The fact that death by suicide is not a defense under the terms of the policy does not affect the question. The real issue is the fraud, suicide being merely the ultimate agency by which the fraud is ac-

complished. (*Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, affirming 51 Hun, 575, 4 N. Y. Supp. 521.) But there must be a well-defined intent or definite purpose to commit suicide, and not a mere consideration of the subject of suicide (*Ætna Life Ins. Co. v. Florida*, 69 Fed. 932, 16 C. C. A. 618, 30 L. R. A. 87). Moreover, the fact that suicide was actually committed by the insured is not conclusive as to the existence of the intent at the inception of the contract. The intent may have developed subsequent to the issuance of the policy. (*Supreme Conclave Improved Order of Heptasophs v. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528.)

The evidence tending to show an intent to commit suicide was considered in *Ritter v. Mutual Life Ins. Co.*, 18 Sup. Ct. 300, 169 U. S. 139, 42 L. Ed. 693, affirming 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583; *Fidelity Mut. Life Ass'n v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Supreme Conclave Improved Order of Heptasophs of Baltimore City v. Miles*, 48 Atl. 845, 92 Md. 613, 84 Am. St. Rep. 528; *Elliot v. Des Moines Life Ass'n*, 63 S. W. 400, 163 Mo. 132; *Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

(j) Fraud of company or agent.

Where the agent of the insurer has been guilty of fraud in inducing the insured to take out the policy, the latter may have the policy declared void in equity, or may avoid his own obligations thereunder in an action to enforce them.

Cox v. Ætna Ins. Co., 29 Ind. 586; *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349; *Delouche v. Metropolitan Life Ins. Co.*, 69 N. H. 587, 45 Atl. 414; *Martin v. Ætna Life Ins. Co.*, 1 Tenn. Cas. 361, 2 Leg. Rep. 87; *Smallwood v. Life Ins. Co. of Virginia*, 45 S. E. 519, 133 N. O. 15; *Armstrong v. Mutual Life Ins. Co.*, 96 N. W. 954, 121 Iowa, 362.

Thus it has been held that the insured may show fraud on the part of the agent in representing that the premiums would not be increased (*Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659). But it was held in *Blanks v. Moore*, 139 Ala. 624, 36 South. 783, that insured, in an action for premiums, could not show representations by the agent that the premiums would be reduced, as such evidence would violate the rule forbidding the admission of parol evidence varying a written contract. More reasonable seems to be the doctrine on which *Hale v. Continental Life Ins. Co. (C. C.)* 12 Fed. 359, was decided, where the insured asked rescission in equity and a return of premiums paid on the ground of

misrepresentations by the agent as to the amount of profits that would be realized on an endowment policy. The court held that as the misrepresentations were wholly as to future events, and not as to past or present facts, and the insured had received value in the form of insurance, it could not be said that contract was wholly vitiated, so as to entitle the insured to the full measure of relief asked.

Though the insured may avoid a policy because of the fraud of the agent, inducing the acceptance of the policy, he cannot make such fraud the basis of a right to recover on the policy, if by its terms no recovery can be had (*Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen [Mass.] 569). Nevertheless a stipulation inserted into the contract by the fraud of the agent may be declared void as to the insured (*Liverpool & London & Globe Ins. Co. v. Morris*, 84 Ga. 759, 11 S. E. 895). Whether the agent knew the representations were false is not important, as they were in effect the representations of the company, and their effect on the contract would be the same, whether the agent knew their falsity or not (*Equitable Life Assur. Soc. v. Maverick* [Tex. Civ. App.] 78 S. W. 560).

Untrue statements by the agent to an applicant for insurance that he was giving him lower rates than he could get elsewhere; that if he was dissatisfied he could leave the company at the end of the year by paying the proportioned rate; that he had insured other parties in applicant's neighborhood—are mere inducements, and form no ground upon which to base fraudulent misrepresentations (*Rockford Ins. Co. v. Warne*, 22 Ill. App. 19). So a claim of fraud cannot be based on mere expressions of the opinion of the agent as to the advantages of the particular plan of insurance adopted by the company he represents (*Simons v. New York Life Ins. Co.*, 38 Hun [N. Y.] 309). Nor can a claim of fraud be based on a representation by the agent that a clause made a part of the policy furnished by his company was not in the policies issued by another company, knowing the assertion to be false, where the agent invited insured to compare his proposed contract with that of the other company, leaving his blank form for that purpose (*American Steam Boiler Ins. Co. v. Wilder*, 39 Minn. 350, 40 N. W. 252, 1 L. R. A. 671). An intention on the part of the company to deceive cannot be presumed from the fact that some portions of the policy are printed in smaller type than other portions, the former being referred to in the latter (*Whitehouse v. Travelers' Ins. Co.*, 29 Fed. Cas. 1039). Where a policy, numbered 50, was issued to the in-

sured in class No. 4 of an insurance company, but no policy had been issued in that class bearing a lower number, this was not a fraud upon the insured, as inducing him to believe that there were 49 persons who would share the losses with him, as the numbering seemed to have been entirely arbitrary (*Atlantic Mut. Fire Ins. Co. v. Goodall*, 29 N. H. 182).

The fraud of the agent must be alleged, to be available to the insured (*O'Donnell v. Connecticut Fire Ins. Co.*, 41 N. W. 95, 73 Mich. 1); but it is not necessary to tender any part of the premium (*Equitable Life Assur. Soc. v. Maverick* [Tex. Civ. App.] 78 S. W. 560). The sufficiency of the evidence to show fraud on the part of the agent is considered in *Keller v. Liverpool & L. & G. Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695.

(k) Policy procured without the knowledge of insured.

The rule is well established that a life policy procured by one without the knowledge and consent of the person whose life is insured is void as against public policy.

Reference may be made to *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *Metropolitan Life Ins. Co. v. Reinke*, 15 Ky. Law Rep. 125; *Same v. Monohan*, 42 S. W. 924, 102 Ky. 13; *Same v. Trende* (Ky.) 53 S. W. 412; *Same v. Blesch*, 58 S. W. 436, 22 Ky. Law Rep. 530; *Same v. Smith* (Ky.) 59 S. W. 24, 53 L. R. A. 817; *Same v. Asmus*, 25 Ky. Law Rep. 1550, 78 S. W. 204; *McCann v. Metropolitan Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026; *Fulton v. Same*, 1 Misc. Rep. 478, 21 N. Y. Supp. 470; *Griffin's Adm'r v. Equitable Assur. Soc. (Ky.)* 84 S. W. 1164. The rule is in Indiana based on *Burns' Ann. St. 1901, § 4905*, declaring the procuring of a policy of insurance on the life of another without his knowledge or consent to be a felony. *Work v. American Mut. Life Ins. Co.*, 67 N. E. 458, 31 Ind. App. 153; *American Mut. Life Ins. Co. v. Bertram* (Ind. Sup.) 70 N. E. 258, 64 L. R. A. 935.

The rule has also been applied in the case of fire policies.

Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466; *London & L. Fire Ins. Co. v. Turnbull*, 5 S. W. 542, 9 Ky. Law Rep. 544; *Clark v. Insurance Co. of North America*, 89 Me. 26, 85 Atl. 1008, 35 L. R. A. 276.

It has, however, been held in several states that the company could not set up fraud in defense to a life policy taken out without the knowledge and consent of the insured, if the agent had notice of the facts and represented that the policy would be valid.

Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; *Shadlinger v. Metropolitan Life Ins. Co.*, 2 Ohio S. & C. P. Dec. 402. It

should appear that the person procuring the policy was a party to the fraud. *McCann v. Metropolitan Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026.

And where the taking of the policy was induced by the representations of the agent, the objection may be raised by the person procuring the policy (*Delouche v. Metropolitan Life Ins. Co.*, 69 N. H. 587, 45 Atl. 414).

Under Code Ala. 1876, § 2733, providing that "any married woman, by herself and in her name, or in the name of any third person with his assent as trustee, may cause to be insured for her sole use the life of her husband," a policy is valid, though taken out and kept up by the husband without the knowledge of the wife (*Felrath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319).

(1) Alteration of application or policy.

An alteration in the copy of the application returned with the policy is not such a material alteration as will affect the validity of the policy (*Steeley's Creditors v. Steeley* [Ky.] 64 S. W. 642). And in the same case it was said that an alteration in an application, even if it affected the validity of the policy, can be taken advantage of only by the insurance company. It cannot be pleaded in an action by a creditor of the insured against an assignee of the policy to subject the proceeds thereof to the creditor's claim. Even a fraudulent alteration of an application by the agent of the insurer, if within the apparent limits of his employment, though not within the actual authority conferred upon him, cannot be taken advantage of by the insurer. (*Swan v. Watertown Fire Ins. Co.*, 96 Pa. 37.)

An application which has been altered by tearing off a part of it is not admissible in evidence. *Ames v. Manhattan Life Ins. Co.*, 31 App. Div. 180, 52 N. Y. Supp. 759, affirmed 167 N. Y. 584, 60 N. E. 1106.

The addition of the words, "This policy includes shelving, counters, and drawers," to a policy of insurance on a building, is a material alteration, which, if made by the holder after loss, without the knowledge or consent of the insurer, whether with fraudulent intent or not, will vitiate the entire policy, though the holder subsequently withdraws any claim for the loss of the shelving, etc. (*Phoenix Ins. Co. of Hartford v. McKernan*, 37 S. W. 490, 100 Ky. 97). If an alteration appears to have been made in a policy produced by the insured, the burden is on him to disprove or explain the spoliation (*Burton v. American Guarantee Fund National Fire Ins. Co.*, 70 S. W. 172, 96 Mo. App. 204). The same rule was applied in *Da-*

vidson v. Guardian Assur. Co., 176 Pa. 525, 35 Atl. 220; but in Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553, where there was apparently an alteration by erasure, it was said that the burden was on the insurer to show that the erasure was made after delivery. An alteration as to one of the risks indorsed on a policy, though material, will not affect the validity of the policy so far as the other risks are concerned (Robinson v. Phoenix Ins. Co., 25 Iowa, 430). Nor can the company object to the introduction of the policy in evidence on the ground that it appeared to have been altered, if in fact such alteration was made by the agent of the company (German Fire Ins. Co. v. Gerber, 4 Ill. App. 222).

Where the insurance company deals with one who is the agent of the real parties insured, and who retains possession of the policy, it is authorized to assume that such person has power to direct an alteration in a policy, and, such alteration being made, it is not a fraud on the part of the company which will render the policy invalid (Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338.*

2. WHAT LAW GOVERNS IN DETERMINING THE VALIDITY OF THE CONTRACT.

- (a) The general rule—Validity determined by the law of the place where the contract is made.
- (b) Exceptions—Law of place of performance—Law of domicile of insurer.
- (c) Contract valid where made is valid everywhere.
- (d) Same—Modification of rule on considerations of public policy.
- (e) Intent of parties.
- (f) What is the place of contract—Approval of risk.
- (g) Same—Delivery of policy.
- (h) Same—Payment of premium.
- (i) Same—Countersigning by agent.
- (j) Same—Stipulations as to place of contract.
- (k) Questions of practice.

- (a) The general rule—Validity determined by the law of the place where the contract is made.

When the contract of insurance has been made or is to be performed in a state different from the one in which enforcement is sought, it is often necessary, in determining the validity of the con-

* Effect of alteration of instruments in general, see Cent. Dig. vol. 2, "Alteration of Instruments."

tract, to consider first by what law the question of validity is governed, whether that of the state where the contract is made, or that of the state where it is to be performed, or the law of the state where suit is pending. It may be stated as a general rule, supported by numerous well considered decisions, that, in the absence of stipulations or other evidence of a contrary intent, the validity of the contract of insurance is to be determined by the law of the place where the contract is made.

This rule is asserted and discussed in *Lamb v. Bowser*, 14 Fed. Cas. 980; *Northwestern Mut. Life Ins. Co. v. Elliott* (C. C.) 5 Fed. 225; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 439, affirmed in 50 Fed. 511, 1 C. C. A. 561; *Kelley v. Mutual Life Ins. Co.* (C. C.) 109 Fed. 56; *Lancashire Ins. Co. v. Barnard*, 111 Fed. 702, 49 C. C. A. 559; *Albro v. Manhattan Life Ins. Co.* (C. C.) 119 Fed. 629; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Des Moines Life Ass'n v. Owens*, 10 Colo. App. 131, 50 Pac. 210; *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Wiestling v. Warthin*, 1 Ind. App. 217, 27 N. E. 576; *Mardin v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; *Archer v. National Ins. Co.*, 2 Bush (Ky.) 226; *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.) 133, 99 Am. Dec. 663; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 178 Mass. 161, 53 N. E. 373; *Voorhels v. People's Mut. Ben. Society*, 91 Mich. 469, 51 N. W. 1109; *Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367; *Summers v. Fidelity Mut. Aid Ass'n*, 84 Mo. App. 605; *Price v. Connecticut Mut. Life Ins. Co.*, 48 Mo. App. 281; *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412; *Connecticut River Mut. Fire Ins. Co. v. Way*, 62 N. H. 622; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Seely v. Manhattan Life Ins. Co.*, 55 Atl. 425, 72 N. H. 49; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626; *Western Mass. Mut. Fire Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258; *Roberts v. Winton*, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. 982; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 22 L. R. A. 287, 36 Am. St. Rep. 166; *Wood v. Cascade Fire & Marine Ins. Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. Rep. 917; *Seamans v. Knapp, etc., Co.*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825; *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232.¹

¹ Application of the rule to contracts in general, see Cent. Dig. vol. 11, "Contracts," cols. 436-439, § 455.

(b) Exceptions—Law of place of performance—Law of domicile of insurer.

There are a few cases in which the law of the place of the performance seems to have been determinative of the validity of the contract, though, in view of the particular facts, it is, perhaps, doubtful whether they can be regarded as contravening the general rule. In *Hyde v. Goodnow*, 3 N. Y. 266, the court said that it is a general rule that the rights of the parties to a contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed; but the court qualified this statement by the proviso that, if the contract is declared void by the law of the state or country where it is made, it cannot be enforced as a valid contract in any other, though by its terms it is to be performed there. The case can, therefore, scarcely be regarded as asserting an unqualified rule that the law of the place of the performance should govern. In the well-known case of *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516, where the contract was actually made in the state of Georgia, but purported on its face to have been executed in New Jersey, the court said that the law of the forum governs as to the remedy, but not as to the rights arising under the contract. These usually depend on the law of the place where the contract is to be performed, though, if there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, even if the contract is to be performed elsewhere. It is to be noted that the intent of the parties seems to have been given weight in this case. In a recent case, *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113, the supreme court of the United States says that, generally speaking, the law of the place where the contract is to be performed is the law which governs its validity; but, in view of the fact that the contract was by its terms to be performed in England and the parties agreed that claims under it should be adjusted according to the custom of the English Lloyds, the decision must be regarded as dependent on the particular provisions of the contract.²

² See, also, *Scudder v. National Bank*, 91 U. S. 406, 23 L. Ed. 245, where the court laid down the following general rules: Matters respecting the remedy are dependent on the law of the place where the suit is brought. Matters bearing on the validity of a contract are

determined by the law of the place where the contract is made. Matters connected with its performance, are regulated by the law prevailing at the place of performance. See *Cent. Dig.* vol. 11, "Contracts," cols. 441, 442, § 458.

It is, of course, obvious that, where the question of validity is dependent directly on the powers of the insurer, the law under which the insurer was organized, or the law of its domicile, will govern.

This may be deduced from *Supreme Lodge of Knights of Honor v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, *Knights of Honor v. Nairn*, 60 Mich. 44, 26 N. W. 826, *Supreme Commandery U. O. G. C. v. Merriek*, 165 Mass. 421, 43 N. E. 127, and *Gibson v. Imperial Council of Order of United Friends*, 168 Mass. 391, 47 N. E. 101.

It seems to be intimated, in *Huth v. New York Life Ins. Co.*, 21 N. Y. Super. Ct. 538, that if the policy was executed in a foreign country, and there is nothing to show what the law of that country is, the contract will be governed by the law of the forum.

(c) Contract valid where made is valid everywhere.

As a corollary to the general rule given above, it may be laid down as a settled principle that, in general, a policy which is valid in the state where it was made is valid in any other state.

Reference may be made to *Lamb v. Bowser*, 14 Fed. Cas. 980; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.)* 41 Fed. 643; *State v. Williams*, 46 La. Ann. 922, 15 South. 290; *Merchants' & Manufacturers' Ins. Co. v. Linchey*, 3 Mo. App. 588; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law, 33; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Western Mass. Mut. Fire Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; and *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 22 L. R. A. 287, 36 Am. St. Rep. 166.*

It naturally follows from these rules that, if the contract is invalid where it is made, it will not be enforced anywhere.

Such is the principle asserted in *Northwestern Mut. Life Ins. Co. v. Elliott (C. C.)* 5 Fed. 225, *Archer v. National Ins. Co.*, 2 Bush (Ky.) 226, and *Wood v. Cascade Fire & Marine Ins. Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. Rep. 917.

A qualification of this principle is found in *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.) 133, 99 Am. Dec. 663, where it is intimated that the contract would be enforced, if valid where it was to be performed, though invalid where made. This qualification, however, seems to be contrary to the doctrine of *Hyde v. Goodnow*, 3 N. Y. 266, already referred to.

* See, also, Cent. Dig. vol. 11, "Contracts," cols. 436-440, §§ 455, 456.
B.B.INS.—36

(d) Same—Modification of rule on considerations of public policy.

The general principle that the rules determining what law governs contracts may be modified by a statute granting or restricting the franchise right to transact business in the state is asserted in *Re Andress' Estate*, 6 Ohio Dec. 174. In *Western Mass. Mut. Fire Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996, it was said that a policy valid in the state where it was made is enforceable in another state, though it would have been invalid if made in the latter state, so long as the public policy of the latter state is not contravened and there is no conscious attempt to evade the laws of such latter state. We are, therefore, prepared to modify the broad rule that policies valid where made are valid everywhere by the condition, well stated in *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855, to the effect that courts will not enforce contracts made and valid elsewhere, but which are contrary to the public policy of the state where it is attempted to enforce such contracts. This is not giving to the laws of the latter state an extraterritorial effect, but merely a refusal to enforce a contract.

This principle seems to have been asserted in *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *McDermott v. Prudential Ins. Co.*, 7 Kulp (Pa.) 246; *Huth v. New York Ins. Co.*, 21 N. Y. Super. Ct. 338; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 409, 28 L. R. A. 430, 55 Am. St. Rep. 457; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545; *Lamb v. Bowser*, 14 Fed. Cas. 980; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Buell v. Breese Mill & Grain Co.*, 65 Ill. App. 271; *Price v. Connecticut Mut. Life Ins. Co.*, 48 Mo. App. 281.

A contrary doctrine seems to have been upheld in *St. John v. American Mut. Life Ins. Co.*, 9 N. Y. Super. Ct. 419, where the validity of a wager policy was involved.⁴

(e) Intent of parties.

Though, as said in *Berry v. Knights Templars' & Masons' Life Indemnity Co. (C. C.)* 46 Fed. 439, affirmed in 50 Fed. 511, 1 C. C. A. 561, the parties to a policy cannot by stipulation evade the effect of the laws of the state where the contract is made and enforced, yet there are well-considered cases which hold that if the manifest in-

⁴ See, also, *Cent. Dig.* vol. 11, "Contracts," cols. 440, 441, § 457.

tent of the parties is that the policy shall not be governed by the law of the place where the contract is made, but by the law of some other place, such intent will be given effect.

This would seem to be the doctrine applied in *Ruse v. Mutual Benefit & Life Ins. Co.*, 23 N. Y. 516, *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464, and *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113.*

On the other hand, in *New York Life Ins. Co. v. Block*, 12 Ohio Cir. Ct. R. 224, it was said that the rights of the parties will be governed by the laws of the state where enforcement of the contract is sought, though the insured and the company have agreed that the contract shall be regarded as made under the laws of the state of the company's residence. But in *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, the court seems to have recognized as valid a stipulation providing that the contract should be governed by the law of Massachusetts.

(f) What is the place of contract—Approval of risk.

Though the decisions are not uniform as to what elements must be coincident to determine the place of contract, the theory of the decisions undoubtedly is that the place of contract is the place where the minds of the parties met and the contract became complete. The divergencies arise from the fact that the courts do not seem to agree in all respects as to when the contract becomes complete. In a few cases the approval of the risk has been regarded as the determining factor. Thus, in *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329, where the application was taken in Washington and forwarded to the home office in Kansas, where the risk was approved and the policy issued, the court held that the contract was not completed until the policy was issued. Until this took place there was a mere proposition; but, when the company acted upon the proposal and issued the policy, the minds of the parties met and the contract became complete. Therefore the place of contract was in Kansas.

A similar rule was asserted in *Des Moines Life Ass'n v. Owen*, 10 Colo. App. 131, 50 Pac. 210, and *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316.

See, also, *State v. Williams*, 46 La. Ann. 922, 15 South. 290, where an open marine policy executed at the home office of the insurer in New York provided that no risk should be insured by such policy

* See, also, *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104.

until a letter signed by the defendant, describing the risk, was deposited in the post office at New Orleans. The policy further provided that the risk should commence from a certain time in New Orleans, but the court held that the original policy and the special insurance effected under it were New York contracts, as the policies were issued from the domicile of the company and assented to there.

(g) Same—Delivery of policy.

In an important case, *Seamans v. Knapp, Stout & Co. Company*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825, the Supreme Court of Wisconsin adopted the rule that the place of final assent to the contract must be regarded as the place of contract, and a similar doctrine controlled *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849. The logic of this is obvious, and, in view of the reasoning employed in other cases where the subject has been extensively discussed, we are justified in assuming that the really determining factor is the delivery of the policy. Such is undoubtedly the theory of those cases which hold that where the application taken in one state is forwarded to the home office of the company in another state, and there accepted, and the policy mailed to the insured, the place of contract is the latter state.

This is the rule laid down in *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Hyde v. Goodnow*, 3 N. Y. 266; *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855; *Lamb v. Bowser*, 14 Fed. Cas. 980; *Id.* 982; *State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191.

The principle on which these cases rest is, as shown by *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476, that by the mailing of the policy directed to the insured there was a delivery which completed the contract. A similar principle seems to have been the basis of *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258, where the policy, instead of being mailed directly to the insured, was mailed to the agent who forwarded the application, and who was, in this instance, regarded as the agent of the insured. The court said that when the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete; both parties becoming bound. This paves the way for those cases which hold that where the risk is approved, and the policy issued and

mailed to the broker who solicited the risk, the place of approval, issuance, and mailing of the policy is the place of the contract; the broker being, of course, the agent of the insured.

The policies were sent to brokers for delivery to the insured in *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 173 Mass. 161, 53 N. E. 373; *Baker v. Spaulding*, 42 Atl. 982, 71 Vt. 169; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Same v. American Mfg. Mut. Fire Ins. Co., Id.*; *Same v. Home Mfg. Ins. Co., Id.*; *Western Mass. Mut. Fire Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

But this rule is qualified where, as in *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.) 133, 99 Am. Dec. 663, and *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. 982, some additional act, as the acceptance by the broker of premium notes, is a condition precedent to the delivery of the policy to the insured.

On the other hand, where the policy, after approval of the risk, is issued and mailed to the agent of the company for delivery to the insured at the place of his residence, such place, and not the place of the mailing, becomes the place of contract.

Such is the doctrine of *Wiestling v. Warthin*, 1 Ind. App. 217, 27 N. E. 576, and *Berry v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 439, affirmed in 50 Fed. 511, 1 C. C. A. 561.

If, under the laws of the state where the risk was solicited, a broker is regarded as the agent of the company, as was the fact in *Lancashire Ins. Co. v. Barnard*, 111 Fed. 702, 49 C. C. A. 559, a similar rule will prevail. But if the agent of the company is, because of the circumstances, to be regarded as the agent of the insured, mailing to the agent is a delivery, so as to make the place of mailing the place of contract.

Baker v. Spaulding, 71 Vt. 169, 42 Atl. 982; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258.

(b) Same—Payment of premium.

Attention has already been called to *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.) 133, 99 Am. Dec. 663, where it was said that, if the execution and delivery are the last acts necessary to complete the transaction, the place from which the policy is sent to the insured is the place of contract; but such rule is not applicable where the approval and acceptance of premium notes is required as a condition precedent to the delivery of the policies to the insured. In *Albro v. Manhattan Life Ins. Co.* (C. C.) 119 Fed. 629, where the

application was made in Massachusetts and the policy delivered within that state, the first premium being also paid there, the company contended that the payment of the premium related only to the point of time when the insurance was to commence; but the court seems inclined to the opinion that **the delivery and payment of the premium are essential factors in determining the place of contract.**

Payment of the premium seems to have been regarded as an important element in *Voorheis v. People's Mut. Ben. Society*, 91 Mich. 469, 51 N. W. 1109; *Wiestling v. Warthin*, 27 N. E. 576, 1 Ind. App. 217; *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. 982; *Cravens v. New York Life Ins. Co.*, 50 S. W. 519, 148 Mo. 583, 53 L. R. A. 305, 71 Am. St. Rep. 628.

(1) Same—Countersigning by agent.

In *Huth v. New York Ins. Co.*, 21 N. Y. Super. Ct. 538, where the policy provided that it should be countersigned by the insurer's agent in a Chinese port, it was contended that the place of contract was such port. The court, however, said that as the company was a New York corporation, the vessel an American vessel, and the contract purported to be executed in New York, the fact that it was declared not to be binding until countersigned by the agent at Canton was not indicative of the place of contract, as such countersigning should be regarded as a mere authentication of the issue and delivery, and the contract must be looked upon as a New York contract. A different rule has, however, been adopted in other well-considered cases. Thus, in *Continental Life Ins. Co. v. Webb*, 54 Ala. 688, where the policy provided that it should take effect only when countersigned by certain agents in Alabama, the court held that it was not a perfect instrument until the act indicated was done. Until that time it was merely inchoate, and, **the countersigning and delivery being accomplished in Alabama, such state was the place of contract.**

This rule seems also to have controlled the decisions in *Northwestern Mut. Life Ins. Co. v. Elliott (C. C.)* 5 Fed. 225; *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412; *Neufelder v. German Am. Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 22 L. R. A. 287, 36 Am. St. Rep. 166; *Galoway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

(2) Same—Stipulations as to place of contract.

It would seem to follow naturally, from the principles heretofore discussed, that stipulations as to the place of contract must yield to considerations of public policy. Such, indeed, seems to be the

rule laid down in *New York Life Ins. Co. v. Block*, 12 Ohio Cir. Ct. R. 224. In the absence of such considerations, however, the validity of stipulations fixing the place of contract has been recognized.

Albro v. Manhattan Life Ins. Co. (C. C.) 119 Fed. 629; *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Voorheis v. People's Mut. Ben. Society*, 91 Mich. 469, 51 N. W. 1109.

But in *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545, where the policy recited that it was issued by the insurer's agent in Omaha, the court said that such a recital is not contractual and may be disproved.

(k) Questions of practice.

It would seem, from the language of the opinion in *Archer v. National Ins. Co.*, 2 Bush (Ky.) 226, that, if the insurer relies on the law of another state as determining the validity of the contract, the facts must be distinctly pleaded. A plea that the policy was issued, delivered, and received in violation of the laws of New York was regarded, in *Wood v. Cascade Fire & Marine Ins. Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. Rep. 917, as equivalent to an allegation that the contract was executed in that state. Where it did not appear from the pleadings where the contract was made, the premium paid, the policy delivered, or at what place and to whom it was payable, as in *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395, the court held that as the company was an Iowa company, and the property insured was located in Pennsylvania, there was no basis for a presumption that the contract was made in one state rather than in another.

3. LIMITATIONS ON THE POWERS OF INSURERS.

- (a) General limitations.
- (b) Same—Mutual companies.
- (c) Territorial limitations.
- (d) Limitations as to character of property and extent of interest therein.
- (e) Limitations as to amount of insurance.
- (f) Life and accident companies.
- (g) Limitations peculiar to mutual benefit associations.
- (h) Same—Limitations as to age.
- (i) Same—Power to write endowment policies.
- (j) Same—Power to reinsure.

(a) General limitations.

While insurance may be against all losses or risks, except such as may be repugnant to public policy or positive prohibition (*Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. [La.] 423, 39 Am. Dec. 542), an insurance company can enter into a valid contract to insure only against such casualties as it is authorized to insure against by its charter, or the articles of association under which it is formed (*Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r, 119); and, if it is organized to insure a certain class of risks, it cannot insure other risks (*Rochester Ins. Co. v. Martin*, 13 Minn. 59 [Gil. 54]). Thus, a corporation authorized by its charter to insure against fire, whether caused "by accident, lightning, or by any other means," cannot insure against damage by lightning not resulting in fire, although its by-laws provide for its doing so (*Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 256). But there must be a distinct limitation, and a statute authorizing the formation of mutual companies for the purpose of insuring the lives of domestic animals does not limit the insurance to risks of health and injury, but also authorizes insurance against fire risks on animals (*O'Grady v. New York Mut. Live Stock Ins. Co.*, 16 App. Div. 567, 44 N. Y. Supp. 946).

The Illinois act of April 21, 1899, relating to the incorporation of casualty insurance companies, describes seven kinds of insurance, viz.: Insurance against (1) accidents; (2) employers' liability; (3) loss of credits; (4) burglary or theft; (5) breakage of glass; (6) explosion or accidents to boilers and elevator machinery; (7) other lawful casualty risks. It is also provided that the charter of a company organized under the act shall show the nature and kind of

business to be transacted, which may include those specified under subdivisions 1 and 2, or subdivisions 3, 4, 5, 6, and 7. This act was construed in *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, and it was held that the latter provision does not have the effect of separating the kinds of insurance enumerated into two groups, so as to preclude a company which does the kind of business specified in subdivisions 1 and 2 from doing any or all of those specified in the other subdivisions, or vice versa, no reason being apparent for such separation; but that the word "or" should be construed to mean "and," giving a company the right, on compliance with the act, to do any or all of the kinds of business specified.

In *People v. Fidelity & Casualty Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, it was said that, in addition to fire and marine insurance, the laws of Illinois contemplate insurance on lives of persons, insurance on the health of persons, insurance against injury, disability, or death resulting from accident, guarantying the fidelity of persons holding places of public or private trust, insurance on the lives of live stock, insurance on plate glass against breakage, insurance on steam boilers against explosion and against loss or damage to life or property resulting therefrom, and insurance against loss by burglary or theft. Therefore, though a strict construction of the statute seems to limit the right of a corporation organized in the state to one class of insurance, yet a foreign corporation, chartered under laws authorizing a multiform insurance business, may do such business in Illinois on conforming to the requirements of the statutes regulating foreign companies. On the other hand, it was held in *Clafin v. United States Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, that a foreign company organized to do a credit insurance business could not do business in Massachusetts, as the statute (St. 1887, c. 214) does not authorize the transaction of that kind of insurance business.

An averment that the company was authorized to effect insurance generally covers all kinds of insurance, and is sufficient as an averment of power to write fire insurance. *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347.

Since corporations generally have no authority to enter into partnership with individuals or other corporations, or into agreements which may create partnerships, insurance companies cannot combine in issuing joint policies, unless it distinctly appears that each company receives a certain and definite portion of the premium and assumes a certain definite portion of the liability (*Opinion of the Attorney General*, 7 Pa. Dist. R. 17).

Reinsurance, being a valid contract at common law, may be written in the case of fire risks, as well as marine risks; and, under the general powers conferred to make a contract of insurance, an insurance company is authorized to make reinsurance (*New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.* [N. Y.] 17 Wend. 359). So, under a statute authorizing organizations known as "fire Lloyd's" to do a general fire insurance business, such associations have power to reinsure fire risks (*Sun Ins. Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693).

(b) Same—Mutual companies.

While the promoters of a mutual insurance company are authorized and required to take applications for a certain amount of insurance before the company is organized, such promoters have no authority to bind the corporation by any kind of contract of insurance before it is organized and authorized to do business (*Montgomery v. Whitbeck*, 96 N. W. 327, 12 N. D. 385). The same principle was asserted in *Manufacturers' & Merchants' Mut. Ins. Co. v. Gent*, 13 Ill. App. 308; but in *Clark v. Spafford*, 47 Ill. App. 160, it was said that there may nevertheless be a recovery on a contract of insurance made by the promoters during the course of its formation, if they did not assume to act as a corporation, but made a mutual agreement that certain payments should be made in case of loss before incorporation, and provided that this agreement, without further action, should end on the incorporation of the company, which should then deliver to the applicant its standard form of policy.

Conversely, a policy of insurance issued by a mutual fire insurance company is not void because by its terms it extends beyond the time limited by the charter of the company for its corporate existence. The policy is valid until the expiration of the charter (*Huntley v. Beecher*, 30 Barb. [N. Y.] 580; *Same v. Merrill*, 32 Barb. [N. Y.] 626).

The risks which may be insured against by a mutual insurance company may be made dependent on the amount of guaranty or capital possessed by such a company (*Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 90 Minn. 383, 97 N. W. 110).

Of some interest is the question often arising as to the power of a mutual company to issue policies on the stock or cash premium plan. According to *Given v. Rettew*, 162 Pa. 638, 29 Atl. 703, a stock policy must not be confounded with a cash policy; that is,

a policy on which the payment of a cash premium is made. The payment of a cash premium does not decide the character of a payment, as to whether it is mutual or stock. A mutual company may insure for either note or cash, and so may a stock company. A stock policy is issued solely on the credit of the capital stock of the company to one who may be an entire stranger to the corporation. It has therefore been held in this and other Pennsylvania cases that a mutual company may issue policies on the cash premium plan.

Lycoming Fire Ins. Co. v. Buck, 1 Luz. Leg. Reg. 351; *Lehigh Valley Fire Ins. Co. v. Schimpf*, 13 Phila. 515.

It is, of course, evident that a mutual company may be authorized by statute to do business on the cash premium plan (*State v. Manufacturers' Mut. Fire Ins. Co.*, 91 Mo. 311, 3 S. W. 383); and such policies will be valid.

Union Ins. Co. v. Hoge, 21 How. 35, 16 L. Ed. 61; *Carey v. Nagle*, 5 Fed. Cas. 60; *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Powell v. Wyman*, Id.; *Hannibal Sav. & Ins. Co. v. Pipe*, 43 Mo. 407; *Mygatt v. New York Protection Ins. Co.*, 21 N. Y. 52, 19 How. Prac. 61.

It has, indeed, been held in Colorado (*Spruance v. Farmers' & Merchants' Ins. Co.*, 9 Colo. 73, 10 Pac. 285), that, in absence of a prohibition in the statute, a mutual company may issue policies on the cash premium plan. And in Texas it has been held that, where neither the charter of a mutual insurance company nor the statute under which it was organized prescribes the mode and manner in which it shall do business, an absolute unconditional policy issued by the company, undertaking for a fixed premium to insure property for a stated sum, will not be abrogated by the courts as ultra vires (*Continental Fire Ass'n v. Masonic Temple Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930). So, in Wisconsin, where the statute (*Sanb. & B. St. § 1941e*) provides that in case of loss an assessment shall be made on "all property insured" in a mutual company, it was held (*Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516) that, though a mutual insurance company had no authority to issue policies as a stock company for a fixed cash premium, yet a policy issued for a cash premium is binding on the company and not ultra vires, since the holder, notwithstanding such payment, is, under the statute, still liable to assessments.

On the other hand, the statute of Iowa (Code, §§ 1159, 1160) for-

bids mutual companies from issuing policies on the stock or cash premium plan.

Corey v. Sherman (Iowa) 60 N. W. 232; *Id.*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 514.

It has also been held in that state that in the absence of statutory authority a mutual company cannot issue a policy on the stock plan (*Smith v. Sherman*, 113 Iowa, 601, 85 N. W. 747). This also seems to be the rule in Ohio (*State v. Manufacturers' Mut. Fire Ass'n*, 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252). In another case (*State v. Monitor Fire Ass'n*, 42 Ohio St. 555) it was said that mutual companies have no authority to provide for the payment of an agreed annual deposit during the life of a policy, by which the holder shall be exempt from assessment for losses during the year of the prepayment, as such annual deposit is in fact a premium for carrying the risk, and not a specific assessment authorized by the statute.

(c) Territorial limitations.

The powers of mutual companies are generally limited territorially; that is to say, they can write insurance only on property situated in the state or in certain counties. Thus, under the law of Ohio (Rev. St. §§ 3686-3690), a mutual company cannot receive as members or insure the property of persons not residents of the state (*State v. Manufacturers' Mut. Fire Ass'n*, 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252). The statute of Michigan (How. Ann. St. § 4249) confines the business of mutual companies to three counties, to be designated in the charter, and insurance on property outside of such limits is void (*Eddy v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 651, 40 N. W. 775). The Kansas statute (Comp. Laws 1885, c. 130, § 4) provides that mutual fire insurance companies that have a guaranty fund of \$100,000 may do business outside of the state; hence companies that do not have that guaranty fund cannot legally issue policies of insurance on property situated outside of the state (*Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, 23 Pac. 1061). Such limitations on the powers of insurers are recognized as valid (*Patrons of Industry Fire Ins. Co. v. Plum*, 82 N. Y. Supp. 550, 84 App. Div. 96).

This limitation on the power of mutual companies, forbidding such companies from issuing policies on property situated outside of certain designated territory, applies, however, to the inception of the policy, and, if the property is in the permitted territory when the contract is entered into, the removal of the property outside of

the limits will not render the policy void, but a loss there occurring will be covered.

Eddy v. Farmers' Mut. Ins. Co., 18 Misc. Rep. 297, 41 N. Y. Supp. 854; *Id.*, 20 App. Div. 109, 46 N. Y. Supp. 695; *Coventry Mut. Live Stock Ins. Ass'n v. Evans*, 102 Pa. 281.

In an early case (*Korn v. Mutual Assur. Soc.*, 6 Cranch, 192, 3 L. Ed. 195), which involved a company organized in Virginia and by the law of that state limited in its powers to the insurance of property within the state, it was held that the separation of the county of Alexandria from the state and its inclusion in the District of Columbia did not render invalid policies written before the separation on property situated in the county named. But where a co-operative insurance company, organized to do business in one county only, attempted to extend its territorial limits into an adjoining county, and the steps taken by it were defective, so that it acquired no authority to carry on its business there, a contract of insurance covering property situated in the new county was invalid (*Patrons of Industry Fire Ins. Co. v. Plum*, 84 App. Div. 96, 82 N. Y. Supp. 550). And where a Michigan statute (Acts 1883, No. 175) permitting mutual fire insurance companies, which confine their business to risks therein mentioned, to do business throughout the state, was declared unconstitutional (*Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311), the provision of How. St. § 4249, prohibiting mutual fire insurance companies from doing business in more than three counties, remained in force, and a policy issued by such a company, outside the three counties named in its charter, is void (*Eddy v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 651, 40 N. W. 775).

Notwithstanding the general rule that a mutual company cannot do business outside of the state, if the charter or the statute under which the company is organized does not expressly so limit its powers, a policy undertaking to insure certain property outside of the state for a fixed premium is not ultra vires (*Continental Fire Ass'n v. Masonic Temple Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930). This is also the rule in New York.

Huntley v. Merrill, 32 Barb. (N. Y.) 626; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258.

(d) Limitations as to character of property and extent of interest therein.

The powers of mutual companies are often limited by restrictions as to class of property or kind of interest on which risks may

be written. Limitations of this nature have been considered in an interesting series of cases. Thus, where such a company has "full power and authority to make insurance on any kind of property against loss by fire," it has the right to insure personal property, and is not confined to real property only, though the act of corporation makes the premium notes liens upon real estate only (*Allen v. Mutual Fire Ins. Co.*, 2 Md. 111). If the statute or charter authorizes the company to insure dwelling houses, farm buildings, and "other property," the company may insure a sawmill or the contents of a printing office (*Thompson Lumber Co. v. Mutual Fire Ins. Co.*, 66 Ill. App. 254); or a flour mill (*Langworthy v. C. C. Washburn Flouring-Mills Co.*, 79 N. W. 974, 77 Minn. 256). But under the Wisconsin statute relating to mutual companies (Laws 1885, c. 421, § 2), which provides that "no such corporation shall insure any property other than detached dwellings and their contents, farm buildings and their contents, live stock in possession and running at large, farm products on premises, and farming implements," a mutual company has no power to insure an incubator building (*O'Neil v. Pleasant Prairie Mut. Fire Ins. Co.*, 71 Wis. 621, 38 N. W. 345). So, under the Wisconsin statute (Rev. St. § 1931, and Laws 1872, c. 103, § 10) prohibiting town insurance companies from insuring schoolhouses, a policy issued on a dwelling house becomes void if afterwards the dwelling house is converted into a schoolhouse (*Luthe v. Farmers' Mut. Fire Ins. Co.*, 55 Wis. 543, 13 N. W. 490).

Where the property or risk is specified it will include only property or risks of similar kind. Thus, a company authorized to insure against "loss by fire and storm on any * * * buildings, and on goods, wares, merchandise, and effects, and on household furniture therein, * * *" cannot lawfully insure live stock (*Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r, 119). So, too, it was held in *Rochester Ins. Co. v. Martin*, 13 Minn. 59 (Gil. 54), that a company formed for the purpose of insuring buildings, household furniture, and merchandise against loss by fire, cannot insure live stock against loss by accident or disease resulting in death.

It has been held in Minnesota that a mutual company authorized to insure farm buildings and their contents, live stock, and hay or grain in bin or stack, has no power to insure growing grain.

Delaware Farmers' Mut. Fire Ins. Co. v. Wagner, 56 Minn. 240, 57 N. W. 656; *Same v. Knuppel*, 56 Minn. 243, 57 N. W. 656.

If, however, the company is authorized to insure hay, grain, and other agricultural products in barns, stacks, or otherwise, it has power to insure wheat growing in a field (*Mutual Fire Ins. Co. v. De Haven* [Pa.] 5 Atl. 65).

The power of mutual companies to insure is sometimes limited to unincumbered property, or property owned in fee simple (*Ingrams v. Mutual Assur. Soc.*, 1 Rob. [Va.] 661), or it is required that, if the estate of the insured is less than fee simple, the nature and extent thereof must be fully set forth (*Addison v. Kentucky & L. Ins. Co.*, 7 B. Mon. [Ky.] 470). The limitation may be that insurance shall not be written on property mortgaged beyond a certain percentage of its value (*Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 398). Policies issued in violation of these limitations are, of course, invalid. But, under a charter forbidding insurance if the assured has a less estate in the property than a fee simple unincumbered, a policy is not invalid because of formal defects in title of the assured, which could be corrected in equity (*Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 305).

In view of the general rule that a policy issued by a mutual company, insuring property of one not a member for a fixed premium, is *ultra vires* and void (*Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149), it has been held in South Carolina that such company cannot insure the property of a husband whose wife is a member of the company (*Pearson v. Mutual Ins. Co.*, 61 S. C. 321, 39 S. E. 512). So a policy taken out by a husband in his own name, as fee simple owner, on buildings erected on the separate real estate of his wife, is void in its inception, as *ultra vires* (*Froehly v. North St. Louis Mut. Fire Ins. Co.*, 32 Mo. App. 302). But it has been held in Maryland that a mutual insurance company, having full power and authority to make insurance on any kind of property, may insure the interest which a husband has in property conveyed to his wife (*Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673).

(c) Limitations as to amount of insurance.

An insurance company may be limited as to the amount of the insurance it may write on any one risk, and any insurance exceeding that amount is *ultra vires* (*Industrial & General Trust v. Tod*, 56 App. Div. 39, 67 N. Y. Supp. 362). Thus, the powers of a mutual company may be restricted, so that mortgaged property shall not be insured to such an amount as that the amount of the insur-

ance and the mortgage shall exceed three-fourths of its value (*Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 398). But generally the policy is void only as to the excess over the amount prescribed.

Boulware v. Farmers' & Laborers' Co-op. Ins. Co., 77 Mo. App. 639;
Hoxsle v. Providence Mut. Fire Ins. Co., 6 R. I. 517; *Post v. Hampshire Mut. Fire Ins. Co.*, 12 Metc. (Mass.) 555, 46 Am. Dec. 702.

Though the company is authorized to insure only to a certain per cent. of the value of the property, if the company deliberately makes a valuation and insures the prescribed per cent. of that valuation, or voluntarily insures more than the prescribed per cent. of the true value, the policy is not invalid.

Fuller v. Boston Mut. Fire Ins. Co., 4 Metc. (Mass.) 206; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219.

It has, indeed, been held in Pennsylvania that a policy insuring for more than the prescribed per cent. of the value is not invalid, unless the overinsurance was procured by means of some wrongful act on the part of insured (*Moore v. Susquehanna Mut. Fire Ins. Co.*, 46 Atl. 266, 196 Pa. 30).

(2) Life and accident companies.

The powers of life and accident insurance companies are often limited by restrictions as to the character of the risk which may be assumed. Thus, under a statute authorizing the organization of a life insurance association to issue contracts of general life insurance payable only on the contingency of death, the association may issue whole life policies, short term policies, full paid policies, or joint policies upon the lives of two or more persons, so long as the amounts payable are payable only on the contingency of death (*Home Life Assur. Co. v. Attorney General*, 112 Mich. 497, 70 N. W. 1031). So, where the articles of incorporation provide for the payment of insurance only on the death of the insured, the company cannot issue a policy payable on the occurrence of total disability (*Preferred Masonic Mut. Life Ins. Co. v. Giddings*, 112 Mich. 401, 70 N. W. 1026). Similarly, an association organized to insure against death or disability due to accident cannot write policies insuring against disability resulting from illness not caused by accident.

Knowlton v. Bay State Beneficiary Ass'n, 171 Mass. 455, 50 N. E. 929;
Same v. *Berkshire Health & Accident Ass'n*, 171 Mass. 459, 50 N. E. 930.

An accident insurance company, authorized only to insure against accidents sustained in traveling, cannot insure against accidents otherwise caused (*Miller v. American Mut. Acc. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765).

In *Employers' Liability Assurance Corporation v. Merrill*, 155 Mass. 404, 29 N. E. 529, it was held that a company organized to insure against bodily injury or death by accident may issue policies insuring an employer against liability for accidental injuries to others than employés, caused by horses or vehicles of the insured, elevator accidents, or negligence of the insured or his employés: all of such policies being accident policies, within Acts 1887, c. 214, § 29. And it has been held in Ohio that, in the absence of a statute prohibiting life insurance companies from writing employers' liability insurance, a life insurance company, incorporated and organized under the laws of another state and empowered by its charter to write employers' liability insurance, may, under the rule of comity, transact such business in the state, though the statute does not in express terms confer such authority upon life insurance companies (*State v. Aetna Life Ins. Co.*, 69 Ohio St. 317, 69 N. E. 608).

The New York statute (Laws 1892, c. 690, § 55), which provides that a policy on the life of a child under two years of age shall not be issued to an amount exceeding \$30, does not prohibit the issuing of several policies, each for that amount (*O'Rourke v. John Hancock Mut. Life Ins. Co.*, 10 Misc. Rep. 405, 31 N. Y. Supp. 130). Under the laws of Maryland (Code Pub. Gen. Laws, art. 23, §§ 127, 128; Laws 1892, c. 488, § 128; Laws 1894, c. 256, § 128), a fraternal benefit society cannot issue policies to exceed \$1,000 on any one life (*International Fraternal Alliance v. State*, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187).

(g) Limitations peculiar to mutual benefit associations.

Benefit societies are creations of the statute, incapable of exercising any power not therein expressed or clearly implied, and an attempt so to do is ultra vires (*Ferbrache v. Grand Lodge A. O. U. W.*, 81 Mo. App. 268). It is, therefore, a general rule that a mutual benefit association cannot do a general insurance business; that is to say, it cannot conduct its business on the lines of ordinary life insurance companies.

International Fraternal Alliance v. State, 39 Atl. 512, 86 Md. 550, 40 L. R. A. 187; *State v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 399; *Commonwealth v. Order of Vesta*, 2 Pa. Dist. R. 254. See,

B.B.INS.—37

also, the dissenting opinion of Justice Hamersley in *Fawcett v. Supreme Sitting of Order of Iron Hall*, 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815.

As a special application of this general rule is the additional rule that mutual benefit or fraternal associations, organized under statutes authorizing insurance for the benefit of the family and heirs of a deceased member, cannot write insurance for the benefit of persons not falling within such designation.

Golden Rule v. People, 118 Ill. 492, 9 N. E. 342; *Bankers' Union of the World v. Crawford*, 73 Pac. 79, 67 Kan. 449, 100 Am. St. Rep. 465; *State v. Moore*, 38 Ohio St. 7; *State v. Moore*, 39 Ohio St. 486; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; *Grand Lodge Order of Sons of Herman v. Iselt* (Tex. Civ. App.) 37 S. W. 377.

But a claim of ultra vires cannot prevail, if based on a misconstruction by the association of the limitations on its powers (*Watts v. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441).

In some mutual benefit associations the rules restrict the membership to persons who are members of some affiliated secret order, such as the Masons or the Odd Fellows. Such restrictions are not, strictly speaking, limitations on the powers of the association, and consequently the association may be estopped to assert them (*Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603). In any event, the eligibility of the person to membership will be determined by the rules of the order, affiliation with which is the condition prescribed (*Connelly v. Masonic Mut. Benefit Ass'n*, 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428); and the admission to membership in the association of a person regarded as a member by the affiliated order is valid (*Traders' Mut. Life Ins. Co. v. Humphrey*, 109 Ill. App. 246, affirmed in 69 N. E. 875, 207 Ill. 540).

(h) Same—Limitations as to age.

It is in the power of mutual benefit associations to limit membership to persons under a certain age (*Marcoux v. Society of Beneficence St. John the Baptist*, 91 Me. 250, 39 Atl. 1027); or the statutes relating to the organization of co-operative assessment companies may limit the power of the association to insure persons between certain ages, and any policies written on persons either younger or older than the ages limited will be void.

Gray v. National Benefit Ass'n, 111 Ind. 531, 11 N. E. 477; *Brenner v. Kansas Mut. Life Ass'n*, 6 Kan. App. 152, 51 Pac. 303. See, also,

Meehan v. Supreme Council Catholic Benev. Legion, 88 N. Y. Supp. 821, 95 App. Div. 142, where the sufficiency of the evidence to show ineligibility on this ground was considered.

Where the policy so provides, the law of the state where the association was organized will govern as to the age limitation (*Voorheis v. People's Mutual Benefit Society of Elkhart*, 91 Mich. 469, 51 N. W. 1109).

It has been held that limitations as to age, though based on the by-laws of the association, cannot be waived (*McCoy v. Roman Catholic Mut. Ins. Co.*, 152 Mass. 272, 25 N. E. 289); but a different rule was laid down in *Wood v. Supreme Ruling of Fraternal Mystic Circle*, 72 N. E. 783, 212 Ill. 532, where, as the limitation as to age was not part of the organic law, it was held that the association might be estopped to assert that the member was above the age limit when the certificate was issued. It has been held in Nebraska that the limitation as to age cannot be evaded by the purchase of the business and risks of another society, and consolidating such society with itself (*State v. Bankers' Union of the World*, 99 N. W. 531); but the better opinion seems to be that a limitation as to age relates to original insurance, and does not invalidate a policy issued in lieu of a policy in another company with which the first insurer has consolidated and whose outstanding risks it has taken, if the insured was within the prescribed age when the original policy issued.

Cartcart v. Equitable Mut. Life Ass'n, 111 Iowa, 471, 82 N. W. 964;
Rand v. Massachusetts Ben. Life Ass'n, 20 App. Div. 392, 46 N. Y. Supp. 725, affirming 42 N. Y. Supp. 26, 18 Misc. Rep. 336.

(1) Same—Power to write endowment policies.

The rule is well established that a mutual benefit association cannot issue endowment policies.

Reference may be made to *Rockhold v. Canton Masonic Mut. Ben. Ass'n*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420 (former report, 19 N. E. 710); *Order of International Fraternal Alliance v. State*, 77 Md. 547, 26 Atl. 1040; *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512.

So, in *Dishong v. Iowa Life & Endowment Ass'n*, 92 Iowa, 163, 60 N. W. 505, it was held that under Acts 21st Gen. Assem. c. 65, prohibiting mutual benefit associations from writing endowment policies, an association could not, by contract of reinsurance of the risks of another association going out of business, render itself

liable on endowment contracts issued by such other association. If, however, such an association has authority to issue a life policy, but has not complied with the law so as to enable it to issue endowment policies, the fact that it exceeds its authority in agreeing to issue at some future time and in a certain contingency an endowment policy does not render a life policy issued pending the delivery of the endowment policy, absolutely void (*Calandra v. Life Ass'n of America* [Sup.] 84 N. Y. Supp. 498).

On the other hand, it would seem, from *Kerr v. Minnesota Mut. Benefit Ass'n*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, and *State v. Educational Endowment Ass'n*, 49 Minn. 158, 51 N. W. 908, that mutual benefit or assessment companies in Minnesota may write endowment insurance. Such, too, may be inferred to be the rule in Ohio, from the decision in *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129.

In this connection it may be noted that in *Haydel v. Mutual Reserve Fund Life Ass'n*, 104 Fed. 718, 44 C. C. A. 169, affirming (C. C.) 98 Fed. 200, it was held that a policy requiring the payment of a fixed premium—that is to say, a stated sum at stated periods—or such multiple thereof as should be determined by the directors, and providing that the excess of such amount above what was required to meet current mortuary claims should constitute a reserve fund, from which, after a certain number of years, the policy holder was given the option of receiving as its surrender value a certain per cent. of the amount remaining in the reserve fund directly contributed by him, was not an endowment policy, beyond the power of an assessment company to issue.

(J) Same—Power to reinsure.

The right of mutual benefit associations to reinsure the risks of other associations is usually regulated by statute. Thus, the Illinois statute (*Hurd's Rev. St.* 1903, p. 1109, c. 73, § 245) provides that no life insurance corporation doing business on the assessment plan shall reinsure risks in any other corporation unless the contract of transfer or reinsurance is approved by a two-thirds vote of the insured, etc., and that, if such transfer shall be approved, every member of the corporation who shall file his preference to be transferred to another corporation than that named in the contract shall be accorded rights in aid of such transfer, and that no such corporation shall transfer its risks or assets, or reinsure its risks, or any part thereof, in any insurance corporation in any other state which is not at the time of the transfer authorized to do business in Illinois. It was held that such section did not, by implication or otherwise, attempt to dictate the terms of a contract for the

transfer of the membership of an association to a reinsurer, nor prohibit a contract limiting the reinsurance to those members who appeared on the books of the transferring corporation to be in good standing at the time. (*Parvin v. Mutual Reserve Life Ins. Co.* [Iowa] 100 N. W. 39.)

So, in *Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co.*, 64 N. J. Law, 340, 45 Atl. 762, it was held that a statute providing that an insurance company should not reinsure, unless it had the consent in writing of two-thirds the number of the holders of the policies proposed to be reinsured, and requiring that the policies should be submitted to the Secretary of State and by him approved, was not violative of the constitutional enactment that no state shall deprive any person of liberty or property without due process of law.

It is, however, well established that it is not within the power of a mutual benefit association by a contract of reinsurance or transfer to assume the payment of the death claims of another association that have already accrued.

Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418; *Bankers' Union v. Crawford*, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; *Royal Fraternal Union v. Crosier* (Kan.) 78 Pac. 162.

4. VALIDITY OF POLICY AND COLLATERAL CONTRACTS AS AFFECTED BY FAILURE TO COMPLY WITH STATUTES REGULATING INSURANCE COMPANIES.

- (a) General principles.
- (b) Validity of contracts based on doctrine of estoppel.
- (c) Validity of contracts under general laws.
- (d) Validity of contracts when statute does not expressly declare them void.
- (e) Same—Contracts valid notwithstanding prohibition of the statute.
- (f) Contrary doctrine—Contracts void when business is prohibited and penalty provided.
- (g) Right of insurer to recover money paid on policy or to enforce subrogation.
- (h) Validity as dependent on place of contract.
- (i) Questions of practice.

(a) General principles.

Reference has been made elsewhere to the general purpose and validity of statutes regulating the business of insurance.¹ These

¹ See ante, p. 57.

statutes usually prescribe certain acts to be done by foreign insurance corporations as conditions precedent to the transaction of business in the state, prohibit the companies from writing insurance until these requirements have been complied with, and provide a penalty for violation thereof. In view of these provisions, the question has been raised whether contracts of insurance made by foreign companies which have not complied with the statute are valid and enforceable by either the insurer, who is at fault, or the insured.² It may be conceded that a state legislature has power to declare such contracts void, as contrary to public policy (*Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683), or to declare them valid, as has been done in some instances. The question is only as to the effect of non-compliance with the statute, whether or not it contains any express declaration as to the status of contracts.

It is a fundamental principle that, to be affected by the noncompliance of the company with the statutes regulating the business of insurance, the contract must pertain to the insurance business.

Contracts preliminary to the transacting of insurance business, such as subscriptions to the stock of the company, are not within the purview of the statute. *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369; *Payson v. Withers*, 19 Fed. Cas. 29. Nor are contracts relating to loans made by the company. *Daly v. National Life Ins. Co.*, 64 Ind. 1.

In accordance with this principle, it was held, in *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350, 34 South. 1012, that the company's noncompliance did not prevent its recovering from an agent premiums collected by such agent; the theory of the court being that the requirements of the statute extended only to affect dealings between the company and the insured. The weight of authority is, however, that, if the right which it is sought to enforce is one growing out of the insurance business, it falls within the statute.

This is the principle governing *Madison Mut. Ins. Co. v. Ecker*, 16 Fed. Cas. 365; *Gilbert v. State Ins. Co.*, 3 Kan. App. 1, 44 Pac. 442; *People's Mut. Benefit Society v. Lester*, 105 Mich. 716, 63 N. W. 977; *Thorne v. Travelers' Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89; *New Hampshire Ins. Co. v. Kennedy*, 96 Tenn. 711, 36 S. W. 709—where recovery from the agent was sought. But see *Penn Mut. Life Ins. Co. v. Bradley*, 66 Hun, 635, 21 N. Y. Supp. 876, affirmed without opinion 142 N. Y. 660, 37 N. E. 569, where it was held that

² Effect of noncompliance with statutory regulations on the contracts of foreign corporations generally, see Cent. Dig. vol. 12, "Corporations," §§ 2536-2549.

the agent was estopped to plead noncompliance, and *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 121, 47 Pac. 848, where it was held that, in the absence of a special declaration to that effect, contracts of noncomplying companies were not void.

The statute will not, of course, affect the validity of a contract entered into prior to its passage (*St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 55 Ark. 163, 18 S. W. 43); nor will the validity of contracts be affected where an attempted compliance has been rendered ineffective by the neglect of the designated state officer to perform his duty in the premises.

American Ins. Co. v. Butler, 70 Ind. 1; *Same v. Pressell*, 78 Ind. 442.

Of course, the failure of the company to comply with the statutes in some of the states where it does business cannot affect the validity of a contract entered into in a state where the company had the right to transact business (*Commonwealth Mut. Fire Ins. Co. v. Wood*, 51 N. E. 19, 171 Mass. 484). If the contract has been fully performed, it will not thereafter be rescinded on the ground of noncompliance (*Casserly v. Manners*, 9 Hun [N. Y.] 695). And generally, the defense of noncompliance can be raised only by persons directly interested in the contract as parties thereto.

Kilnekhamer Brewing Co. v. Cassman, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

(b) Validity of contracts based on doctrine of estoppel.

In some jurisdictions the validity of policies issued by foreign companies which have failed to comply with the statutes relating to such companies has been sustained on the ground of estoppel. A leading case is *Swan v. Watertown Fire Ins. Co.*, 96 Pa. 37, where the court said that, though companies doing business in the state without having complied with the provisions of the statute may not enforce their contracts, they cannot set up their turpitude to defeat actions on their contracts brought by innocent persons. The theory of the cases holding that the company is estopped to assert noncompliance with the statutes in defense of an action on the policy is probably that expressed in *Berry v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 439, where the court said that by doing business in the state the company asserted a compliance with the laws of the state, and, after enjoying all the benefits of that business and receiving the money of the assured, it will not be

heard to say that it never submitted to the jurisdiction of the state. It can reap no advantage from its own wrong. To sustain this defense would be giving judicial sanction to business methods much below the standard of common honesty.

The doctrine of estoppel has been applied to sustain the policy in the following cases: *Ehrman v. Teutonia Ins. Co.* (D. C.) 1 Fed. 471; *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85, 30 N. E. 772, affirming 40 Ill. App. 119; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Union Mut. Life Ins. Co. v. Relf*, 1 Wkly. Law Bul. 290, 7 Ohio Dec. 200; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio Cir. Ct. R. 465, 12 O. C. D. 141; *Hoge v. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939.

The principles laid down in the *Swan Case* have been applied in Minnesota, where it was held, in *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943, that the policy was valid; and in a subsequent case (*Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205, 68 N. W. 1065) it was held that a company which has not complied with the statutory requirements, so as to be authorized to do business in the state, cannot recover premiums on a contract made by it insuring property in the state, distinguishing the *Ganser Case* on the ground that the object of the statutory requirements is the protection of the insured, and the parties are not in *pari delicto*.

Moreover, no presumption of knowledge on the part of the insured arises to affect the application of the doctrine of estoppel. While both parties are presumed to know the law, the insured is not presumed to know whether the company has complied with the law (*Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85, 30 N. E. 772, affirming 40 Ill. App. 119); nor is he bound to ascertain whether the insurer has complied with the statute.

Swan v. Watertown Fire Ins. Co., 96 Pa. 37; *Ehrman v. Teutonia Ins. Co.* (D. C.) 1 Fed. 471.

(c) Validity of contracts under general laws.

A distinction has been drawn in some cases, notably in Indiana, based on the fact whether the statute with which the company had failed to comply was the statute relating to corporations generally or the statute relating to insurance companies. The question was raised in the leading case of *Rising Sun Insurance Co. v. Slaughter*, 20 Ind. 520, in which was involved the validity of a policy issued by a company which had not complied with the general law prescribing the terms on which foreign corporations could do business in the

state. It was urged that this statute did not apply to foreign insurance companies. This contention was based on the ground that separate legislation in reference to such companies had been attempted by a separate act, which was afterwards held to be unconstitutional. The enactments of this statute, however, it was argued, showed that insurance companies were not intended to be included in the general act in relation to corporations. But the court held that the language of the general corporation act would include insurance companies, as well as those formed for any other purpose. This doctrine was subsequently approved in *Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73. It must be observed that the statute considered in these cases expressly provided that contracts made by corporations not complying therewith should be void. It is on this ground that these cases must be distinguished from later Indiana decisions, and especially from *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347. In this case the company had not complied with the statute relating expressly to insurance companies. The court evidently took the position that, as there was a special statute, that was the one that governed the case, and not the general statute. Consequently, as the special statute did not expressly declare the contracts void, the policy must be regarded as valid.

The rule that noncompliance with the general corporation law would render the policy void is apparently approved, though not directly decided, in *Northwestern Mut. Life Ins. Co. v. Elliott* (C. C.) 5 Fed. 225.

The doctrine that, where there is a special statute relating to insurance companies, the noncompliance with the statute relating to foreign corporations in general does not affect the validity of the contract, was directly decided in *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154.

This seems, also, to be the basis of the decision in *Hoffman v. Banks*, 41 Ind. 1, followed in *Cassaday v. American Ins. Co.*, 72 Ind. 95.

In this connection, see *Daly v. National Life Ins. Co.*, 64 Ind. 1, where a mortgage note was involved. The court, while approving the general rule that the special insurance statute would apply to companies incorporated by any foreign government or by any other state, held that it did not apply to this company, as it was incorporated in the District of Columbia. Moreover, the mortgage note was not connected with the business of insurance, within the terms of the statute.

(d) Validity of contracts when statute does not expressly declare them void.

Reference has already been made to *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347, where it was held that, in the absence of any provision declaring void contracts of companies which had not complied with the statute, policies issued by such companies would be regarded as valid. Though this view was taken where the action was to enforce the policy, it had been previously held (*Hoffman v. Banks*, 41 Ind. 1) that the object of the statute is not to protect the company, but the insured, and therefore a premium note given for a policy issued by a noncomplying company could not be enforced.

This rule was also followed in *Cassaday v. American Ins. Co.*, 72 Ind. 95, and *Lamb v. Lamb*, 14 Fed. Cas. 1016, which arose in Indiana.

Later decisions have, however, modified the broad rule, and have considered that the effect of noncompliance with the statute is only to suspend the remedy of the company on the premium notes, so that the right to enforce them accrued as soon as the statute was complied with.

Such is the rule laid down in *American Ins. Co. v. Wellman*, 69 Ind. 413. This was followed in *Wiestling v. Warthin*, 1 Ind. App. 217, 27 N. E. 576.

The Supreme Court of Indiana has, however, in one case apparently departed from the doctrine laid down in *Hoffman v. Banks*. In *Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44, where the action was brought by the insured to recover back premiums paid to an insurer which had not complied with the statute, they recognized the contrary rule that contracts made in violation of the statute are void and that therefore the policy was invalid. But the court held that the insured was not so far *particeps criminis* as to prevent him from recovering back the money paid.

The principle that the policy will not be declared invalid, in the absence of an express provision in the statute, has also been asserted in *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395, where the policy, regarded as a Pennsylvania contract, was considered in relation to the Pennsylvania statute relating to foreign insurers, which provides that no foreign company shall insure property within that state until it has complied with the statute, and also provides a penalty for the violation thereof. The court holds that, while it is a general principle

that the attaching of a penalty to the doing of an act renders it void, still this is not a universal rule. The object of this statute was to protect the citizens of the state. It did not, in words, declare the contracts made in violation thereof void. The prohibition was against the company only. The court, after reviewing the authorities, concludes that in view of the language of the law, the absence of express prohibition, and the evident purpose to protect the insured, it was not intended to render the contract void.

It is, nevertheless, the rule in Iowa that an insurer who has not complied with the statute cannot enforce the collection of premiums or assessments.

Parker v. Lamb & Sons, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704;
Seamans v. Zimmerman, 91 Iowa, 363, 59 N. W. 290.

In view of the stress laid in the Pennypacker Case on the purpose of the statute, it is probable that it was the theory that the statute is meant for the protection of the insured, and not of the insurer, that controlled these cases.

(e) Same—Contracts valid notwithstanding prohibition of the statute.

In some of the cases referred to in the preceding subdivision, there may be traced the additional principle that a statute which prohibits the transacting of business by a foreign insurance company that has not complied therewith, and which prescribes a penalty for a violation thereof, does not by virtue of such provisions render the contracts of such company void.

This principle is the basis of the decisions in *Ehrman v. Teutonia Ins. Co.* (D. C.) 1 Fed. 471; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 439. It was also asserted in *Columbus Ins. Co. v. Walsh*, 18 Mo. 229, where the action was by the company to recover money paid under the policy, and was evidently the governing principle in *Clark v. Middleton*, 19 Mo. 53, which was an action for premiums. It was also laid down in *The Manistee*, 16 Fed. Cas. 617, affirmed *Id.* 618, and *Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165, 50 S. W. 281, where the insurer's right of subrogation was involved.

A somewhat similar principle governs those cases in which the statute is one regulating the business of insurance agents in which it has been held (*Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67) that neither is the policy invalidated, nor the insured relieved

from the obligation of paying the premiums. The prohibition is against persons acting for companies that have not complied with the prescribed conditions. Such persons alone are subject to the penalty. The object of the act is not to make insurance unlawful, but to protect policy holders, and it seems to have been the intent to rely on the penalties imposed as sufficient.

Reference may also be made to *Marshall v. Reading Fire Ins. Co.*, 78 Hun, 83, 29 N. Y. Supp. 334; *Continental Ins. Co. of New York v. Rigen*, 31 Or. 336, 43 Pac. 476.

(f) Contrary doctrine—Contracts void when business is prohibited and penalty provided.

On the other hand, there is a line of cases asserting the doctrine that, where the statute prohibits a foreign insurance company from transacting any insurance business within the state unless it has complied with the requirements of the statute, the contracts of such company are absolutely void.

Reference may be made to *Madison Mut. Ins. Co. v. Ecker*, 16 Fed. Cas. 365; *Beeber v. Walton*, 7 Houst. (Del.) 471, 32 Atl. 777; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush (Ky.) 590; *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law, 33; *Stewart v. Northampton Mut. Live Stock Ins. Co.*, 38 N. J. Law, 436; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 528; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394.

It is to be noted, however, that in all these cases the question arose in an action by the company to collect premiums or assessments; that is, to enforce the contract as against the insured. And in the *Rosenthal Case* the court, though conceding that the question was not before it, declared that it was not prepared to hold that, had the action been on the policy, there could be no recovery. On the other hand, in the *Delaware case* the court said that the policy was void, as well as the premium note. In *Missouri, K. & T. Trust Co. v. Krumseig*, 77 Fed. 32, 23 C. C. A. 1, it was held that the policy was void because of the penalty prescribed in the statute, but it must be noted that this action was brought by the insured to rescind the policy.

In this connection see, also, *Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44, where the general rule was approved, but it was said that the insured was not so far a *particeps criminis* as to be prevented from recovering back the premiums he had paid. And see *McCutcheon v. Rivers*, 68 Mo. 122, where it was held that an in-

insurance agent who takes a premium after the company's certificate of authority to do business in Missouri has been revoked by the superintendent of insurance is liable to return the premium, although he was not then aware of the revocation.

The rule that the prohibitory statute renders the contract absolutely void, whether enforcement is sought on behalf of the insurer or the insured, has been consistently followed in Massachusetts. This doctrine was laid down in *Williams v. Cheney*, 3 Gray (Mass.) 215, which was an action on a premium note, and has been reiterated in numerous cases since.

Jones v. Smith, 3 Gray (Mass.) 500; *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray (Mass.) 376; *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.) 398; *Williams v. Cheney*, 8 Gray (Mass.) 206; *General Mutual Ins. Co. v. Phillips*, 13 Gray (Mass.) 90. And see *Roche v. Ladd*, 1 Allen (Mass.) 436.

It was, however, conceded in *Williams v. Cheney*, 3 Gray (Mass.) 215, and *Jones v. Smith*, Id. 500, that the rule would not apply to defeat an action on a premium note in the hands of a bona fide holder. So far as the right to enforce premium notes is concerned, the effect of the statute is rather to suspend the remedy, and on subsequent compliance with the requirements of the statute the notes may be enforced: *Atlantic Mut. Fire Ins. Co. v. Concklin*, 6 Gray (Mass.) 73; *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen (Mass.) 231.

The foregoing cases were decided under statutes (St. 1847, c. 273) which contained no provision that contracts would, nevertheless, be valid. Such was, also, the character of the statute of 1887 (chapter 214), and in cases decided under this statute the rule announced above has been reasserted.

Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; *Clafin v. United States Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528; *Baldwin v. Connecticut Mut. Life Ins. Co.*, 182 Mass. 389, 65 N. E. 837. See, also, *Abraham v. Mutual Reserve Fund Life Ass'n*, 183 Mass. 116, 66 N. E. 605.

Under retaliatory statutes the rule announced in Massachusetts has also been applied in New Hampshire, where the offending company was a Massachusetts corporation (*Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123).

It was, however, conceded, in *Williams v. Cheney*, 3 Gray (Mass.) 215, and in *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59, that if the statute had contained a provision declaring the contracts of noncomplying companies nevertheless valid, the rule

announced in those cases would not apply. This was also recognized in *Clafin v. United States Credit System Co.*, 43 N. E. 293, 165 Mass. 501, 52 Am. St. Rep. 528. The statute of 1854 (chapter 453, § 36) contained such a declaration, and therefore, in cases decided under that statute, it was held that the insurer might recover premiums and assessments, though the company had not complied with the requirements of the statute.

Provincial Ins. Co. v. Lapsley, 15 Gray (Mass.) 262; *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen (Mass.) 231; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221. See, also, *Lester v. Webb*, 5 Allen (Mass.) 569, where it was held that under an act providing that contracts made by a foreign insurance company without complying with the act were nevertheless valid, except that if any such company should neglect to so comply after notice it shall not recover any premium or assessment, disability to sue on a premium note does not arise until such notice has been given.

In accord with this principle is the decision in *Leonard v. Washburn*, 100 Mass. 251, where it was held that a premium actually paid could not be recovered back by the insured, as none of the provisions of the statute contemplate or authorize such recovery, and as, in view of the validity of the policy, there was no failure of consideration.

The principle recognized in these Massachusetts cases involving the statute of 1854 has also been recognized in New Hampshire (*Union Insurance Company v. Smart*, 60 N. H. 460), and in Rhode Island (*Commonwealth Mut. Fire Ins. Co. v. Place*, 21 R. I. 248, 43 Atl. 68).

(g) Right of insurer to recover money paid on policy or to enforce subrogation.

In *Northwestern Mut. Life Ins. Co. v. Elliott* (C. C.) 5 Fed. 225, where the contract was held void because the insurer had not complied with the statute of Oregon regulating foreign corporations, the insurer was nevertheless allowed to recover the amount paid on the policy, on the ground that the action was based, not on the contract, but on the fraud of the beneficiary. The right of the insurer to recover was, however, sustained in Massachusetts (*Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221), because the statute expressly declared the contract valid, notwithstanding failure to comply therewith, and in Missouri (*Columbus Ins. Co. v. Walsh*, 18 Mo. 229), on the theory that, as the statute merely prescribed a penalty for noncompliance, the contract was not rendered invalid.

The effect of noncompliance with the statute on the insurer's right to subrogation has been considered in several interesting cases. In *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, it was held that noncompliance with the statute of Arkansas relating to foreign corporations did not affect the right, as the rights of foreign insurance companies depended on special statutes. The right to enforce subrogation has also been sustained on the theory that, in the absence of an express declaration that contracts of companies not complying with the statute shall be void, that effect would not follow from a mere declaration that the business was unlawful (*The Manistee*, 16 Fed. Cas. 617, affirmed in *Id.* 618). The right has been sustained in Indiana, on the theory that the statute does not apply to such actions as they are not based on the contract. The insurer is merely standing in the place of the insured to enforce a duty which the person causing the loss owes to the insured. (*Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405.) In still other cases it has been held that, as the contract of insurance was made in another state and valid there, the fact that the insurer had not complied with the statute of the state where the insured property was located and the action brought did not affect the right of subrogation.

St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; *Id.*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; *Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165, 50 S. W. 281.

(h) Validity as dependent on place of contract.

It is evident that the general rules as to what law governs in determining the validity of a contract are applicable, where the effect of noncompliance with the statutes regulating insurance companies is in issue. These rules have been adequately discussed elsewhere,³ and it is deemed sufficient at this time to refer only to the established principles and the cases which illustrate them, as applied to the present discussion.

It is fairly well settled that if the contract of insurance is invalid in the state where it was made, by reason of the failure of the company to comply with the statutes of such state, it will not be enforced in any other state.

Ford v. Buckeye State Ins. Co., 6 Bush (Ky.) 133, 99 Am. Dec. 663; *Hacheny v. Leary*, 12 Or. 40, sub nom. *Beneo v. Yesler*, 7 Pac. 329.

³ See ante, p. 558.

The rule was followed in Washington, though the company involved was a domestic corporation; the contract being made in New York and invalid there (*Wood v. Cascade Fire & Marine Ins. Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. Rep. 917).

The contract may, however, be made in one state covering property in another state, in which the company is not authorized to do business. Nevertheless, as the contract is valid where it was made, it will be enforced there; the failure to comply with the laws of the state where the property is located being immaterial.

Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co., 173 Mass. 161, 53 N. E. 373; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Hyde v. Goodnow*, 3 N. Y. 266; *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626; *Ward v. Tucker*, 7 Wash. 399, 35 Pac. 1086; *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825.

The decisions are, however, far from unanimous, when the contract is valid in the state where made, but covers property in another state, the statute of which has not been complied with and in which the action is brought. In some jurisdictions it has been held that such contracts, though invalid in the state where enforcement is sought, will nevertheless be enforced in the courts of that state on principles of comity.

Lamb v. Bowser, 14 Fed. Cas. 983, affirming *Id.* 980; *State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *French v. People*, 6 Colo. App. 311, 40 Pac. 463; *Lumbermen's Mutual Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 S. W. 165, 50 S. W. 281; *Connecticut River Mut. Fire Ins. Co. v. Way*, 62 N. H. 622; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law, 33; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Western Massachusetts Mut. Fire Ins. Co. v. Hilton*, 58 N. Y. Supp. 996, 42 App. Div. 52; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. 982. In the last case the decision is apparently based on the provisions of the Vermont statute (sections 4181, 4182) permitting residents of the state to procure insurance at the home office of foreign companies not authorized to do business in the state.

On the other hand, in other jurisdictions, the courts have taken the position that the principle of comity does not apply where the contract is one in contravention of the settled public policy of the state in which enforcement is sought, and that they will not, there-

fore, sustain a contract made by a company not complying with the statute on property within the state, though the contract was made in another state and valid there.

Buell v. Breese Mill & Grain Co., 65 Ill. App. 271; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; *Cowan v. London Assur. Corp.*, 73 Miss. 321, 19 South. 298, 55 Am. St. Rep. 535; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545 (the judgment was reversed on rehearing, reported in 85 N. W. 443, 61 Neb. 454, but on other grounds); *Swing v. Munson*, 191 Pa. 582, 43 Atl. 342, 58 L. R. A. 223, 71 Am. St. Rep. 772 (but see *Thornton v. Western Reserve Farmers' Ins. Co.*, 1 Grant, Cas. [Pa.] 472); *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526, 46 Am. St. Rep. 855, 27 L. R. A. 556.

(1) Questions of practice.

In an action on the contract of insurance, the plaintiff need not allege that the insurer has complied with the statute; noncompliance being a matter of defense.

New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9; *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943; *Thompson v. Colonial Assur. Co.*, 33 Misc. Rep. 37, 68 N. Y. Supp. 143; *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234, 86 Am. Dec. 761.

Similarly it has been held that the company, in an action to enforce its rights under the contract, need not allege that it has complied with the statute, as noncompliance will not be presumed.

St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Williams v. Cheney*, 3 Gray (Mass.) 215.

The contrary doctrine prevails in Vermont. *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526.

In an action on the contract, the burden is on the company to show noncompliance with the statute (*Abraham v. Mutual Reserve Fund Life Ass'n*, 183 Mass. 116, 66 N. E. 605). So, in an action on the premium note, the burden is on the company to show compliance (*Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray [Mass.] 165). The burden of showing that a mutual relief association, excepted by Rev. St. 1895, art. 3096, from the operation of the general insurance laws, is withdrawn from the protection of that

article by a failure to comply with the statute is on a beneficiary suing on a certificate (*Supreme Council A. L. H. v. Story* [Tex. Sup.] 78 S. W. 1).

5. RIGHT TO INSURE IN COMPANY NOT COMPLYING WITH THE LAWS REGULATING INSURANCE COMPANIES.

- (a) Scope of discussion.
- (b) The Pennsylvania rule—*Commonwealth v. Biddle*.
- (c) The doctrine of the Hooper Case.
- (d) Same—Dissenting opinion of Mr. Justice Harlan.
- (e) The Louisiana cases—*State v. Williams*.
- (f) Same—*The Allgeyer Case*.
- (g) Same—Comment on the *Allgeyer Case*.
- (h) The Massachusetts rule—*Commonwealth v. Nutting*.
- (i) The question in other states.
- (j) Conclusion.

(a) Scope of discussion.

Among the interesting questions which have arisen in connection with the failure of insurance companies to comply with the laws regulating such companies in the states wherein the property covered by their policies is situated is the question whether a property owner, desiring to insure his property, has the right to insure in such a company, if he so elect. Though this question is, in a sense, but a phase of the general question of the validity of contracts made with companies not complying with the laws, it is of sufficient importance and peculiarity to be treated separately.

(b) The Pennsylvania rule—*Commonwealth v. Biddle*.

A leading case in which this question is involved is *Commonwealth v. Biddle*, 139 Pa. 605, 21 Atl. 134, 11 L. R. A. 561, decided in 1891. The defendant, a citizen of Pennsylvania, insured his property located in that state in an insurance company not authorized to do business in the state. On expiration of the policy a renewal was sent to him, and he forwarded to the representative of the company in Providence, R. I., a check for the premium. It was sought to hold defendant liable under the act of April 26, 1887, declaring that "any person or persons, or any agent, officer, or member of any corporation, paying or receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance, or effecting any contract

of insurance, * * * directly or indirectly, with any insurance company, not of this state, which has not been authorized" to do business in it, shall be guilty of a misdemeanor. This act is supplemental to the act of April 4, 1873, imposing a penalty on insurance companies doing business in the state without authority, and is intended to bring within the provisions of the former act all persons engaged in doing an unauthorized insurance business.

While recognizing that the law is very broad in its scope, the court does not regard it as applicable to the present case. The reasoning of the court is that the prohibitions of the act are from paying or receiving, forwarding, securing, helping, or aiding in placing insurance, or effecting any contracts, etc., and the prohibited acts themselves are all expressed in the plural—"premiums," "applications," "contracts." These phrases are not applicable to an owner making a single contract of insurance on his own property. They apply to agents, brokers, and others doing an insurance business. It may be readily conceded that an act which should attempt to prevent a nonresident owner of property in this state, or a resident owner not at the time within its territory, from insuring his property in any manner lawful in the place of contract, would be void as extraterritorial. So, also, it may be conceded that if a citizen of Pennsylvania has, by a contract validly made outside of its boundaries, incurred a liability, no law of this state can, under the Constitution of the United States, prevent his fulfilling that obligation, even by an act done within the state. The court has no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company, by an owner, criminal, if done in this state. But, when asked to say that the legislature intended so unusual and extreme an interference with the rights of citizens in the management of their private affairs, the court may demand that such intent shall be shown in clear and unambiguous terms. Though not decided, it may be inferred that the court regarded the contract as really made without the state.

(c) The doctrine of the Hooper Case.

The question of the right of a resident to insure his property in a company not authorized to do business in the state was raised in *Hooper v. People*, 15 Sup. Ct. 207, 155 U. S. 648, 39 L. Ed. 297. A shipowner engaged Hooper to procure insurance on a vessel. Hooper was not an insurance agent, but represented a firm of brokers and adjusters, whose principal place of business was in New

York, and the statement in the case emphasizes the fact that in all the transactions involved Hooper acted as agent of such brokers, and not otherwise. Hooper applied to this firm for the insurance. The brokers procured a policy in a company not authorized to transact business in California, sent it to Hooper, who delivered it to the owner, collecting the premium therefor and depositing it to the credit of the New York brokers, his principals. Hooper was prosecuted and convicted under Pen. Code Cal. § 439, which provides that "every person who in this state procures or agrees to procure any insurance for a resident of this state from any insurance company not incorporated under the laws of this state, unless such company or its agent has filed the bond required by the laws of this state relative to insurance, is guilty of a misdemeanor."

On writ of error to the Supreme Court of the United States, the judgment of conviction was affirmed; the opinion of the court being written by Mr. Justice White. The grounds of the decision were that the contract, though made by mail, was a California contract; that as the state has the power to exclude foreign insurance companies from her territory, and the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within the state, she has also the further right to prohibit a citizen from contracting within her jurisdiction, either in his own behalf or through an agent, with any foreign company which had not acquired the privilege of engaging in business therein. It was contended by the defendant that, as the right of a citizen to contract for insurance for himself is guaranteed by Const. U. S. Amend. 14, he cannot be deprived by the state of the capacity so to contract through an agent. The court says, however, that the fourteenth amendment does not guaranty the citizen the right to make within his state, either directly or indirectly, a contract the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, he might therefore authorize an agent to violate in his behalf the laws of the state within her own limits, involves a non sequitur and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction.

(d) Same—Dissenting opinion of Mr. Justice Harlan.

Mr. Justice Harlan dissented, and was joined in his dissent by Mr. Justice Brewer and Mr. Justice Jackson. He maintained that

the single act of the company in issuing this policy does not show that it was transacting business within the state, as forbidden by the statute. In his opinion, the statute, in its application to this case, is an illegal interference with the liberty of both the owner and Hooper, as well as an abridgment of the privileges of the individual citizens, namely, the principals of Hooper, through whom he obtained the contract. These principals were not insurance agents, but were brokers and adjusters. Referring to the case of the procurement of a loan from a company which had not complied with the statutes regulating foreign corporations, he said that while the state could forbid any foreign corporation, whose business it is to invest money for itself and others, from doing business in California by agent, or could require as a condition of its business there by agent that the corporation or agent should give bond, with surety, as is prescribed in the case of insurance agents, it could not be made a crime for one in that state to procure a loan of money for a resident of the state through individual citizens of another state, although the money should be obtained from a foreign investment company not authorized to transact business by agent in the state where the borrower resides. The principle which is approved by the court in this case would seem to justify the contrary view. The owner could not be compelled to restrict his application for insurance to companies doing or proposing to do business in California. If he preferred to insure in a company that had no agent in California, he had the right to that preference, and any interference with its free exercise would infringe his liberty. If he had applied by mail directly to the principals of Hooper for insurance, and that firm had delivered the policy to an express company, with directions to deliver it to the owner, or had made his application directly to the company, it cannot be believed that a statute making his conduct in either of the cases supposed a criminal offense would be sustained as consistent with the constitutional guaranties of liberty. But it seems, from the opinion of the court, that a state is at liberty to treat one as a criminal for doing for another that which the latter might do for himself. The assumption that Hooper and his principals acted as agents of the insurance company is unwarranted by the facts. The transaction in legal effect is the same as it would have been if the owner had himself applied by mail to the principals for insurance and had received the policy from them by mail, or through some one to whom it was intrusted by them for delivery.

As pointed out by Mr. Justice Harlan, the turning point in the case is whether Hooper or his principals were agents for the insurer or the insured. This is also recognized by the court in its discussion of this case in *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. Indeed, the only theory on which the decision can be sustained is that Hooper was acting as agent for the insurer. Upon the view that is taken of his relation to the case depends the answer to the question whether the contract of insurance was a California or a New York contract, and it is conceded that, if it was not a California contract, the statute was not applicable.

The statement of facts appearing in the opinion seems to support the contention of Mr. Justice Harlan that neither Hooper nor his principals were agents of the insurance company. According to the statement they were brokers and adjusters, and as such were employed to procure the policy. That a mere broker employed to procure insurance is the agent of the insured, and not of the insurer, is well settled.

Reference may be made to *Hamblet v. City Ins. Co.* (D. C.) 36 Fed. 118; *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* (C. C.) 13 Fed. 74; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282, 16 South. 798; *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382, 47 N. E. 1026; *Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 173 Mass. 161, 53 N. E. 373.

If Hooper or his principals were not agents of the insurer, but of the insured—and so Mr. Justice Harlan says he must be regarded under the facts in the case—on what theory is the policy regarded as a California contract? The terms of the policy are not set out in the report, but the language of the opinion justifies us in assuming that the theory on which the policy was declared to be a California contract was that it was delivered and the premium paid in California. It is well settled that, had the company mailed the policy direct to the insured, the place of delivery, and consequently the place of contract, would have been New York.

Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Hyde v. Goodnow*, 3

N. Y. 266; *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855; *Lamb v. Bowser*, 14 Fed. Cas. 980; *State Mut. Fire Ins. Co. v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191.

The same result would follow if the policy was mailed direct to the broker or agent of the insured.

Western v. Genesee Mut. Ins. Co., 12 N. Y. 258; *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 173 Mass. 161, 53 N. E. 373; *Baker v. Spaulding*, 42 Atl. 982, 71 Vt. 169; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Western Mass. Mut. Fire Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

There are cases, however, which hold that, where the premium remains to be paid, the place of payment determines the place of contract. It is probable that the Supreme Court regarded this as the determining factor in the solution of the question of the place of contract in this case. There is nothing in the statement of facts to show whether the policy provided that it should not take effect until the premium was actually paid in cash, or whether payment was acknowledged in the policy. In any event, the course of business in this instance was such as to give support to the proposition that this was not a California, but a New York, contract. The policy was actually delivered to the brokers—Hooper's principals—in New York. They forwarded it to their agent, Hooper, in California, and he delivered it to the insured, at the same time collecting the premium which had been previously agreed to. The amount so collected was not remitted to the company, but was deposited by Hooper to the credit of his principals. This state of facts may justify the presumption that the premium was actually paid to the insurance company by the New York brokers. If, then, the policy was actually delivered to the agents of the insured in New York, and the premium paid there, the policy must be regarded as a New York contract, and the main issue would be governed rather by the principles laid down by Mr. Justice Harlan and subsequently applied by the Supreme Court in the *Allgeyer Case*.

(c) The Louisiana cases—*State v. Williams*.

Reference has been made to the case of *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. This case, which reversed *State v. Allgeyer*, 48 La. Ann. 106, 18 South. 904, is

not only important in itself, but is of especial interest as explaining the Hooper Case. Before considering the Allgeyer Case it is necessary, however, to refer to a prior case in Louisiana involving a similar question (*State v. Williams*, 46 La. Ann. 922, 15 South. 290). The defendant, who was a cotton buyer, procured insurance on certain cotton in the Atlantic Mutual Insurance Company, a company not authorized to transact business in Louisiana. The action was brought to compel Williams to pay the license fee required by Acts 1890, No. 150, § 7. This act provides that every insurance company, association, corporation, firm, or individual doing and conducting an insurance business of any kind, whether located or domiciled in the state or operating through a branch department, local office, or agency of any kind shall pay a license on said business for each company represented, and on all risks located within the state. It is also provided that any person or firm who shall fill up or sign a policy or certificate of insurance on open marine or fire insurance policy for a corporation not located or represented in the state shall be considered the agent of such corporation, and shall be liable for all licenses.

The policy involved in this case was an open policy, agreed to in New York, and issued to the defendant on his own account, the separate risks to take effect on the deposit in the mail at New Orleans of a proper notice. But the court did not regard the stipulation making the separate risks take effect from a certain time in New Orleans as making the contract a Louisiana contract. The contract was regarded as a New York contract. The court held, therefore, that the Atlantic Insurance Company, having no agent in Louisiana, cannot be considered as doing an insurance business in the state, so as to be liable for the license fee. Moreover, there is a clear distinction between the business of insurance agency and the conducting of an insurance business, and a person who takes out policies in a foreign company having no agent in the state, and which does no business in the state, cannot be made to pay a license which the company would pay if doing business. The court, however, recognizes the right of the state to prohibit its own citizens from conducting the business of taking out an open policy, covering special contracts of insurance, in a foreign insurance company which has not complied with constitutional and statutory regulations, as it has the exclusive right by virtue of its sovereignty to regulate the conditions and capacity of all persons within it.

(2) Same—The Allgeyer Case.

The Allgeyer Case (State v. Allgeyer, 48 La. Ann. 106, 18 South. 904) was the sequel to the Williams Case, and involved insurances made under the same policy. The action was brought against E. Allgeyer & Co. to recover penalties for effecting marine insurance in foreign companies which failed to comply with the state law. It was based on Act No. 66 of 1894, which provides "that any person, firm or corporation who shall fill up, sign or issue in this state any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this state to effect for himself or for another, insurance on property, then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of \$1,000 for each offense."

On appeal from a judgment for the defendants, the Supreme Court, regarding the effect of the contract to be to evade the statute, which was intended to prevent just such contracts, took the position that the question presented is the simple proposition whether, under the act, a person, while in the state, can insure property in Louisiana in a foreign insurance company which has not complied with the laws of the state, under an open policy, the special contract or insurance and the open policy being contracts entered into beyond the limits of the state. The power to forbid foreign insurance companies from doing business until they comply with prescribed conditions within the state necessarily carries with it the right to enforce this power by appropriate legislation. The state, therefore, has the right to prohibit its citizens from taking out an open policy, covering special contracts of insurance, in a foreign insurance company which has not complied with its laws. Following the Williams and the Hooper Cases, the court held that the contract involved in this case is clearly a violation of the laws of the state, rendering the defendants liable for the penalty. The court recognizes that there is, in the statute, an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired. But, in exercising this liberty, they would interfere with the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits. Individual liberty of action must give way to the greater right of the collective people in the assertion of a well-defined policy adopted for the general welfare.

The case was taken by writ of error to the Supreme Court of the United States, and there reversed (*Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832) on grounds which, though undoubtedly correct as matter of law, seem to be utterly inadequate, in view of the doctrines laid down by the court in the *Hooper Case*. The court directly disclaims any intention to throw doubt upon or in the least to shake the authority of that case, but bases its decision on the ground that the facts of that case and the principles therein decided are totally different from the facts and principles involved in the present case. The contract in the *Hooper Case* is regarded as a California contract, while in the present case the contract—the open policy—must be regarded, not as a Louisiana contract, but as made in New York, and to be performed there. The only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. The giving of the notice is a mere collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract.

With this as a foundation, the court evidently bases its distinction between the two cases, and its reversal of the present case, on the theory that in the present instance the insurance was taken out by the insured himself, while in the *Hooper Case* it was procured by an agent. Does the court regard *Hooper* as an agent for the insured or for the insurer? Evidently the latter; for, after deciding that the place of contract in the present case was outside the state, the court says: "Has not a citizen of a state, under the provisions of the federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper Case*, and would be controlled by it." But, as already pointed out, the theory that *Hooper* was agent for the insurer is not borne out by either the facts or the law.

The court recognizes the principle that the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, embraces the right to make all proper contracts in relation thereto; and though it may be conceded that the right to contract in relation to persons or property, or to do business within the jurisdiction of the state, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibit a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state. The insurance company in this case did no business of insurance within the state of Louisiana. Any act of the state legislature which should prevent the mailing within the state of letters completing such a contract is an improper and illegal interference with the conduct of the citizen, though residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state.

(g) Same—Comment on the Allgeyer Case.

Of interest in this connection are the remarks of Judge Hammond in *Eastern Building & Loan Ass'n v. Bedford* (C. C.) 88 Fed. 7, a case which presents the precise situation supposed by Justice Harlan in his dissenting opinion in the *Hooper Case*, namely, a loan made from a foreign corporation which had not complied with the laws regulating such corporations. The issue in the case was whether the mortgage given to secure the loan, which was made by defendant through the agents of himself and his fellow members of the association in Tennessee, could be enforced. Commenting on the *Allgeyer Case*, and contrasting the facts in that case with those of the present case, Judge Hammond said:

"It is not to be inferred that, if the insurance company had made this contract through the agency of some solicitor, who performed the function of mailing the correspondence by which it was effectuated, instead of that correspondence being mailed by the insured himself, the decision would have been otherwise than it was; and that is all the difference there is in this case. There Allgeyer wrote and mailed his own letters, which were necessary to complete the contract. Here the defendant's application and subsequent acceptance were also transmitted through the mails, albeit by the instrumentality of his own agents or fellow members of the building and loan association acting in the city of Memphis. These were only his messengers or agents to put his letters in the mails. The essential facts are that he applied in the state of New York by mail for a loan, and the acceptance of his offer was

had in the state of New York, and transmitted to him by mail through the same agents as before. The contract was that he would pay the money, principal and interest, in New York, which made it a New York contract; and the fact that the creditor gave him the privilege of paying it here in Memphis if he chose to do so does not at all affect that circumstance. The most that can be said upon the facts of this case is that the preliminary negotiations for the contract took place in Tennessee. It may be that the agents through whom they were carried on were, in the sense of the Tennessee statute, as to those negotiations, doing business in that state contrary to the statute; and it may be that the Supreme Court will refuse to hold that the fourteenth amendment protects the defendant in his right to borrow money in the state of New York, and to mortgage his Tennessee land as security for it, if he does the business through such agencies, and may confine that valuable constitutional protection to the bare use of the mails; but I do not see why any such distinction should be made. * * *

"I understand the case of *Allgeyer v. Louisiana* to settle that it is not within the competency of the legislature to prohibit a citizen of Tennessee from borrowing money in New York from a citizen of New York and giving a mortgage upon his property in Tennessee to secure it, and the fact that the lender is a New York corporation does not at all alter the right both of the defendant to make the contract of borrowing and of the corporation in New York to make the contract of lending according to its capacities in that state. * * * It is only a question of how the parties shall get together to make their contract. It seems to me quite preposterous to say, as was suggested in the argument, that the borrower must physically leave the state of Tennessee, and be physically present in the state of New York, in order to make such a contract valid. * * * It is decided in *Allgeyer's Case* that it can be enforced if the contract is made through the agency of the mails; that is to say, through the functions of the postmasters. I suppose it would be argued that, if the defendant had made the same contract through the agency of the express company, it would not have been illegal; or if he had put a messenger on the cars, and sent him with a power of attorney to the city of New York, it would not have been illegal. Now, why is it any more illegal to negotiate through persons in Tennessee, who are willing to take the burden of attending to the details and transmitting their correspondence through the mails? For my part, I do not see any distinction that can be fairly drawn upon the circumstances, between the two cases."

(h) The Massachusetts rule—*Commonwealth v. Nutting*.

The most recent case involving this question is *Commonwealth v. Nutting*, 175 Mass. 156, 55 N. E. 895. The defendant was indicted for acting in the negotiation and transaction of unlawful insurance by negotiating in Boston, with foreign insurers not admitted to do insurance business in the commonwealth, and procuring, a policy of insurance upon a vessel in Boston, to be issued by them. The indictment was based on St. 1894, c. 522, which provides (section 3) that "it shall be unlawful * * * for any person as in-

surance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of" insurance upon any property or interests in this commonwealth, or with any resident thereof, except as authorized by the act; and (section 98) "any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance," is subjected to a penalty. The court holds that, while the owner might have applied from Boston to the foreign company for insurance, the legislature had the power to prohibit the agents of such company from soliciting business in Boston, and that it cannot escape by an agreement making the solicitors the agents of the insured in the transaction. In other words, while the legislature cannot impair the freedom of the owner to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom to solicit contracts, which otherwise he would not have thought of making. The court thus approves the doctrine laid down in the *Allgeyer Case*, and at the same time is able to rest its decision on the *Hooper Case*, as limited by the *Allgeyer Case*.

It does not clearly appear in the report of the case whether the defendant was or was not the accredited agent of the insurer, though that was apparently the fact. But in this connection the words of Justice Holmes, who wrote the opinion, are interesting. He says: "Possibly it would be within the power of the legislature to enact that the insurance broker should be regarded as the agent of the insurers, whatever the agreement of the parties, and in that way reach the result that any contract made through him when he and the insured were here would be made in this state, and thus would be subject to our laws. Possibly it might be argued that such was the effect of our statute, although, if so, it fails to state it as clearly as could be wished."

(1) The question in other states.

Though the cases that have been discussed are the leading cases involving the right to insure in companies which have not complied with the statutes, the question has arisen more or less directly in some other jurisdictions, and the courts have indicated their views in a general way. In *French v. People*, 6 Colo. App. 311, 40 Pac. 463, the Colorado statute (Gen. St. c. 55, § 16) declaring it

unlawful for any person, etc., in the state, to procure or forward applications for insurance in, or to issue or deliver policies for, any company which has not complied with insurance laws, was involved. The court held that the law would be void, as a restriction on constitutional rights, if it were construed to prohibit a citizen of Colorado from contracting in a foreign state with a company not licensed to do business in Colorado for insurance on property within the latter state, and that a contract of insurance on property in Colorado made by a resident of the state by correspondence and consummated at the home office of the company in Illinois is valid.

Similarly the Supreme Court of Illinois in *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683, while holding that the legislature has power to declare contracts with companies not licensed to do business in the state void, to the extent that they will not be enforced in the courts of the state, conceded that it is incompetent for the legislature to say that a citizen of the state cannot make a contract with such a company for the insurance of property in the state.

The statute of Vermont (V. S. 4181, 4182) prohibits foreign insurance companies from doing business in Vermont unless authorized by the insurance commissioners, except that residents of Vermont may procure insurance at the home office of foreign companies not authorized to do business in the state. *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. 982.

(J) Conclusion.

In view of the construction which the Supreme Court of the United States has put on its own decision in the *Hooper Case*, and the trend of judicial opinion in other cases, it may be regarded as the settled rule that, though the state has power to prohibit one from making within the state, with a company not authorized to do business therein, either on his own behalf or on behalf of another, a contract of insurance on property within the state, it has no power to impose a penalty on one who, while within the state, makes such a contract outside of the state.

6. ESTOPPEL AND WAIVER AS TO DEFECTS AND OBJECTIONS IN GENERAL.

- (a) In general.
- (b) Estoppel by acts of agents or officers.
- (c) Estoppel by receiving and retaining premium.
- (d) Ratification by insurer.
- (e) Estoppel of insured.
- (f) Same—As to form and contents of policy.

(a) In general.

Though the insurer requires that an application should be made by the insured as a prerequisite to the issuance of a policy, such requirement may be waived by the execution and delivery of the policy in the absence of an application.

Jones v. New York Life Ins. Co., 168 Mass. 245, 47 N. E. 92; *Weber v. Ancient Order of Pyramids*, 78 S. W. 650, 104 Mo. App. 729; *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286.

Similarly, where a policy of insurance recites that it was issued on the faith of a former application, the company issuing it is precluded from afterwards saying that it was issued on the faith of a subsequent health certificate (*People's Mut. Assur. Fund v. Boesse*, 92 Ky. 290, 17 S. W. 630). So, too, the delivery of a policy or benefit certificate as a completed instrument estops the insurer to assert any irregularities in it.

Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; *Hoelt v. Supreme Lodge Knights of Honor*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Bardwell v. Conway Mut. Fire Ins. Co.*, 122 Mass. 90; *Wells v. Metropolitan Life Ins. Co.*, 19 App. Div. 18, 46 N. Y. Supp. 80, affirmed without opinion 163 N. Y. 572, 57 N. E. 1128.

Generally, by delivery of the policy and acceptance of the premium the company is estopped to deny its power to issue the policy or the authority of its agent (*Hoge v. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939). So, where an insurance company organized under How. Ann. St. Mich. c. 132, and restricted by section 4247 to issuing insurance upon certain buildings "that constitute detached risks in villages and cities," issued a policy upon a store in the hamlet of S., the application describing the place as the "town" of S., but on making out the policy at the home office "village" was substituted therefor, the company is estopped from deny-

ing that S. is a village (*Russell v. Detroit Mut. Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 356). By the charter of a mutual company all risks were required to be divided into four classes, each policy to be assigned to its proper class. A by-law was passed defining the different kinds of property in each class. It was held that the company, having, with full knowledge of the facts, insured property in one class which should have been assigned to another class, could not raise an objection to the policy based on such improper classification. (*Union Mut. Fire Ins. Co. v. Keyser*, 32 N. H. 313, 64 Am. Dec. 375.) It is, however, generally held that **there can be no waiver or estoppel as to a matter rendering the policy absolutely void at its inception, such as a lack of insurable interest.**

Agricultural Ins. Co. v. Montague, 38 Mich. 548, 31 Am. Rep. 326; *Eastman v. Carrol County Mut. Fire Ins. Co.*, 45 Me. 307.

(b) Estoppel by acts of agents or officers.

The courts are not in agreement as to the extent to which estoppel or waiver can arise from the acts and declarations of an agent, especially as to matters apparently essential to the taking effect of the contract, and not mere irregularities. The principles which govern the decisions on this question are undoubtedly the same as those which govern the decisions involving the powers of agents to waive misrepresentations or conditions in avoidance. Reference may, therefore, be made to the discussion of that question for a statement of those principles.¹ It is deemed sufficient for the present purpose to refer only to the concrete applications of the doctrines of estoppel and waiver by the acts of agents, without attempting to discuss the principles on which the decisions are based or on which they are to be distinguished.

Where the affairs of a mutual company are managed by a board of directors, who select all officers of the company, such officers have power to waive defects in policies (*Pratt v. Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117). And generally it may be said that **an insurer is estopped to assert the invalidity of a policy, when such invalidity is due to the fraudulent conduct of its own agent.**

Rivara v. Queen's Ins. Co., 62 Miss. 720; *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Shaddinger v. Metropolitan Life Ins. Co.*, 2 S. & C. P. Dec. (Ohio) 402; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. 37.

¹ See post, p. 2473.

Thus, the insurer may be estopped to assert the rule that a person whose life is insured for the benefit of another must have knowledge of the insurance and sign the application by fraudulent acts on the part of its agent, misleading the one taking out the policy.

Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180;
McCann v. Metropolitan Life Ins. Co., 177 Mass. 280, 58 N. E. 1026.

So it is no defense to an action on a life policy that the agent of the company withheld the genuine application of the insured and imposed upon the company a spurious application, which the company believed to be genuine (*Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647).

Though the authority of an agent is restricted to certain territory, the custom followed by an agent in accepting risks and writing policies, known to the insurer, will estop the latter from pleading that the agent had no authority to issue the policy, as the risk was a prohibited one and outside of his territory (*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41). Probably on the theory that it is not only customary, but necessary, that agents should employ and authorize clerks to transact business in their absence, it has been held that a clerk in the office of the local agent of a guaranty insurance company may issue an indemnity bond and waive a condition of its issuance (*Cullinan v. Bowker*, 82 N. Y. Supp. 707, 40 Misc. Rep. 439). But a delegation of authority by an agent cannot result in estoppel against the company, if the company had no knowledge thereof (*Lynn v. Burgoyne*, 13 B. Mon. [Ky.] 400).

No estoppel can arise against a mutual company by acts of the directors in contravention of by-laws expressly limiting their powers in relation to the reception of new members (*Cannon v. Farmers' Mut. Fire Ass'n*, 58 N. J. Eq. 102, 43 Atl. 281). So, too, an estoppel by statements of an agent cannot arise as to limitations on the powers of the insurer of which the insured had knowledge (*Manufacturers' & Merchants' Ins. Co. v. Gent*, 13 Ill. App. 308). On the other hand, it has been held that a railroad ticket agent, who is also agent of an accident company, authorized to solicit risks and permitted to be the sole judge as to whether a risk would be accepted, has power to waive a provision in the policy that it should not insure any crippled person; and if he sells a policy providing that it shall not insure any crippled person, with knowledge

that the purchaser was crippled, the company is estopped to deny that the agent waived such provision (*Standard Life & Accident Ins. Co. v. Holloway*, 24 Ky. Law Rep. 1856, 72 S. W. 796).

(c) Estoppel by receiving and retaining premium.

In accordance with the general rule that estoppel may arise from the acceptance and retention of benefits is the principle that **an insurer, by receiving and retaining the premiums on a contract of insurance, is estopped to deny its power to issue the policy or that liability attached thereunder.**

Lockwood v. Middlesex Mutual Assur. Co., 47 Conn. 553; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Watts v. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441; *Powell v. Factors' & Traders' Ins. Co.*, 28 La. Ann. 19; *Hoge v. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939.

Thus, if agents, who are duly authorized to solicit and make contracts of insurance, deliberately represent to the insured that a given policy has been renewed, and subsequently receive and appropriate money which they have good reason to believe is paid to cover the cost of such extended insurance, the company will be estopped, after a loss has occurred, to allege that the policy was not renewed (*International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608, 36 U. S. App. 277). In *Dryer v. Security Fire Ins. Co. (Iowa)* 82 N. W. 494, the agent agreed with the insured, who could neither read nor write English, that the policy should contain certain conditions. It was held that, if the agent failed to embody the conditions in the policy, the company was nevertheless charged with constructive notice thereof, so as to be bound thereby, by the acceptance of premiums. So, too, the acceptance of premiums will estop the insurer to object on the ground of irregularities in the execution of the contract, such as the failure of the agent to countersign the policy (*Camden Consol. Oil Co. v. Ohio Ins. Co.*, 4 Fed. Cas. 1126).

Where a fidelity insurance company received premiums for two renewals of a bond with knowledge that the bond was not signed by the employé whose fidelity was insured, as required by the bond, it was estopped to set up the absence of such signature to prevent a recovery on the bond (*Proctor Coal Co. v. United States Fidelity & Guaranty Co. [C. C.]* 124 Fed. 424). On the other hand, it was held, in *Union Cent. Life Ins. Co. v. United States Fidelity &*

Guaranty Co. (Md.) 58 Atl. 437, that where a bond given by an insurer of the fidelity of an employé provided "that it is essential to the validity of this bond that the employé's signature be hereunto subscribed and witnessed," and at the foot of the bond there **was** a place indicated for the signature of the employé, but it was **never** signed by him, the bond was invalid notwithstanding subsequent renewals by renewal receipts explicitly declared to be subject to all the covenants and conditions contained in the original bond. So, too, the mere acceptance of the first premium was held not to constitute a waiver of the employé's signature in *United States Fidelity & Guaranty Co. v. Ridgley* (Neb.) 97 N. W. 836.

The acceptance and retention of premiums estop a life company to assert that the application was not made and signed by the insured (*Bohringer v. Empire Mut. Life Ins. Co.*, 2 Thomp. & C. [N. Y.] 610). By the acceptance and retention of assessments a mutual benefit association is estopped to object that the subordinate lodge was not validly organized, and that consequently there were irregularities in the admission of a member (*Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 50 N. W. 1022, 51 Minn. 224, 53 N. W. 367), or that the assured had not signed the constitution of the association, as required (*Richards v. Louis Lipp Co.*, 69 Ohio St. 359, 69 N. E. 616, 100 Am. St. Rep. 679), or that the insured had not been duly initiated (*Shackelford v. Supreme Conclave Knights of Damon*, 26 S. E. 746, 98 Ga. 295).

An insurance company which has directed its agent to return a premium paid to him by an applicant is not estopped from denying an acceptance of the application by the agent's failure to return the premium (*Connecticut Mut. Life Ins. Co. v. Rudolph*, 45 Tex. 454).

(d) Ratification by insurer.

Where the affairs of a mutual company, of which every person insured by it is required to be a member, are managed by a board of directors, who select all the officers of the company, such officers have power to ratify invalid policies of insurance (*Pratt v. Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117, reversing 53 Hun, 101, 6 N. Y. Supp. 78). While mere knowledge of the issuance of a policy not conforming to the rules of the insurer is not a ratification thereof (*Wilkinson v. Travelers' Ins. Co.* [Tex. Civ. App.] 72 S. W. 1016), the insurer may by acts and statements ratify a policy not intended to take effect, as where a decoy policy was issued to a solicitor, in order that he might tell those

whom he solicited that he held a policy in the company (*Union Life Ins. Co. v. Haman*, 54 Neb. 599, 74 N. W. 1090).

Retention of premiums, or other acts, or even silence, recognizing a policy as a binding obligation, may amount to a ratification.

Farmers' Co-operative Ins. Ass'n v. Talliaferro, 107 Ga. 328, 33 S. E. 26; *Block v. Columbian Ins. Co.*, 42 N. Y. 393; *Pratt v. Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206, 29 N. E. 117, reversing 53 Hun, 101, 6 N. Y. Supp. 78; *Northwestern Iron Co. v. Ætna Ins. Co.*, 26 Wis. 78.

But the acceptance by the company of premiums paid to an agent is not a ratification of an unauthorized contract made by the agent, unless the company knew on what account the money was received, and the terms of the contract (*Ætna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458).

If a policy is issued by one acting as agent for the company, but without authority so to act, the subsequent renewal of the policy by an authorized agent amounts to a ratification of the original policy (*Beal v. Park Fire Ins. Co.*, 16 Wis. 241, 82 Am. Dec. 719).

An insured, who relies on a ratification by the insurer of an unauthorized policy, need not specially reply, setting up such a ratification.
Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 32 S. W. 344.

(e) Estoppel of insured.

Though the acceptance of an insurance policy and the payment of premiums estop the insured to deny that he made application for the policy (*Stone v. Lorentz*, 19 Pa. Co. Ct. R. 51, 6 Pa. Dist. R. 17), the insured is not, by signing an application for insurance, estopped to claim that fraud was practiced on him by the insurance company's agent in obtaining the signature (*Cooke v. National Life Ass'n* [R. I.] 36 Atl. 838). But delay for an unreasonable time may estop the insured to allege fraud in inducing him to take out the policies (*Schofield v. Leach*, 15 Pa. Super. Ct. 354). If the insured brings suit on the policy as a valid contract, he cannot by way of replication allege fraud as to a condition therein limiting the liability of the insurer (*Christian v. Niagara Fire Ins. Co.*, 101 Ala. 634, 14 South. 374).

An application for an insurance policy forms a part of the contract of insurance, and an applicant who can read will not be heard to say he was ignorant of its contents, in the absence of fraud or mistake (*Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C.

480, 2 S. E. 258). The presumption is that one signing an application for insurance knew its contents.

Fletcher v. New York Life Ins. Co. (C. C.) 11 Fed. 877; *Hartford Life & Annuity Ins. Co. v. Gray*, 80 Ill. 28; *School District v. State Ins. Co.*, 61 Mo. App. 597; *Dolan v. Missouri Town Mut. Fire Ins. Co.*, 88 Mo. App. 666.

It is the duty of the applicant to inform himself as to the contents of his application, and in the absence of fraud, deceit, or misrepresentation he cannot be protected by a claim of ignorance as to the contents (*Herndon v. Triple Alliance*, 45 Mo. App. 426). Especially will the insured be estopped to deny knowledge of the contents of the application, where a copy thereof attached to the policy has been in his possession for a long time without objection.

National Union v. Arnhorst, 74 Ill. App. 482; *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93, 71 N. W. 831.

On the other hand, it has been held that the failure of the insured to read the application is not negligence which will defeat a reformation of the policy, where the soliciting agent was in a hurry to get away, and the insured signed the application when only partially completed (*Fitchner v. Fidelity Mut. Fire Ass'n*, 72 N. W. 530, 103 Iowa, 276). So, too, it has been held in California that where a foreigner, imperfectly acquainted with the English language and ignorant of the terminology of insurance, signed a blank application which was filled out by an agent, the insured was not guilty of negligence in not reading the application after it was completed by the agent, so as to estop him from showing that the agent had not filled out the application in accordance with the preliminary agreement therefor (*La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053). But the contrary rule was asserted in *Virginia Fire & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, on the ground that to allow such facts to be shown would infringe the rule excluding parol evidence to contradict or vary a written contract.

Where the insurer contended that the risk was prohibited by the instructions it had given to its agent, it was held that the insured was not estopped by such instructions, unless it could be shown that he had actual or constructive knowledge of them (*Teutonia Ins. Co. v. Ewing*, 90 Fed. 217, 32 C. C. A. 583).

Though the insurance contract is open to objection on the part of the insured, he may, by bringing suit thereon, ratify the con-

tract and enforce it (*Georgia Home Ins. Co. v. City of Smithville* [Tex. Civ. App.] 49 S. W. 412).

(f) Same—As to form and contents of policy.

It is a fundamental principle that the insured is bound by the conditions in the policy (*Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144); and it is also a fundamental principle that under ordinary circumstances the insured is estopped to assert that the contract is other than that expressed in the policy. This principle is illustrated in *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305, where it was said that every business man, knowing that insurance companies have forms of policies in common use, which contain the terms, limitations, and conditions to be inserted in all contracts of insurance, must expect insurance upon the usual terms, and it will not be presumed that he is entitled to a special contract variant from the usual terms imposed by the company. The policy is binding when delivered, though it contains terms and conditions not included in the application, unless they are unusual or extraordinary, as the application must be deemed to be for such insurance as, in view of the particulars submitted, the company sells, and with which the purchaser is presumed to be acquainted (*Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516). Especially is this true when the policy is a standard policy, as in such case the insured is presumed to know the law and to have contracted with reference to it (*Skinner v. Norman*, 46 N. Y. Supp. 65, 18 App. Div. 609). The principle as to the binding effect of conditions was carried even further in *Davitt v. National Life Ass'n*, 36 App. Div. 632, 56 N. Y. Supp. 839, where it was said that one holding a life policy in a company which is absorbed by a second company, by accepting a condition imposed to becoming insured in such second company, instead of standing on his rights under his original contract, is bound thereby; it being explicitly incorporated in the agreement, though he did not understand it.

The doctrine that the insured is estopped to assert that the policy does not conform to the agreement rests on the principle that, in the absence of fraud or mistake, the parties are conclusively presumed to know the contents of the contract.

Wierengo v. American Fire Ins. Co., 98 Mich. 621, 57 N. W. 833; *Hartford Fire Ins. Co. v. Davis*, 59 Mo. App. 405; *Straker v. Phenix Ins. Co.*, 101 Wis. 418, 77 N. W. 752.

Underlying the whole doctrine is the further principle that, as the insured is bound to take notice of the terms of his contract as contained in the policy, his acceptance and retention of the policy without objection raises the presumption of knowledge and estops him from afterwards making objection.

Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *Conner v. Manchester Assur. Co.* (C. C. A.) 130 Fed. 743; *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003; *Moore v. State Ins. Co.*, 72 Iowa, 414, 34 N. W. 183; *Reeve v. Phoenix Ins. Co.*, 23 La. Ann. 219; *Monitor Mut. Ins. Co. v. Buffum*, 115 Mass. 343; *McFarland v. St. Paul Fire & Marine Ins. Co.*, 46 Minn. 519, 49 N. W. 253; *Overton v. American Cent. Ins. Co.*, 79 Mo. App. 1; *Dwyer v. Mutual Life Ins. Co.*, 58 Atl. 502, 72 N. H. 572; *May v. New York Safety Reserve Fund Society*, 14 Daly (N. Y.) 389; *Mecke v. Life Ins. Co. of New York*, 8 Phila. (Pa.) 6; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 566.

Of course, the presumption of knowledge of the conditions which will estop the insured cannot arise where the policy was retained by the agent of the insurer and not shown to the insured, and no information given as to its contents (*St. Paul Fire & Marine Ins. Co. v. Wells*, 89 Ill. 82). It has even been held that if the policy was received by insured's clerk, and its terms not known to him until the loss occurred, it is not such an acceptance as will estop him (*Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. [Ky.] 231). But it has also been held in Kentucky, that though a policy was not issued, the insured cannot claim that a condition therein is not binding on him because no policy was furnished, if there is nothing to show that insured ever made any demand on the company for a policy, or informed the company that he claimed for a loss, the only demand being made on the local agent about three years after loss (*Western Ins. Co. v. Meuth*, 10 Ky. Law Rep. 718). And it has been held in Texas that, if a policy is delivered at the request of the insured to a person designated, insured is chargeable with notice of its provisions, though he did not read it, and though, when so delivered, it was sealed in an envelope (*Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915).

In a majority of cases it has been said that the insured cannot escape the effect of the conditions on the ground of ignorance, due to a failure to read his policy; it being his duty to examine it.

American Ins. Co. v. Nelberger, 74 Mo. 167; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *Ramer v. American Cent. Ins. Co.*, 70 Mo.

App. 47; *United States Fidelity & Guaranty Co. v. Ridgley* (Neb.) 97 N. W. 836; *Imperial Shale Brick Co. v. Jewett*, 60 N. Y. Supp. 35, 42 App. Div. 588; *Brady v. Mutual Reserve Life Ins. Co.*, 85 App. Div. 623, 82 N. Y. Supp. 1095; *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 936, 11 Okl. 579, judgment affirmed on rehearing 69 Pac. 938, 11 Okl. 585; *Guinn v. Phoenix Ins. Co.* (Tex. Civ. App.) 31 S. W. 506; *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851. Nor is the rule changed by the fact that in many cases persons procuring policies of insurance do not read them or inform themselves as to their terms and conditions. *Baumgartel v. Providence Washington Ins. Co.*, 136 N. Y. 547, 32 N. E. 990.

So, too, it has been said that it is no excuse for ignorance as to the contents of a policy that insured was unable to read, where it appears that other members of his family could read (*McHoney v. German Ins. Co.*, 52 Mo. App. 94). That ignorance of the language is no excuse seems also to be asserted in *Cornelius v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. 1037, so far as provisions relating to the future are concerned; the case being distinguished on this ground from *Fitchner v. Fidelity Mut. Fire Ass'n* (Iowa) 68 N. W. 710.

On the other hand, it has been held in several well-considered cases that the insured is not necessarily estopped, by receiving and retaining the policy, from setting up a variance between the agreement and the written contract. In Pennsylvania it has been held as a general principle that it cannot be said as a matter of law that, in anticipation of a fraud on the part of the company, there is any absolute duty imposed upon the insured to read his policy when he receives it.

Klister v. Lebanon Mut. Ins. Co., 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696; *Zimmer v. Central Acc. Ins. Co.*, 207 Pa. 472, 56 Atl. 1003.

So, in Iowa (*Dryer v. Security Fire Ins. Co.*, 82 N. W. 494), it has been held that the insurer cannot escape liability on the ground that the insured is bound by the terms of the policy accepted, since he is entitled to presume it to be in accordance with his application, and is not bound to take it to some one who could read it to him, to learn whether the company had given the contract agreed on.

In the federal courts especially the principles on which the estoppel of the insured is based have been repudiated. Thus it has been said that an insured has the right to rely on the presumption that

the policy he receives is in accordance with his application, and his failure to read it will not relieve the insurer or its agent from the duty of so writing it (*McElroy v. British America Assur. Co.*, 94 Fed. 990, 36 C. C. A. 615). In the long-contested and important case of *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, the Supreme Court of the United States, reversing the Circuit Court of Appeals, said that the failure of the insured to read a life policy when delivered to him, when, in answer to his inquiry, the agent informed him that the policy conformed to their agreement, does not constitute such negligence as to estop the insured from denying that, by accepting the policy, he agreed to a provision therein contained, but of which he was ignorant, and to which he had not actually agreed.

Reference may also be made to *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887; *Fitchner v. Fidelity Mut. Fire Ass'n (Iowa)* 68 N. W. 710; *Burson v. Fire Ass'n*, 136 Pa. 287, 20 Atl. 401, 20 Am. St. Rep. 919. For the judicial history of the *McMaster* Case, see 99 Fed. 856, 40 C. C. A. 119; (C. C.) 90 Fed. 40; 87 Fed. 63, 30 C. C. A. 532; (C. C.) 78 Fed. 33. See, also, 171 U. S. 687, 18 Sup. Ct. 944.

That the length of time the policy has been in the insured's possession is an important factor in determining whether there has been an estoppel is recognized even in those jurisdictions which uphold the doctrine that a presumption of knowledge arises from the acceptance of the policy.

Massey v. Cotton States Life Ins. Co., 70 Ga. 794; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *Wilson v. National Life Ins. Co.*, 81 Misc. Rep. 403, 65 N. Y. Supp. 550; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799; *Union Cent. Life Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Wagner v. Westchester Fire Ins. Co. (Tex. Civ. App.)* 48 S. W. 49; *Fennell v. Zimmerman*, 96 Va. 197, 31 S. E. 22; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246.

And that an estoppel may arise when the insured has had possession for a long time is conceded even in jurisdictions where no presumption of knowledge arises from necessity.

Reference may be made to *Insurance Co. v. Swank*, 102 Pa. 17; *Susquehanna Mut. Fire Ins. Co. v. Oberholtzer*, 172 Pa. 223, 32 Atl. 1105; *Okes v. Fire Ins. Co.*, 12 Pa. Co. Ct. Rep. 341.

There is, however, no rule of law which fixes the period within which one may discover that a writing does not express the con-

tract which he supposed it to contain, and the mere fact that a policy was in the insured's hands for a considerable time is merely a circumstance to be considered in determining whether the policy did, in fact, conform to the contract (*Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263). So, too, the general rule may be qualified where, by fraud, the insured has been deterred from examining his policy (*Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246).²

In accord with the principle of the *Bostwick Case* is the rule that conditions inserted in the policy without authority will not bind the insured, where he is misled and prevented from examining the contract at the time of acceptance.

McMaster v. New York Life Ins. Co., 22 Sup. Ct. 10, 183 U. S. 25, 46 L. Ed. 64; *Wyman v. Gillett*, 54 Minn. 536, 56 N. W. 167.

If, however, the change in the conditions of the policy is known to and accepted by the brokers employed by the insured, it is binding on the latter; and he cannot rely on a provision of the policy that agents of the insurer have no authority to change its terms, as this provision is for the benefit of the insurer solely, and will not avail the insured, where the insurer has waived it and adopted changes made by said agents (*Belt v. American Cent. Ins. Co.*, 53 N. Y. Supp. 316, 29 App. Div. 546).

7. ESTOPPEL TO PLEAD ULTRA VIRES AS TO THE INSURANCE CONTRACT.

- (a) Estoppel of insurer—Early doctrine.
- (b) Same—Later doctrine.
- (c) Same—Reception of benefits.
- (d) Same—Insured's knowledge of limitation.
- (e) Same—Character of ultra vires acts.
- (f) Estoppel of insured.
- (g) Questions of practice.

(a) Estoppel of insurer—Early doctrine.

In view of the various limitations on the powers of insurers, whether based on absolute statutory prohibitions or on an absence of granted powers, an interesting question is sometimes presented as to the right of the insurer to plead that the contract on which

² On rehearing. For original opinion, see 116 Wis. 392, 89 N. W. 538.

recovery is sought is ultra vires, and therefore void. In the earlier cases, the principle that corporations, being wholly creatures of the statute, had merely the powers which the statute gave them, influenced the courts to hold generally that corporations could not, on considerations of public policy, be estopped from pleading ultra vires as to those contracts that were not strictly within the powers granted.¹

As illustrations of this doctrine in insurance cases, reference may be made to *Rochester Ins. Co. v. Martin*, 13 Minn. 59 (Gil. 54); *Miller v. American Mutual Accident Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; *Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r, 119. And see, also, *Webster v. Buffalo Ins. Co.* (C. C.) 7 Fed. 399.

The theory on which these cases were decided is well stated in the *Miller Case*, where it was said that contracts of corporations made in excess of their charter powers are in contravention of public policy. As to such contracts the corporation is not estopped to plead ultra vires. There can be no ratification or estoppel as to contracts void by reason of public policy. All persons dealing with a corporation are charged with notice of limitations upon its authority.

(b) Same—Later doctrine.

There is, however, in the later decisions a growing tendency to qualify the strict doctrine, and in several states it has been settled that a corporation may be estopped to deny its authority to enter into a contract, when the contract has been executed by the other party and the corporation has derived the benefit which it sought by the contract. This doctrine is well illustrated in *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, where the insurer pleaded that its contract of insurance against hail was ultra vires, as it was empowered only to write fire risks. The company argued that the courts ought in all cases to sustain the defense of ultra vires, as here interposed, on the ground of public policy. The court, however, calls attention to the fact that the interests of the public would not be best subserved by a public policy which would allow a corporation, any more than an individual, to violate the principles of common honesty and to claim exemp-

¹ Estoppel of corporation to plead ultra vires, see Cent. Dig. vol. 12, "Corporations," §§ 1556-1558.

tion from the obligation of its contracts by pleading its own wrongdoing. It is not public policy for the state to protect the business of private corporations, as against the interests of its individual citizens. To invoke public policy as a ground for allowing the corporation to avoid its contract, after it had received the benefits thereof, would in effect be to prevent the corporation from doing wrong by punishing the other party.

The doctrine of the McClelland Case was followed in *Watts v. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441. After calling attention to the fact that in the earlier cases the doctrine that the company could plead *ultra vires* is based on the theory that the interests of the public demanded that corporations should not exceed the powers granted to them, the court said that in recent years private corporations have multiplied with such rapidity that the modern tendency is to relax the original rule, and to treat corporations as individuals, holding them to the same rules of business morality that govern the individual. The law will not sustain the defense of *ultra vires* out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved.

(c) Same—Reception of benefits.

As intimated above, the doctrine that the insurer is estopped to plead *ultra vires* as to contracts executed by the other party is based largely on the ground that the insurer has received the benefits of the contract. This has been regarded as a controlling factor in many other cases, where the company has been held to be estopped.

Reference may be made to *Bloomington Mut. Ben. Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; *Matt v. Roman Catholic Mut. Protective Soc.*, 70 Iowa, 455, 30 N. W. 799; *Garner v. Mutual Fire Ins. Co. (Iowa)* 86 N. W. 289; *Doane v. Millville Mut. Marine & Fire Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739; *Tramblay v. Supreme Council Catholic Benev. Legion*, 90 App. Div. 39, 85 N. Y. Supp. 613; *Wagner v. Keystone Mut. Ben. Ass'n*, 8 Pa. Dist. R. 231; *Continental Fire Ass'n v. Masonic Temple Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930. See, also, *Schrimplin v. Farmers' Life Ass'n*, 123 Iowa, 102, 98 N. W. 613.

It must, however, appear that there was an actual benefit accruing to the insurer. When there is no actual benefit, as in *Twiss v. Guaranty Life Ass'n*, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418, or where the benefits are equal, as in *Dishong v. Iowa Life & Endowment Ass'n*, 92 Iowa, 163, 60 N. W. 505, the principle does not

apply, though the general rule that, where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received and yet plead the ultra vires, may be recognized.

(d) Same—Insured's knowledge of limitation.

The rule of estoppel by benefits has, however, been qualified in *Rockhold v. Canton Masonic Mut. Ben. Ass'n* (Ill.) 19 N. E. 710. The court approves the doctrine that, if the contract has been fully performed by the person contracting with the corporation and the corporation has received the benefits of such performance, it cannot invoke the doctrine of ultra vires; but it restricts this ruling to dealings between a corporation and a third person. If the question arises between a corporation and one of its constituent members, as a member of a co-operative assessment company, such member is charged with full knowledge of the want of power in the corporation, and therefore is estopped, and the doctrine that the corporation is estopped to plead ultra vires does not apply. This view of the status of the member is criticised in *Watts v. Equitable Mut. Life Ass'n of Waterloo*, 82 N. W. 441, 111 Iowa, 90, where it was also contended that the insured had constructive notice of the powers of the association by reason of the recording of the articles of incorporation. The court says that while, as a general proposition, this may be conceded to be true, yet such constructive notice is of a very vague and shadowy character. It is not claimed that the insured had actual knowledge, and it is hardly to be presumed that he would keep paying assessments and dues on a contract that he understood to be of no validity. Furthermore, as it is the duty of the stockholders or members of a corporation to know what their own officers or managers are doing, and how they are and have been conducting the business of the corporation, if the insured is to be charged with the notice as claimed, it is but fair that his co-members should be charged to have had full knowledge of the contract with him and his full compliance therewith.

(e) Same—Character of ultra vires acts.

It must, however, be noted that the application of the qualifying circumstances referred to depend on the character of the act or contract as to which ultra vires is alleged. This is recognized in the leading case of *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, already referred to. The basis of that

VI. CONSTRUCTION OF THE CONTRACT.

1. General rules of construction of insurance contracts.
 - (a) Application of general rules of construction.
 - (b) Same—Not dependent on kind of insurance.
 - (c) Liberal or strict construction.
 - (d) Same—Guaranty insurance.
 - (e) Same—Contracts should be construed so as to sustain indemnity.
 - (f) Same—Qualification of rule.
 - (g) Language of policy in general.
 - (h) Printed and written portions of policy.
 - (i) Marginal writings, indorsements, slips, and riders.
 - (j) General and specific conditions or exceptions.
 - (k) Construction by the parties.
 - (l) Effect of prior decisions.
 - (m) Evidence to aid construction.
 - (n) Same—Customs and usages.
2. What law governs in the construction of the contract.
 - (a) Construction determined by the law of the place where the contract was made.
 - (b) Exceptions to rule—Law of the place of performance—Law of domicile of insurer.
 - (c) Intent of parties—Effect of stipulation.
 - (d) General rules and stipulations controlled by considerations of public policy.
 - (e) What is the place of contract—Approval of risk.
 - (f) Same—Place of final assent.
 - (g) Same—Place of delivery and payment of premium.
 - (h) Same—Countersigning by agent.
 - (i) Same—Stipulation of parties—Statutory provisions.
 - (j) Presumptions and burden of proof.
3. Papers accompanying policy or construed therewith in general.
 - (a) In general.
 - (b) Premium notes.
 - (c) Prospectus or other pamphlet.
 - (d) Advertisements and circulars in general.
 - (e) Circulars modifying strict provisions of contract.
 - (f) Reference to circulars in aid of construction.
 - (g) Published rules and by-laws.
4. Application as part of the contract.
 - (a) In general.
 - (b) Statutory provisions requiring a copy of the application to be attached to the policy.
 - (c) Same—To what kinds of insurance statutes apply.
 - (d) Same—Sufficiency of compliance with statute.

4. Application as part of the contract—(Cont'd).
 - (e) Same—Effect of noncompliance with statute—Admissibility of application in evidence.
 - (f) Construction of application and policy.
 - (g) Questions of practice.
5. Charter, constitution, by-laws, and statutes as part of the contract.
 - (a) Statutes and ordinances as part of the contract.
 - (b) Subjection of members of mutual company to charter, by-laws, and rules.
 - (c) Charter, by-laws, and rules as part of the contract.
 - (d) Subjection of member of mutual company to subsequent by-laws.
 - (e) Members of mutual benefit associations bound by constitution and by-laws.
 - (f) Constitution and by-laws of mutual benefit association as part of the contract.
 - (g) Same—Construction.
 - (h) Extent to which members of mutual benefit associations are bound by subsequent by-laws, etc.
 - (i) Same—Assent of member.
 - (j) Same—Effect of reservation of right to amend.
 - (k) Same—Effect of agreement to be bound by laws subsequently enacted.
 - (l) Same—Laws must be reasonable.
 - (m) Same—Purpose and effect of laws and the relation thereof to prior legislation.
 - (n) Same—Laws impairing contract or vested rights.
 - (o) Same—Conclusion.
6. Property and interests covered by policy of marine insurance.
 - (a) Property covered in general.
 - (b) Cargo and proceeds thereof.
 - (c) Property covered by open or running policy.
 - (d) Interests covered by the policy.
7. Property covered by policy—Fire and casualty insurance.
 - (a) General rules.
 - (b) Location of property.
 - (c) Same—Shifting location.
 - (d) Same—Temporary removal.
 - (e) Use of property.
 - (f) Buildings—Additions and appurtenances thereto.
 - (g) Fixtures.
 - (h) Manufacturers' and mercantile stock.
 - (i) Same—Hazardous articles.
 - (j) Machinery—Tools.
 - (k) Household furniture—Grain and crops.
 - (l) Property excluded.
 - (m) Shifting risk.
 - (n) General and specific insurance.

7. Property covered by policy—Fire and casualty insurance—(Cont'd).
 - (o) Modification and reformation.
 - (p) Questions of practice.
8. Interests covered by policy—Fire and casualty insurance.
 - (a) General rules.
 - (b) Joint owners.
 - (c) Stock of goods.
 - (d) Insurance of liability and of property for which liable—Contractor's insurance.
 - (e) Property "held in trust."
 - (f) Insurance on property "sold but not delivered."
 - (g) Insurance "for account of whom it may concern"—Agents, trustees, estates, etc.
 - (h) Loss payable to appointee—Mortgagee or lessee.
 - (i) Use and occupancy—Profits.
9. Subjects of insurance in indemnity and guaranty policies.
 - (a) General principles.
10. Parties to insurance contracts.
 - (a) Parties to marine and fire insurance contracts in general.
 - (b) Change in firm or firm name.
 - (c) Insurance for benefit of "whom it may concern."
 - (d) Effect of "loss payable" and mortgage clauses.
 - (e) Insurance procured in representative capacity.
 - (f) Parties to life and accident contracts.
 - (g) Who is "the insured" or "the assured."
 - (h) Parties to guaranty and indemnity policies.
 - (i) Parties to reinsurance contracts.
11. Beneficiaries.
 - (a) Who may be beneficiaries in general.
 - (b) Statutory provisions restricting right to designate beneficiary.
 - (c) Provisions of by-laws.
 - (d) Same—Effect of subsequent by-laws.
 - (e) Construction and effect of limitations.
 - (f) Particular limitations or classes of beneficiaries.
 - (g) Same—Children.
 - (h) Same—Heirs, representatives, or next of kin.
 - (i) Same—Family.
 - (j) Same—Relations.
 - (k) Same—Dependents.
 - (l) Objections to eligibility and waiver thereof.
 - (m) Mode and sufficiency of designation.
 - (n) Same—Construction.
 - (o) Same—Revocation by marriage.
12. Amount of insurance.
 - (a) Determination of amount in general.
 - (b) Life insurance.
 - (c) Same—Limitation to amount of assessment.

12. Amount of insurance—(Cont'd).
 - (d) Same—Reduction of amount.
 - (e) Questions of practice.
13. Commencement, duration, and termination of risk.
 - (a) Commencement of risk.
 - (b) Same—Marine policies.
 - (c) Duration of risk.
 - (d) Same—Policy expiring "at noon."
 - (e) Same—Vessel at sea.
 - (f) Termination of insurance—Marine policies.
 - (g) Life and accident insurance.
 - (h) Same—Effect of war.
 - (i) Casualty and guaranty insurance.
14. Renewal of the contract.
 - (a) Form and validity in general.
 - (b) Nature and construction of renewal contracts.
 - (c) Same—Conditions of insurance.
 - (d) Renewal of guaranty policies.

1. GENERAL RULES OF CONSTRUCTION OF INSURANCE CONTRACTS.

- (a) Application of general rules of construction.
 - (b) Same—Not dependent on kind of insurance.
 - (c) Liberal or strict construction.
 - (d) Same—Guaranty insurance.
 - (e) Same—Contracts should be construed so as to sustain indemnity.
 - (f) Same—Qualification of rule.
 - (g) Language of policy in general.
 - (h) Printed and written portions of policy.
 - (i) Marginal writings, indorsements, slips, and riders.
 - (j) General and specific conditions or exceptions.
 - (k) Construction by the parties.
 - (l) Effect of prior decisions.
 - (m) Evidence to aid construction.
 - (n) Same—Customs and usages.
- (a) Application of general rules of construction.**

The contract of insurance is essentially commercial, and must be tested by the rules of such transactions. Notwithstanding the numerous technical phrases which are usually inserted in policies and the peculiar language in which they are generally couched, they are, after all, only written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties.

Liverpool & London & Globe Ins. Co. v. Kearney, 21 Sup. Ct. 326, 180 U. S. 132, 45 L. Ed. 460; Wells, Fargo & Co. v. Pacific Ins. Co., 44

Cal. 397; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *Hone v. Mutual Safety Ins. Co.*, 3 N. Y. Super. Ct. 137; *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23; *Snyder v. Groff*, 8 Pa. Dist. R. 291.¹

In construing the contract and determining the intent of the parties, the court is not called upon to enter into an examination of the nature of the business of insurance and calculation of risks and changes and probable profits, to ascertain what sort of a contract the parties could afford to make; but that intent is to be ascertained by applying the same rules of construction as are applied in cases of other contracts (*Symonds v. Northwestern Mut. Life Ins. Co.*, 23 Minn. 491).

The rule is well settled that a policy of insurance, with its clauses, conditions, and stipulations, is the law of the insurer and insured, and the intent of the parties must be gathered from the language of the policy itself.

American Basket Co. v. Farmville Ins. Co., 1 Fed. Cas. 618; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *Hough, Clendenen & Co. v. People's Fire Ins. Co.*, 36 Md. 398; *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215; *Graham & Buckingham v. Insurance Co.*, 2 Disn. (Ohio) 255.

Every part of the contract should be considered in arriving at an interpretation thereof, and no part of the words of a policy should be rejected as insensible or inoperative, if a rational and intelligible meaning can be given to them, consistent with the general design and object of the whole instrument.

Yoch v. Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *A. A. Griffing Iron Co. v. Liverpool & London & Globe Ins. Co.*, 68 N. J. Law, 368, 54 Atl. 409; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Snyder v. Groff*, 8 Pa. Dist. R. 291.

Thus a policy of life insurance, having four pages and containing, besides the main contract, certain conditions, a copy of the application and acknowledgments and agreements of the applicant, and the usual indorsement that the paper was a life policy, giving the name of the insured, etc., should be construed in its entirety as but one instrument; the contents of all four pages being regarded as the contract between the parties (*Grevenig v. Washington Life Ins. Co. of N. Y.*, 36 South. 790, 112 La. 879).

¹ See Cent. Dig. vol. 28, "Insurance," cols. 837-839, § 292.

Not only should every part of a policy be considered, but such a construction should, if possible, be put upon the contract as will harmonize and give effect to all its provisions.

Seton v. Delaware Ins. Co., 21 Fed. Cas. 1093; Bargett v. Orient Mut. Ins. Co., 16 N. Y. Super. Ct. 385; Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. 856; Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Another general rule to be observed in the construction of insurance contracts is that they, like other contracts, are to be construed with reference to the intention of the parties, to be ascertained from the terms and conditions.

James v. Lycoming Ins. Co., 13 Fed. Cas. 309; Overhiser v. Overhiser, 14 Colo. App. 1, 59 Pac. 75; Phoenix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; Continental Ins. Co. v. Kyle, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; Aetna Ins. Co. v. Jackson & Co., 16 B. Mon. (Ky.) 242; Beck v. Hibernia Ins. Co., 44 Md. 95; Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; Pietri v. Seguenot, 96 Mo. App. 258, 69 S. W. 1055; Travelers' Ins. Co. v. Myers, 57 N. E. 458, 62 Ohio St. 529, 49 L. R. A. 760; Woodmen of the World v. Gilliland, 67 Pac. 485, 11 Okl. 384; Hartman v. Keystone Ins. Co., 21 Pa. 466; Snyder v. Groff, 8 Pa. Dist. R. 291.

Though the meaning and intent of insurance contracts is to be obtained first from the language employed, if, by settled rules of construction, the intent is not clear from the language itself, then the surrounding circumstances existing at the time the contract was entered into may be resorted to to solve the difficulty and to dispel any obscurity.

Boright v. Springfield Fire & M. Ins. Co., 34 Minn. 352, 25 N. W. 796; Savage v. Howard Ins. Co., 44 How. Prac. (N. Y.) 40; New York Belting & Packing Co. v. Washington Fire Ins. Co., 23 N. Y. Super. Ct. 428; McKeesport Mach. Co. v. Ben Franklin Ins. Co., 173 Pa. 53, 34 Atl. 16.

When there are no ambiguities or uncertainties, and no conflicting inferences to be drawn from the language of the policy, the construction is a question of law for the court.

Lapeer County Farmers' Mut. Ins. Co. v. Doyle, 30 Mich. 159; Reid v. Lancaster Fire Ins. Co., 90 N. Y. 382; Baranowski v. Baltimore Mut. Aid Soc., 3 Pa. Super. Ct. 367; Snyder v. Groff, 8 Pa. Dist. R. 291; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594.

If, however, there is a latent ambiguity, due to the use of words of uncertain meaning, the determination of the true meaning is a matter of fact for the jury.

Bassell v. American Fire Ins. Co., 2 Fed. Cas. 1007; *Parks v. Hartford Fire Ins. Co.*, 100 Mo. 373, 12 S. W. 1058; *Beatty v. Lycoming Mut. Ins. Co.*, 52 Pa. 456; *Evans v. Commercial Mutual Ins. Co.*, 6 R. I. 47; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

(b) Same—Not dependent on kind of insurance.

The general rules of construction used in the interpretation of other contracts are applicable to insurance contracts, irrespective of the particular form of insurance evidenced by the contract. Though modified by changed conditions of commercial intercourse, the same rules apply in marine, fire, life, or other insurance. Thus, if not rendered inapplicable by reason of the particular subject-matter, the rules and principles of marine insurance must be applied to the interpretation of policies of insurance effected upon vessels exclusively employed in inland navigation. (*Caldwell v. St. Louis Perpetual Ins. Co.*, 1 La. Ann. 85.) The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract, which must be construed by the rules of construction usually applied to insurance contracts.

Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 545; *Reed v. Washington Ins. Co.*, 138 Mass. 572; *John Davis Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 393; *Kollitz v. Equitable Mut. Fire Ins. Co. (Minn.)* 99 N. W. 892; *Matthews v. American Central Ins. Co.*, 154 N. Y. 456, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627; *Maisel v. Fire Association*, 59 App. Div. 461, 69 N. Y. Supp. 181; *Stage v. Home Ins. Co.*, 76 App. Div. 509, 78 N. Y. Supp. 555; *Nelson v. Traders' Ins. Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220; *Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752.

It has often been said that the construction of life insurance policies is governed by rules different from those applied to marine and fire policies; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, being cited as authority for the proposition. It is to be noted, however, that the application of the principle was made in this case merely to the question of necessity of insurable interest, and was based wholly on the theory that, while marine and fire policies are contracts of indemnity, life policies are not. It cannot be said, on

the authority of this case, that the general rules of construction applicable to fire and marine policies are not of equal force in the construction of life policies. So, the certificates of membership in mutual benefit associations being in all essentials contracts of life insurance, the rights of the parties thereto will be determined on the same principles as are applied to other insurance contracts.

Wiggin v. Knights of Pythias (C. C.) 31 Fed. 122; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Presbyterian Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222, 81 N. W. 484; *Goodman v. Jedidjah Lodge*, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; *Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165; *Woodmen of the World v. Gilliland*, 11 Okl. 384, 67 Pac. 485; *Logsdon v. Supreme Lodge Fraternal Union*, 34 Wash. 666, 76 Pac. 292.

As contracts indemnifying against loss by the defalcations of employés, by the insolvency of debtors, or by defects in titles are essentially contracts of insurance, they are to be construed in accordance with the same general rules as are applicable to other contracts of insurance.

Reference may be made to *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Id.*, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96; *Mechanics' Savings Bank & Trust Co. v. Guarantee Co. of North America* (C. C.) 68 Fed. 459; *Minnesota Title Ins. & Trust Co. v. Drexel*, 70 Fed. 194, 17 C. C. A. 56; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264; *Tebbetts v. Mercantile Credit & Guaranty Co.*, 73 Fed. 95, 19 C. C. A. 281; *Missouri, K. & T. Trust Co. v. German National Bank*, 77 Fed. 117, 23 C. C. A. 65; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146; *American Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270; *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.*, 115 Ky. 863, 75 S. W. 197; *People v. Mercantile Credit Guarantee Co.*, 166 N. Y. 416, 60 N. E. 24; *Trenton Potteries Co. v. Title, Guarantee & Trust Co.*, 50 App. Div. 490, 64 N. Y. Supp. 116; *Bank of Tarboro v. Fidelity & Deposit Co.*, 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *Id.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; *Union Trust Co. v. Citizens' Trust & Surety Co.*, 185 Pa. 217, 39 Atl. 886; *Wheeler v. Equitable Trust Co.*, 206 Pa. 428, 55 Atl. 1065; *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754; *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989. But see *National Bank v. Fidelity & Casualty Co.*, 89 Fed. 819, 32

C. C. A. 355; *United States v. American Bonding & Trust Co.*, 89 Fed. 925, 32 C. C. A. 420; *American Surety Co. v. Thorn-Hallwell Cement Co.*, 9 Kan. App. 8, 57 Pac. 237; *Harrisburg S. & L. Ass'n v. United States Fidelity & Guaranty Co.*, 197 Pa. 177, 46 Atl. 910.

(c) Liberal or strict construction.

In the early decisions, especially where marine policies were involved, the tendency was to construe the contract very strictly. Yet it was often recognized that such policies were loose in form, and were not to be given a strict grammatical construction (*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664). Fire policies were at first subjected to the same strict rules followed in the interpretation of marine contracts; but, as the policy became more technical in form, the rules of construction were relaxed. It is now the well-settled rule that contracts of insurance will not be subjected to any critical or technical interpretation, but will be liberally construed in favor of the insured, whenever there is an ambiguity in the language used.

McMaster v. New York Life Ins. Co. (C. C.) 78 Fed. 33; *Tubb v. Liverpool & London & Globe Ins. Co.*, 106 Ala. 651, 17 South. 615; *Massachusetts Ben. Life Ass'n v. Robinson*, 30 S. E. 918, 104 Ga. 256, 42 L. R. A. 261; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 156; *Supreme Lodge of Order of Columbian Knights v. McLaughlin*, 108 Ill. App. 85; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534, affirmed in 201 Ill. 260, 66 N. E. 388; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *Royal Circle v. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Collins v. Merchants' & Bankers' Mut. Ins. Co.*, 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438; *Cunningham v. Union Casualty & Surety Co.*, 82 Mo. App. 607; *Howerton v. Iowa State Ins. Co.*, 80 S. W. 27, 105 Mo. App. 575; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 62 N. E. 167; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810; *Greeff v. Equitable Life Assur. Soc.*, 57 N. Y. Supp. 871, 40 App. Div. 180; *Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; *Fenton v. Fidelity & Casualty Co. of New York*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770. The rule applies, though the policy is in the standard form. *Maisel v. Fire Ass'n*, 59 App. Div. 461, 69 N. Y. Supp. 181; *Matthews v. American Central Ins. Co.*, 154 N. Y. 456, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627.²

² See, also, Cent. Dig. vol. 28, "Insurance," cols. 843-846, § 295.

So, too, the laws and rules of a mutual benefit association should be liberally construed in favor of the insured and the beneficiary.

Supreme Lodge Order of Mutual Protection v. Meister, 105 Ill. App. 471; *Knights Templars' & Masons' Life Indemnity Co. v. Vail*, 206 Ill. 404, 68 N. E. 1103; *Woodmen of the World v. Gilliland*, 11 Okl. 384, 67 Pac. 485.

In view of the rule that the policy should be liberally construed in favor of the insured, it follows that provisions of the contract limiting or avoiding liability will be construed strictly against the insurer (*Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17), and generally all ambiguities will be resolved against the insurer.

Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 328, 45 L. Ed. 460; *Stout v. Commercial Union Assur. Co. (C. C.)* 12 Fed. 554; *Turner v. Meridan Fire Ins. Co. (C. C.)* 16 Fed. 459; *Small v. Westchester Fire Ins. Co. (C. C.)* 51 Fed. 789; *Commercial Travelers' Mut. Acc. Ass'n v. Fulton*, 79 Fed. 423, 24 C. C. A. 654; *Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 C. C. A. 63; *Hagan v. Scottish Union & National Ins. Co. (D. C.)* 98 Fed. 129; *American S. S. Co. v. Indemnity Mut. Marine Assur. Co.*, 118 Fed. 1014, 56 C. C. A. 56, affirming (D. C.) 108 Fed. 421; *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11, 7 Am. Rep. 581; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399; *Robinson v. Aetna Ins. Co.*, 128 Ala. 477, 30 South. 665; *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. Rep. 129; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 298; *Phenix Ins. Co. v. Lewis*, 63 Ill. App. 228; *National Acc. Soc. v. Ralstin*, 101 Ill. App. 192; *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222, 81 N. W. 484; *Queen Ins. Co. v. Excelsior Milling Co. (Kan. Sup.)* 76 Pac. 423; *Continental Ins. Co. v. Daniel*, 25 Ky. Law Rep. 1501, 78 S. W. 866; *American Order of Protection v. Stanley (Neb.)* 97 N. W. 467; *Anders v. Supreme Lodge Knights of Honor*, 51 N. J. Law, 175, 17 Atl. 119; *Stringham v. Mutual Life Ins. Co.*, 44 Or. 447, 75 Pac. 822; *Keck v. Porter (Pa.)* 9 Kulp, 428; *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288; *Frink's Adm'r v. Brotherhood Acc. Co.*, 75 Vt. 249, 54 Atl. 176; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647.

The foregoing rule is based on the principle that, in cases of uncertainty, contracts are construed most strongly against the party responsible for such uncertainty, and, as contracts of insurance are

almost always prepared by the insurer, the rule is especially applicable in the construction of such contracts.

American Basket Co. v. Farmville Ins. Co., 1 Fed. Cas. 618; *Summerfield v. Phoenix Assur. Co.* (C. C.) 65 Fed. 292; *Gunther v. Liverpool & London & Globe Ins. Co.* (C. C.) 85 Fed. 846; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Robson v. United Order of Foresters* (Minn.) 100 N. W. 381; *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 South. 708; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 698; *Orient Ins. Co. v. Burrus*, 23 Ky. Law Rep. 656, 63 S. W. 453; *Swander v. Northern Cent. Life Ins. Co.*, 25 Ohio Cir. Ct. R. 3; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; *Miller v. Citizens' Fire, Marine & Life Ins. Co.*, 12 W. Va. 116, 29 Am. Rep. 452. And see *London Assur. Corp. v. Thompson*, 170 N. Y. 94, 62 N. E. 1066, where it was said that an ambiguity in a policy of reinsurance would be construed strictly against the original insurer, when the policy of reinsurance was in the exact language which the original insurer had prepared and furnished.

These rules as to liberal and strict construction of the contract are especially applicable where liability on the policy has become fixed by the capital fact of loss within the range of the responsibility assumed in the contract. Courts are reluctant to deprive the insured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available.

Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54; *Phoenix Ins. Co. v. Splers*, 10 Ky. Law Rep. 254, 8 S. W. 453; *Mutual Ben. Life Ins. Co. v. First Nat. Bank*, 69 S. W. 1, 24 Ky. Law Rep. 580; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198; *Sergeant v. Liverpool & London & Globe Ins. Co.*, 155 N. Y. 349, 49 N. E. 935.

(d) Same—Guaranty insurance.

In a few cases it has been said that contracts of guaranty insurance, being in the nature of contracts of suretyship, are not subject to the same rules as other insurance contracts, in view of the principle that sureties are the favorites of the law.

This view of guaranty policies is taken in *National Bank v. Fidelity & Casualty Co.*, 89 Fed. 819, 32 C. C. A. 355; *United States v. American Bonding & Trust Co.*, 89 Fed. 925, 32 C. C. A. 420;

American Surety Co. v. Thorn-Halliwell Cement Co., 9 Kan. App. 8, 57 Pac. 237; *Harrisburg S. & L. Ass'n v. United States Fidelity & Guaranty Co.*, 197 Pa. 177, 46 Atl. 910.

The weight of authority is overwhelmingly against this doctrine, however. As said in *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 C. C. A. 96, which involved a fidelity bond, in the case of contracts of this kind, executed upon a consideration by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity which the insured had reasonable grounds to expect. The rule applicable to contracts of fire and life insurance is the rule by analogy most applicable to a contract like that in this case. So, in *Tebbets v. Mercantile Credit Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281, where the company undertook, in consideration of premiums paid, to indemnify merchants against losses by uncollectible debts, the court held that the contract was not one of suretyship, but a policy of insurance, saying that the cases cited by the company to the effect that a surety is a favorite of the law, and that claims against him should be construed strictly, have no application. Corporations entering into contracts of this character may call themselves guaranty or surety companies, but their business is in all essential particulars that of insurers who, upon a careful calculation of the risks of such business and with such restrictions of their liability as may seem to them sufficient, undertake to assure persons against loss in return for premiums sufficiently high to make such business commercially profitable. Their contracts are in fact policies of insurance, and should be so construed.

These principles are supported by the following cases involving various kinds of guaranty policies: *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Id.*, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987; *Minnesota Title Ins. & Trust Co. v. Drexel*, 70 Fed. 194, 17 C. C. A. 56; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264; *Guaranty Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. 766, 28 C. C. A. 146; *Lowenstein v. Fidelity & Casualty Co. (C. C.)* 88 Fed. 474; *American Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161; *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.*, 115 Ky. 863, 75 S. W. 197; *People v. Mercantile Credit Guarantee Co.*, 166 N. Y. 416, 60 N. E. 24; *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 50 App. Div.

490, 64 N. Y. Supp. 116; *Bank of Tarboro v. Fidelity & Deposit Co.*, 128 N. C. 366, 38 S. E. 908; *Id.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; *Mercantile Credit & Guaranty Co. v. Littleford*, 18 Ohio Cir. Ct. R. 889; *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754; *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989.

(e) Same—Contracts should be construed so as to sustain indemnity.

It is a general principle that forfeitures are not favored in law, and nowhere is this more applicable than in the construction of insurance contracts (*Palatine Ins. Co. v. Ewing*, 92 Fed. 111, 34 C. C. A. 236). A construction of a policy resulting in a forfeiture will not be adopted, except to give effect to the obvious intention of the parties (*Phenix Ins. Co. of Brooklyn v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532); nor will provisions for forfeiture in policies of insurance be extended beyond the mischief intended to be met thereby (*Henton v. Farmers' & Merchants' Ins. Co.*, 1 Neb. [Unof.] 425, 95 N. W. 670). Contracts of insurance, whether of life or fire insurance, will, therefore, be construed so as to avoid a forfeiture, if possible.

McMaster v. New York Life Ins. Co. (C. C.) 78 Fed. 33; *Hanover Fire Ins. Co. v. Dole*, 50 N. E. 772, 20 Ind. App. 333; *McCollum v. Niagara Fire Ins. Co.*, 61 Mo. App. 352; *Logsdon v. Supreme Lodge of Fraternal Union of America*, 34 Wash. 666, 76 Pac. 292.

In accord with these principles, it is recognized as the settled doctrine that a policy of insurance must be liberally construed in favor of the insured, so as not to defeat, without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted.

The foregoing principles are supported by *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; *Rogers v. Ætna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396; *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. 417; *National Masonic Acc. Ass'n v. Seed*, 95 Ill. App. 43; *Supreme Lodge Order of Mutual Protection v. Meister*, 105 Ill. App. 471; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534, affirmed in 201 Ill. 260, 68 N. E. 388; *Seitzinger v. Modern Woodmen*, 106 Ill. App. 449, affirmed in 204 Ill. 58, 68 N. E. 478; *Traders' Mut. Life Ins. Co. v. Humphrey*, 109 Ill. App. 246, affirmed in 207 Ill. 540, 69 N. E. 875; *McElfresh v. Odd Fellows Acc. Co.*, 21 Ind. App. 557, 52 N. E.

819; *Goodwin v. Provident Saving Life Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Peterson v. Modern Brotherhood* (Iowa) 101 N. W. 289; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78; *Woodmen Acc. Ass'n v. Pratt*, 87 N. W. 546, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777; *Brooks v. Metropolitan Life Ins. Co.* (N. J. Sup.) 56 Atl. 168; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.) 461; *Home Mut. Ins. Co. v. Tomkies*, 96 Tex. 187, 71 S. W. 812; *Mascott v. First National Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Cleavenger v. Franklin Fire Ins. Co.*, 47 W. Va. 595, 35 S. E. 998.

(f) Same—Qualification of rule.

The rules as to liberal or strict construction are, however, to be applied fairly and reasonably. Not only must there be an unexplained ambiguity in the language of the contract (*Union Life Ins. Co. v. Jameson*, 31 Ind. App. 28, 67 N. E. 199), but, even when it exists, the court, in construing the contract, cannot go further than a fair construction of the language used will permit (*Behling v. Northwestern Nat. Life Ins. Co.*, 117 Wis. 24, 93 N. W. 800).

Liverpool & London & Globe Ins. Co. v. Kearney, 94 Fed. 314, 36 C. C. A. 265, affirming 46 S. W. 414, 2 Ind. T. 67; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91.

As said in *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 305, if the parties have put their agreement in clear and explicit language, it is the duty of courts to enforce it, although it may lead to unreasonable and absurd results. The terms of the policy, fixing the basis and extent of recovery in a case of loss, cannot be restricted or enlarged, where neither fraud nor mistake is alleged or proved (*Ætna Ins. Co. v. Johnson*, 11 Bush [Ky.] 587, 21 Am. Rep. 223). Notwithstanding the rule that, where a clause in a contract of insurance is susceptible of two constructions, that one will be adopted which is more favorable to the assured, when the language of the contract is clear and unambiguous, its effect cannot be destroyed by construction (*German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206). The rule that of two constructions of a policy the one favorable to the insured, if consistent with the objects for which the policy was issued, must be adopted, cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon (*Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 22 Sup. Ct. 124, 183 U. S. 402, 46

L. Ed. 253). In insurance contracts, as well as in other contracts, it is the duty of the courts to interpret the contract made by the parties themselves, and not to make a contract for them.

Seltzinger v. Modern Woodmen of America, 106 Ill. App. 449, affirmed in 204 Ill. 58, 68 N. E. 478; *Maryland Casualty Co. v. Hudgins* (Tex. Sup.) 78 S. W. 745, 64 L. R. A. 849.

In the absence of anything to show that the terms of the policy are intended to be understood in a special sense, the court will go no further than to hold the insurer liable to the extent indicated by the words used, when viewed in their ordinary and commonly received meaning (*Ripley v. Railway Passengers' Assur. Co.*, 20 Fed. Cas. 823, affirmed 16 Wall. 336, 21 L. Ed. 469). While contracts of insurance should not be so narrowly and technically construed as to frustrate their obvious design, they should not, on the other hand, be so loosely and inartificially interpreted as to extend the liability of the insurer beyond the exact limits clearly fixed by the contract (*Union Central Life Ins. Co. v. United States Fidelity & Guaranty Co.* [Md.] 58 Atl. 437).

(g) Language of policy in general.

In determining the meaning of the provisions of a policy, it is not what the insurer may have meant by the language used that is to be considered as controlling (*Stone v. Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235). The language of the policy must be construed according to its plain, ordinary, and popular sense, unless by some known usage it has acquired a different and technical meaning.

Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515; *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 93 Mo. App. 111; *De Forest v. Fulton Fire Ins. Co.*, 1 N. Y. Super. Ct. 94; *Cobb v. Lime Rock Fire & Marine Ins. Co.*, 58 Me. 326; *Burger v. Farmers' Mut. Ins. Co.*, 71 Pa. 422; *Bole v. New Hampshire Fire Ins. Co.*, 159 Pa. 53, 28 Atl. 205. This rule is applicable in the construction of the standard policy. *Nelson v. Traders' Ins. Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220.

Persons employing words which are in common use will, in the absence of fraud, be conclusively presumed to have used them in the sense assigned them by such common use (*St. Louis Gas Light Co. v. American Fire Ins. Co.*, 33 Mo. App. 348). Nevertheless, the meaning of words of general application may be restrained by pe-

culiarities of the subject-matter to which they refer (*Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503). If it appears that, as applied to the subject-matter, the language used was understood by the parties to have a special and peculiar meaning different from that ordinarily attributed to it, that meaning will be adopted (*Seccomb v. Provincial Ins. Co.*, 10 Allen [Mass.] 305). Thus, where words which have acquired a certain definite and notorious meaning among nautical men are adopted by an underwriter and used in the policy in a nautical sense, they will be presumed to have been taken with their known signification in maritime matters (*Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87). And, generally, technical words are to be interpreted as usually understood by persons in the profession or business to which they relate (*Peterson v. Modern Brotherhood [Iowa]* 101 N. W. 289).

The Iowa statute (Code, § 4617), providing that, when the terms of an instrument have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose that the other understood it, does not authorize the distortion of the plain language of the contract so as to make it conform to the notions of one of the parties executing it. *Peterson v. Modern Brotherhood (Iowa)* 101 N. W. 289.

It has been well said that punctuation is a most untrustworthy standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will take the instrument by its four corners in order to ascertain its meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it (*Boright v. Springfield Fire & M. Ins. Co.*, 34 Minn. 352, 25 N. W. 796).

(h) Printed and written portions of policy.

Courts of justice agree that the intent of the parties is the primary rule of construction in ascertaining the meaning of a policy of insurance, as well as interpreting other contracts, and that it is to be gathered, if possible, from both the written and printed portions of the policy, giving effect to both as far as may be. Each stipulation, whether printed or written, should have effect, unless the giving effect to one would destroy another. (*Goss v. Citizens' Ins. Co.*, 18 La. Ann. 97.) The rule is equally well settled that, if there is a contradiction between the printed and the written portions of the policy, the latter must control.

Reference to the following cases is deemed sufficient: *Hugg v. Augusta Ins. & Banking Co.*, 12 Fed. Cas. 821; *Gunther v. Liverpool & Lon-*

don & Globe Ins. Co. (C. C.) 34 Fed. 501; Hagan v. Scottish Union & National Ins. Co. (D. C.) 98 Fed. 129; Phoenix Ins. Co. v. Fleming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; Yoch v. Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; Russell v. Manufacturers' & Builders' Fire Ins. Co., 50 Minn. 409, 52 N. W. 906; Moore v. Perpetual Ins. Co., 16 Mo. 98; Archer v. Merchants' & Manufacturers' Ins. Co., 43 Mo. 434; Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383; Hayward v. Northwestern Ins. Co., 19 Abb. Prac. (N. Y.) 116; Sullivan v. Spring Garden Ins. Co., 54 N. Y. Supp. 629, 34 App. Div. 128; Arnold v. Pacific Mut. Ins. Co., 78 N. Y. 7; Chadsey v. Gulon, 97 N. Y. 333, affirming 48 N. Y. Super. Ct. 267; Mascott v. First Nat. Fire Ins. Co., 69 Vt. 116, 37 Atl. 255.*

The theory of the doctrine that where part of the contract is written and part printed, and there arises any reasonable doubt as to its meaning, the greater effect is to be attributed to the written words, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula, adapted equally to the case in contest and that of all other contracting parties in respect to similar subject-matters (James v. Lycoming Ins. Co., 13 Fed. Cas. 309). But the rule can properly be applied only when the written and the printed portions of the policy so contradict each other that the one must yield to the other. Where they do not, the principle must necessarily be subordinate to another, to which the policy of insurance and all other contracts are subject in their interpretation, viz., that every part of them should have an effect, if possible.

Scottish Union & National Ins. Co. v. Hagan, 102 Fed. 919, 43 O. C. A. 55; Golcochea v. Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Wallace v. Insurance Co., 4 La. 289; Hayward v. Liverpool & London Life & Fire Ins. Co., 2 Abb. Dec. (N. Y.) 349; Mumford v. Hallett, 1 Johns. (N. Y.) 439.

(4) Marginal writings, indorsements, slips, and riders.

Conditions, stipulations, and explanations written across the face or on the margin of the policy are usually to be construed as a part thereof, and as controlling the printed matter.

Dole v. New England Mut. Marine Ins. Co., 7 Fed. Cas. 837; Liscom v. Boston Mut. Fire Ins. Co., 9 Metc. (Mass.) 205; Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151; Cowles v. Continental Life Ins.

* See Cent. Dig. vol. 28, "Insurance," cols. 849-853, §§ 301-304.

Co., 63 N. H. 300; Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560; Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun (N. Y.) 383; Patch v. Phoenix Mut. Life Ins. Co., 44 Vt. 481.

So conditions, stipulations, and memoranda indorsed on a policy will, when sufficiently referred to in the body of the instrument, constitute part of the contract, with the same force and effect as if contained in the body of the policy.

Porter v. United States Life Ins. Co., 160 Mass. 183, 35 N. E. 678; Dewees v. Manhattan Ins. Co., 34 N. J. Law, 244; Desilver v. State Mutual Ins. Co., 38 Pa. 130; Kensington Bank v. Yerkes, 86 Pa. 227. A "note" indorsed on a policy (Jander v. Mutual Life Ins. Co., 16 Ohio Cir. Ct. R. 536), and even a notice on the back of a premium receipt, referred to on the face of the receipt, must be construed as part of the policy (Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204).

If the policy and an indorsement thereon are so much in conflict that they cannot be reconciled, the indorsement will govern (Howes v. Union Ins. Co., 16 La. Ann. 235).

But, unless there is a sufficient reference in the face of the policy, matter on the back thereof will not be regarded as part of the contract.

Bassell v. American Fire Ins. Co., 2 Fed. Cas. 1007; Sun Mut. Ins. Co. v. Crist, 19 Ky. Law Rep. 305, 39 S. W. 837; Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257.

A mere general declaration upon the face of a policy that it is "made and accepted in reference to the conditions hereunto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties," is not sufficient to make conditions printed on the back of a policy part of the instrument (Mullaney v. National Fire & Marine Ins. Co., 118 Mass. 393). And an acceptance on the face of a benefit certificate of "all the conditions therein named" did not carry a reference to matters on the back of the certificate, and make them a part thereof (Page v. Knights and Ladies of America [Tenn. Ch. App.] 61 S. W. 1068).

When a memorandum of a contract for additional insurance is indorsed on a policy previously issued, the stipulations therein contained, in so far as the same may be applicable, are to be treated as constituting the basis of the new contract. Corporation of London Assurance v. Paterson, 32 S. E. 650, 106 Ga. 538.

B.B.INS.—41

A slip or rider attached to a policy, modifying or explaining its provisions, will be read into the contract with the other provisions thereof, as though it were incorporated in its proper place, and will be given due effect in the construction of the policy.

Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. (C. C.) 106 Fed. 116; *Quinn v. Fire Association*, 180 Mass. 560, 62 N. E. 980; *City Drug Store v. Scottish Union & National Ins. Co.* (Tex. Civ. App.) 44 S. W. 21; *Hartford Fire Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. 140; *Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

While riders, if consistent with the stipulations of the policy, will simply be read in with them, it is in accord with the general rule as to the controlling effect of written over printed clauses that riders, if inconsistent and irreconcilable with the printed clauses of the policy, must control.

Gunther v. Liverpool & London & Globe Ins. Co. (C. C.) 34 Fed. 501; *St. Paul Fire & Marine Ins. Co. v. Kidd*, 55 Fed. 238, 5 C. C. A. 88, 14 U. S. App. 201; *Palatine Ins. Co. v. Ewing*, 92 Fed. 111, 34 C. C. A. 236; *German Ins. Co. v. Churchill*, 26 Ill. App. 206; *Jackson v. British America Assur. Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636; *Mascott v. Granite State Fire Ins. Co.*, 68 Vt. 253, 85 Atl. 75.

But the slip or rider should be referred to as forming part of the policy, in order to be of controlling effect (*East Texas Fire Ins. Co. v. Brin*, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 333). When the rider recites that it is subject to the terms and conditions of the policy, it refers only to such terms and conditions as are applicable to the subject-matter of the rider (*Haws v. Fire Ass'n of Philadelphia*, 114 Pa. 431, 7 Atl. 159).

(j) General and specific conditions or exceptions.

It is the duty of an insurance company, seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms, and not to leave the insured in a condition to be misled (*Boon v. Ætna Ins. Co.*, 40 Conn. 575). Consequently, when an express condition or covenant relative to a particular matter exists in a policy, no other will be implied (*Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300). And the stipulations are to be considered in their common popular sense, and are not to be distorted into some hidden meaning that nothing but the

exigency of a hard case would discover (*Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137).

Where there are two inconsistent stipulations covering the same subject-matter, the one general and the other separate and distinct, the latter stipulation will govern, because specific (*Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192). So a special clause, which creates an exception to a general clause, governs the latter clause (*Mitchell Furniture Co. v. Imperial Fire Ins. Co.*, 17 Mo. App. 627). Where a general clause refers to a former and more specific clause, in construing the former it must be done by the light of the clause it refers to (*Lewis v. Penn Mut. Life Ins. Co.*, 3 Mo. App. 372). If, by the introduction of a subsequent and obscure clause, difficult to understand, or requiring expert knowledge for its comprehension, the preceding clauses, plainly and unequivocally expressed, by which the initial loss of the insured is fixed, are nullified, the subsequent clause must be ignored (*American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264, 38 U. S. App. 583). So a clause inserted in a place where it is not in *pari materia* with the other clauses of the policy will not be regarded as a condition or exception, though it is so worded (*Kingsley v. New England Mut. Fire Ins. Co.*, 8 Cush. [Mass.] 393).

(k) Construction by the parties.

The practical interpretation of an insurance contract by the parties while they are engaged in the performance thereof, and before any controversy has arisen in regard thereto, is one of the best indications of their intent, and will be applied in construing the contract.

Manhattan Life Ins. Co. v. Wright, 128 Fed. 82, 61 C. C. A. 138; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738.

Similarly, as a general rule, a practical construction given to the provisions of the contract by the insurer in his dealings with the insured will be accepted by the courts.

Haydel v. Mutual Reserve Fund Life Ass'n, 104 Fed. 718, 44 C. C. A. 169; *Morton v. Supreme Council Royal League*, 100 Mo. App. 76, 73 S. W. 259; *People v. Commercial Alliance Ins. Co.*, 48 N. Y. Supp. 389, 21 App. Div. 533.

But a mere general understanding in the insurer's own office as to the meaning of certain terms cannot control (*Washington Fire*

Ins. Co. v. Davison, 30 Md. 91). Nor can any loose declarations or expressions of opinion by the parties as to the meaning and effect of certain of the clauses prevail in the construction of the contract (*Miller v. Interstate Casualty Co.*, 6 Lack. Leg. N. [Pa.] 62). The construction of an insurance contract is not to be controlled by the fact that in attempting to enforce the liability thereunder the insured may, by his acts and claims, imply that he believes the contract to be construed in a certain way. The true construction, as determined by the court, must govern, notwithstanding such implication from the conduct of the insured. (*Jackson v. British America Assur. Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636.)

(1) Effect of prior decisions.

The policy must be so construed, if practicable, that effect may be given to the written words in it, according to their meaning in such contracts as settled by judicial decisions. It is not competent to show that words which have received a judicial interpretation, have acquired by the usage of trade a peculiar commercial meaning, variant from that which the courts have adjudged to be their true meaning. (*Bargett v. Orient Mut. Ins. Co.*, 16 N. Y. Super. Ct. 385.) And where a provision in a policy has, prior to the issuance thereof, been given a uniform judicial construction by the courts of last resort of several states, it will be presumed that the insurer issued the policy with that construction in view.

Lowenstein v. Fidelity & Casualty Co. (C. C.) 88 Fed. 474; *Fidelity & Casualty Co. of New York v. Lowenstein*, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654; *Slocovich v. Orient Mutual Ins. Co.*, 108 N. Y. 56, 14 N. E. 802.

On similar principles, it is obvious that, as the terms employed in the statutory form of fire policy have been in previous use in insurance contracts and judicially construed, it must be assumed that the terms were used in view of their previously accepted interpretation (*John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 393). But this does not bind a court of a state which has adopted the standard form in use in another state to accept the decisions of the courts of such other state as controlling in the construction of the policy (*Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717).

Where the construction of a policy of insurance depends on questions of general commercial law, the federal courts are not bound by

the decisions of the state in which the contract was made, but by those of the federal Supreme Court.

Carpenter v. Providence Wash. Insurance Company, 16 Pet. 495, 10 L. Ed. 1044; *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.* (C. C.) 106 Fed. 116.

Where a clause in a policy of insurance has been construed by the court on a prior appeal, such construction will be adopted on a second appeal (*Home Ins. Co. v. Continental Ins. Co.*, 89 App. Div. 1, 85 N. Y. Supp. 262).

(m) Evidence to aid construction.

The rule is well established that, when an insurance contract is reduced to writing and is couched in plain and unambiguous language, courts must look to it alone to find the intention and meaning of the parties, and evidence of extrinsic facts and circumstances is inadmissible.

Sias v. Roger Williams Ins. Co. (C. C.) 8 Fed. 187; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Hough Clendening Co. v. People's Fire Ins. Co.*, 36 Md. 398; *Home Ins. Co. v. Continental Ins. Co.*, 89 App. Div. 1, 85 N. Y. Supp. 262.

On the other hand, if the written agreement is incomplete or ambiguous, parol evidence not inconsistent with the written terms is admissible to explain the ambiguity.

Orient Mut. Ins. Co. v. Wright, 1 Wall. 456, 17 L. Ed. 505; *St. Clair County Benevolent Soc. v. Fletsam*, 6 Ill. App. 151; *Hogan v. Wallace*, 63 Ill. App. 385; *Fidelity Mut. Fire Ins. Co. v. Murphy* (Neb.) 95 N. W. 702; *Richardson v. Home Ins. Co.*, 47 N. Y. Super. Ct. 138; *Lycoming Mutual Ins. Co. v. Saller*, 67 Pa. 108.⁴

So, where the parties have ingrafted into their contract terminology peculiar to a particular art, business, or science, it is always proper, where there is a dispute as to the terms employed and the true meaning of the instrument, to resort to extrinsic evidence, and to call in those who are best equipped to give the desired explanation.

Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son, 31 Ala. 711; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Weisenberger v. Harmony Fire & Marine Ins. Co.*, 56 Pa. 442.

⁴ See, also, Cent. Dig. vol. 28, "Insurance," cols. 2572-2579, §§ 1818-1824; vol. 20, cols. 863-865, § 313; 1824.

The principles governing the admission of parol evidence to remove ambiguities in a contract are applied liberally in the interpretation of insurance policies. But it is competent only to place the court in the same situation in which the parties were who made it, to enable the court to interpret the contract in the light in which the parties viewed it, and to give the proper application to the words they have used and the object sought to be obtained by it. It will not be admitted for the purpose of contradicting or varying the instrument. (*Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.) Such evidence will not, therefore, be admitted to show prior or contemporaneous parol agreements not referred to in the written contract.

Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. 183; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Gomila v. Hibernia Ins. Co.*, 40 La. Ann. 553, 4 South. 490.⁵

(a) Same—Customs and usages.

As a written agreement, which is in no wise of ambiguous or of uncertain import, is to have effect according to its terms, the express stipulations of parties cannot be overruled or set aside by any custom not to require their performance according to their tenor (*St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.*, 18 N. Y. Super. Ct. 238). So evidence of a usage tending to contradict the plain, unequivocal language of the policy, and not offered with a view to ascertain the particular terms, to explain the subject of the contract, is inadmissible (*Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235).

Reference may also be made to *Hunt v. Fidelity & Casualty Co.*, 99 Fed. 242, 39 C. C. A. 496; *Rankin v. American Ins. Co.*, 1 N. Y. Super. Ct. 682; *Van Tassel v. Greenwich Ins. Co.*, 51 N. Y. Supp. 79, 28 App. Div. 163; *Fry v. Provident Savings Life Assur. Soc.* (Tenn. Ch. App.) 38 S. W. 116.

If, however, the terms of a policy have by a known usage of trade acquired an established and appropriate sense and meaning, they will be construed according to that sense and meaning.

Bassell v. American Fire Ins. Co., 2 Fed. Cas. 1007; *Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son*, 31 Ala. 711; *Western Assur. Co. v. Althelmer Bros.*, 58 Ark. 565, 25 S. W. 1067; *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Parsons v. Mann-*

⁵ Admissibility of parol evidence in general, see Cent. Dig. vol. 20, "Evidence," cols. 2365-2620, §§ 1678-1854.

facturers' Ins. Co., 16 Gray (Mass.) 463; *Colt v. Insurance Co.*, 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; *Bryant v. Poughkeepsie Mut. Fire Ins. Co.*, 21 Barb. (N. Y.) 154, affirmed 17 N. Y. 200; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *Burger v. Farmers' Mutual Ins. Co.*, 71 Pa. 422; *Cross v. Shutliffe*, 2 Bay (S. C.) 220, 1 Am. Dec. 645.*

The prevailing doctrine as to the admissibility of proof of custom and usage is well stated in *Ocean Steamship Co. v. Ætna Ins. Co.* (D. C.) 121 Fed. 882, where it is said that, though in the early days of marine insurance the contract was a rather incoherent instrument, founded on usage, and was, therefore, governed and construed by usage, at the present day the contract of insurance is formal and exact in its statement of the property covered, the risk assumed, and the conditions. While under the old contract proof of custom and usage was obviously necessary and competent evidence, where the meaning of the policy was obscure and the law unsettled, there is, so far as the present contract is concerned, no room for the admission of parol evidence to construe a contract expressed in exact terms, which are to be understood in their plain, ordinary, and popular sense. **It is only when, by some known usage of trade, the words have acquired a peculiar sense, distinct from their popular sense, that parol evidence of the usage is admissible.**

While it is well settled that the existence of a usage in respect to the subject-matter of a contract may have the effect of giving to its terms definitions which would not otherwise attach to them, the doctrine rests, except in particular instances, solely on the theory that the parties, in entering into the compact, had such usage in mind, stipulated with reference to it, and hence made it a part of their contract. And whether a usage in a given case is thus to be taken as a part of the contract, whether the parties had it in view in their negotiations, and intended that their agreement should be read and construed with reference to and in the light of such usage, is always a question of fact. (*German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291.) **Mere local customs and usages cannot, of course, affect contracts entered into elsewhere.**

Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517; *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am.

* See, also, Cent. Dig. vol. 28, "Insurance," cols. 865-869, § 314.

Dec. 592; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684. An insurer is not bound by the custom of other companies. *King v. Enterprise Ins. Co.*, 45 Ind. 43.

The parties may expressly contract in relation to a certain custom (*Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 C. C. A. 63). Otherwise, it must be shown that they had the custom in mind in making the contract and contracted with reference to it (*Cook v. Loew*, 69 N. Y. Supp. 614, 34 Misc. Rep. 276); the burden of proof being on the one who alleges the custom (*Phillips v. Insurance Company of Pennsylvania*, 9 Fed. Cas. 514). Knowledge of general customs will be presumed (*Ruger v. Fireman's Fund Ins. Co.* [D. C.] 90 Fed. 310). The presumption of knowledge of an established usage, which arises upon proof of its generality in the business or trade to which it is incident, is, generally speaking, only *prima facie*, and hence rebuttable by direct evidence of the want of such knowledge. With reference to contracts of insurance, there is this exception: Insurance companies are under such a duty to inform themselves of the usages of the particular business insured as that they will not be heard to deny such knowledge. This only means, however, that where a general usage in business is proved, a usage of the character that raises up the *prima facie* presumption of knowledge in ordinary cases, the insurer, in view of the duty resting on him to acquaint himself with the general usages of the business, will not be let in to rebut the presumption. (*German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291.) A mercantile usage, in order to be received as explanatory of a policy of insurance, must not, on the one hand, tend to increase indefinitely the risk assumed by the insurer, nor, on the other hand, unreasonably to deprive the assured of the indemnity which the words of the contract, fairly interpreted, would secure to him. If a usage leads to consequences which are absurd, or which could not be fairly presumed to have been intended by the parties, the presumption is repelled, which the law might otherwise make, that it was intended to be adopted as part of the contract. Therefore courts of law will not enforce unreasonable or absurd usages, however uniform or well known. (*Seccomb et al. v. Provincial Ins. Co.*, 10 Allen [Mass.] 305.)[†]

[†] As to the general rules pertaining to custom and usage, see Cent. Dig. vol. 15, "Customs and Usages."

2. WHAT LAW GOVERNS IN THE CONSTRUCTION OF THE CONTRACT.

- (a) Construction determined by the law of the place where the contract was made.
- (b) Exceptions to rule—Law of the place of performance—Law of domicile of insurer.
- (c) Intent of parties—Effect of stipulation.
- (d) General rules and stipulations controlled by considerations of public policy.
- (e) What is the place of contract—Approval of risk.
- (f) Same—Place of final assent.
- (g) Same—Place of delivery and payment of premium.
- (h) Same—Countersigning by agent.
- (i) Same—Stipulation of parties—Statutory provisions.
- (j) Presumptions and burden of proof.

(a) Construction determined by the law of the place where the contract was made.

In the construction of contracts of insurance, for the purpose of ascertaining the rights of the parties, it is important to determine at the outset the law by which the interpretation of the contract is to be governed. As in the case of the validity of the contract, the general rule is that the construction of contracts of insurance is governed by the law of the place where the contract was made.

The rule is asserted in *Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; *Desmazes v. Mutual Ben. Life Ins. Co.*, 7 Fed. Cas. 529; *The Waubaushene (D. C.)* 22 Fed. 109; *Equitable Life Assur. Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359; *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215; *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89; *Knights Templars' & Masonic Mutual Aid Ass'n v. Greene (C. C.)* 79 Fed. 461; *California Savings Bank v. American Surety Co. (C. C.)* 87 Fed. 118; *Fidelity Mut. Life Assoc. v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Provident Savings Life Assur. Soc. v. Hadley*, 102 Fed. 836, 43 C. C. A. 25; *Kelley v. Mutual Life Ins. Co. (C. C.)* 109 Fed. 56; *Supreme Council American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153, affirming (C. C.) 109 Fed. 261; *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, 124 Fed. 25, 59 C. C. A. 545; *Union Central Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355; *Des Moines Life Ass'n v. Owen*, 10 Colo. App. 131, 50 Pac. 210; *Mullen v. Reed*, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174; *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Fidelity Mut. Life Ass'n v. McDaniel*, 25 Ind. App. 608, 57 N. E. 645;

Belknap v. Johnston, 114 Iowa, 265, 86 N. W. 267; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Bottomley v. Metropolitan Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889; *Franklin Life Ins. Co. v. Galligan*, 73 S. W. 102, 71 Ark. 295, 100 Am. St. Rep. 73; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 38 Atl. 731, 68 Am. St. Rep. 668; *Watt v. Gideon*, 8 Pa. Dist. R. 395; *Roberts v. Winton*, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 579; *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; *Seely v. Manhattan Life Ins. Co.*, 55 Atl. 425, 72 N. H. 49; *Banco de Sonora v. Bankers' Mut. Casualty Co. (Iowa)* 95 N. W. 232; *Id.*, 100 N. W. 532.¹

In *Shiff v. Louisiana State Ins. Co. (La.)* 6 Mart. (N. S.) 629, which involved a policy of marine insurance, the court held that the mere fact that the contract had reference to perils to be encountered in another country did not subject it to be construed by the laws of such other country, but the contract was properly construed by the laws of the place where it was made.

(b) Exceptions to rule—Law of the place of performance—Law of domicile of insurer.

There are, however, a number of well-considered cases which apparently hold that the law of the place where the contract is to be performed will govern its construction. This seems to have been the rule adopted in the well-known case of *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516, where it was said that the law of the place where the contract is to be performed will govern, unless there are circumstances to show that the parties had specially in view the law of the place where the contract is made.

The rule that the law of the place of performance will govern seems to have controlled in *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Selders v. Merchants' Life Ass'n*, 93 Tex. 194, 54 S. W. 753, reversing (Tex. Civ. App.) 51 S. W. 547; *Bottomley v. Metropolitan Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438; *Expressman's Mut. Ben. Ass'n v. Hurlock*, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; *Phinney v. Mutual Life Ins. Co. (C. C.)* 67 Fed. 493.²

¹ What law governs as to construction of contracts in general, see Cent. Dig. vol. 11, "Contracts," cols. 703-708, § 724. See, also, *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed.

104, for a general statement of the doctrine.

² See Cent. Dig. vol. 11, "Contracts," cols. 708-710, § 725.

In some cases, where the law of the place of performance has been regarded as the law of the contract, no material act connected with the contract was to be performed elsewhere. Thus, in *Metro-politan Life Ins. Co. v. Bradley* (Tex. Civ. App.) 79 S. W. 367, the contract, though made in Texas, was payable at the home office in New York, and all premiums were likewise made payable there; no provision being made for any act to be done elsewhere by the company. It was held that the contract should be governed by the laws of New York, as there was nothing in it to indicate that the parties contracted with reference to the laws of Texas. So, in *Summitt v. United States Life Ins. Co.*, 123 Iowa, 681, 99 N. W. 563, a policy executed at the insurer's home office in New York, providing that the premiums were to be paid there, where, also, payment of the insurance should be made, was regarded as governed by the laws of New York, though to take effect on delivery to the insured, in the absence of proof of the place of actual delivery.

In *Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 C. C. A. 63, the court regarded the law of the place of performance as governing the construction of the contract, but said that, if the place of performance is not indicated, then the law of the place where the contract is made will control. The Supreme Court of the United States, in *The London Assur. v. Companhia de Moagens do Barreiro*, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, asserted the doctrine that, generally speaking, the law of the place where the contract is to be performed is the law which governs as to its interpretation; but, in view of the decisions of this court in other cases,⁸ this must be regarded as a broad general statement only, and subject to qualification. A different view was apparently taken in *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181, though the question was not discussed.

In *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915, *Merchants' & Manufacturers' Ins. Co. v. Linchey*, 3 Mo. App. 588, *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 88 Am. St. Rep. 813, and *Fidelity Mut. Life Ass'n v. McDaniel*, 25 Ind. App. 608, 57 N. E. 645, the place where the contract was made and the place of performance coincided.

There are, too, a few cases in which the law of the domicile of the insurer seems to have been regarded as important. Apparently,

⁸ See *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. Ed. 245.

however, this law is applied only when the fundamental and primary rights of the parties, dependent on the powers of the insurer, are involved.

The law of the domicile was regarded as important in *Manhattan Life Ins. Co. v. Fields* (Tex. Civ. App.) 28 S. W. 280, and *Hexter v. United States Life Ins. Co.*, 11 Ky. Law Rep. 903, though the principle was distinctly repudiated in *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308.

In *Warner v. Delbridge & Cameron Co.*, 110 Mich. 590, 68 N. W. 283, 34 L. R. A. 701, 64 Am. St. Rep. 367, where the company involved was a mutual fire insurance company domiciled in Minnesota, it was held that, as the insured became a member of the company, his contract was controlled by the organic law of the company. Similarly, in *Supreme Council Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244, where the association was incorporated under the laws of Massachusetts, the court held that the contract must be construed so as to extend to members in other states the benefits accruing by reason of the statutes of Massachusetts to members in the latter state, since the idea of mutuality and fraternity, which formed the basis of the association, required that all its members should be treated alike.

But, since the laws of a state can have no extraterritorial effect, a policy issued by a New York corporation in Kentucky will not be affected by subsequent legislation in New York. *Provident Sav. Life Assur. Soc. v. Bailey* (Ky.) 80 S. W. 452.

(c) Intent of parties—Effect of stipulation.

The intent of the parties as to what law will govern the construction of the contract may be a controlling factor. This principle was recognized in an early case (*Lenox v. United Ins. Co.*, 3 Johns. Cas. [N. Y.] 178), and has received the sanction of the courts in later decisions.

Reference may be made to *The London Assurance v. Companhia de Moagens do Barreiro*, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113; *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; *Peters v. Warren Ins. Co.*, 19 Fed. Cas. 370; *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 34, 57 S. W. 635, 86 Am. St. Rep. 813; *Bottomley v. Metropolitan Life Ins. Co.*, 49 N. E. 438, 170 Mass. 274; *Gibson v. Connecticut Fire Ins. Co.* (C. C.) 77 Fed. 561; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Id.*, 67 N. H. 335, 39 Atl. 902.

The general doctrine as to intent is, of course, of greater weight when the intent of the parties is definitely expressed by a stipulation that the contract shall be governed by the law of a particular state. In the absence of objections, based on considerations of public policy, such stipulations will, in general, be given effect. As was said in *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 272, 64 Am. St. Rep. 715, where the parties expressly declare that their contract shall be construed as made within a certain jurisdiction, there is no room for inference or presumption as to what their intention is.

Reference may also be made to *Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Phinney v. Mutual Life Ins. Co.* (C. C.) 67 Fed. 493; *London Assurance v. Companhia de Moagens do Barreiro*, 68 Fed. 247, 15 C. C. A. 379, affirming (D. C.) 56 Fed. 44; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132; *Mutual Life Ins. Co. v. Hill*, 118 Fed. 708, 55 C. C. A. 536, affirming (C. C.) 113 Fed. 44; *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43; *Johnson v. New York Life Ins. Co.*, 109 Iowa, 708, 78 N. W. 905, 50 L. R. A. 99; *Baxter v. Brooklyn Life Ins. Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293, affirming 44 Hun, 184; *Smith v. Covenant Mut. Benefit Ass'n of Illinois*, 16 Tex. Civ. App. 593, 43 S. W. 819; *New York Life Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336; *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Id.*, 10 Wash. 211, 38 Pac. 1034—though in some of these cases the place where the contract was made or the place where it was to be performed was the same as that named in the stipulation.

The contrary doctrine was, however, announced in *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197, 53 N. E. 398, where it was held that a policy issued within the state of Massachusetts to a resident of the state should be governed by the laws of Massachusetts, in spite of the indorsement on the back that it should be construed according to the laws of another state.

In *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181, the mere recital in the application that the contract should be governed by the law of the particular state was regarded as insufficient to make such a stipulation a part of the contract, so as to control it; and this decision has been followed in *Mutual Life Ins. Co. v. Hathaway*, 106 Fed. 819, 45 C. C. A. 655.

(d) General rules and stipulations controlled by considerations of public policy.

The rule that the place of contract determines the law by which the contract will be construed must yield, where such construction would contravene the public policy of the state where enforcement is sought (*Seyk v. Millers' National Ins. Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523). A similar doctrine has been asserted where, by stipulation, the parties have agreed that the policy shall be construed according to the law of a particular state. Thus, in *Insurance Co. v. Block*, 12 Ohio Cir. Ct. R. 224, 6 O. C. D. 166, the court said that, though it is a general rule that parties residing in different states can contract with reference to the law of either state, and, having so contracted, their contract will be determined by such law, there is this exception: Where a state, to shield and protect its own citizens, passes a law which shall govern and control the making of such contracts, the law throws its protecting shield over the citizens of the state, and will determine the rights of parties if the laws of two states conflict. The doctrine is also asserted in the important case of *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

Reference may also be made to *Mutual Ben. Life Ins. Co. v. Robison* (C. C.) 54 Fed. 580; *New York Life Ins. Co. v. Russell*, 77 Fed. 94, 23 C. C. A. 43; *McClain v. Provident Savings Life Assurance Soc.*, 110 Fed. 80, 49 C. C. A. 31; *Albro v. Manhattan Life Ins. Co.* (C. C.) 119 Fed. 629; *Price v. Conn. Mutual Life Ins. Co.*, 48 Mo. App. 281; *Summers v. Fidelity Mutual Aid Ass'n*, 84 Mo. App. 605; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; *Pietri v. Seguenot*, 69 S. W. 1055, 96 Mo. App. 258; *In re Andress' Estate*, 6 Ohio Dec. 174; *Keatley v. Travelers' Ins. Co.*, 187 Pa. 197, 40 Atl. 808.

The general doctrine that considerations of public policy must control has been approved in other cases, though it is regarded as inapplicable where no statute on which such consideration could be based exists in the states where enforcement is sought.

Such seems to have been the fact in *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 28 C. C. A. 620, which is followed in *Equitable Life Assur. Soc. v. Trimble*, 83 Fed. 85, 27 C. C. A. 404; *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263; *Mutual Life Ins. Co. of New York v. Sears*, 97 Fed. 986, 38 C. C. A. 696; *Mutual Life Ins. Co. of New York v. Cohen*, 97 Fed. 985, 38 C. C. A. 696; *Mutual Life Ins. Co. of New York v. Allen*, 97 Fed. 985, 38 C. C. A. 696; *Mutual Life Ins. Co. of New York v. Hill*, 118 Fed. 708, 55 C. C. A. 536, affirming (C. C.) 113 Fed. 47.

(e) What is the place of contract—Approval of risk.

Assuming the general principle to be that the law of the place where the contract is made governs its construction, it becomes important to ascertain the rules by which the place of contract is to be determined. The general rule is undoubtedly that stated in *Fidelity Mutual Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813, where the court said that the test is generally the acquiescence of minds by which the contract is concluded; and the place where that occurs is the place where the contract, for most purposes, should be regarded to have been made. Where an application is taken in one state by an agent who has no authority to bind the company, and is forwarded to the domicile of the company, and there accepted, and the policy issued, the contract must be regarded as having been made at such place, if nothing else remains to be done before the parties are to be bound.

The rule seems to have controlled the decisions in *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Commonwealth Mut. Fire Ins. Co. v. Swift*, 174 Mass. 226, 54 N. E. 1097; *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 173 Mass. 161, 53 N. E. 373; *Equitable Life Assur. Soc. of United States v. Trimble*, 83 Fed. 85, 27 C. C. A. 404; *Galloway v. Standard Fire Ins. Co.*, 31 S. E. 969, 45 W. Va. 237; *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316.

Where the policy was originally a Rhode Island contract, as in *Bottomley v. Metropolitan Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438, the fact that, after it had lapsed, a beneficiary who resided in Massachusetts made application for revival, conducted negotiations therefor, and received back the revived policy, paying the premium, in the latter state, did not render the policy as revived a Massachusetts contract.⁴

(f) Same—Place of final assent.

The general rule stated in the preceding subdivision has, however, been modified in numerous cases to meet changed conditions and circumstances. As was said in *Fidelity Mut. Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813, the general rule is to be qualified, where other things are to be done before the parties are to be bound by the acceptance of the risk, as, for instance, where it

⁴ See, also, Cent. Dig. vol. 11, "Contracts," cols. 713-717, § 728.

is stipulated that the policy is not to take effect until the first premium has been paid and the policy countersigned by the agent of the company in the place where the applicant resides. It may, therefore, be said that, where any action by either party is necessary before the contract shall become complete, the place where such additional act is to be performed—that is to say, the place where the final assent is given—must be regarded as the place of contract.

This is the principle that may be deduced from *The Waubaushene* (C. C.) 22 Fed. 109; *Carrollton Furniture Mfg. Co. v. American Credit Ins. Co.*, 124 Fed. 25, 59 C. C. A. 545; *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 34, 57 S. W. 635, 86 Am. St. Rep. 813; *Provident Savings Life Assur. Soc. v. Hadley*, 102 Fed. 856, 43 C. C. A. 25.

Thus, where a fraternal benefit association, organized under the acts of Congress, issued a certificate of membership through its officers in Illinois to a resident of New York, conditioned that it should take effect when the acceptance printed on the certificate was executed by the insured (*Meyer v. Supreme Lodge Knights of Pythias*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, affirming 81 N. Y. Supp. 813, 82 App. Div. 359), the execution of the acceptance in New York made the contract a New York contract to be governed by the laws of that state. So, too, in *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915, reversing 93 Ill. App. 373, where insured became a member of a subordinate council of the defendant association in Illinois, and the laws of the association required an acceptance of the benefit certificate, such acceptance in Illinois made that state the place of the contract. In *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294, the contract as finally issued in New York, where the application had been sent for approval, was not in exact accordance with the terms of the application. It was, therefore, held that the acceptance by the insured in Massachusetts of the policy as issued was the final act necessary to give effect to the contract, thus making that state the place of contract.

Quite similar were the circumstances in *Carrollton Furniture Mfg. Co. v. American Credit Ins. Co.*, 124 Fed. 25, 59 C. C. A. 545; *The Waubaushene* (D. C.) 22 Fed. 109.

On the other hand, in *Gibson v. Connecticut Fire Ins. Co.* (C. C.) 77 Fed. 561, where a resident of Missouri, through a broker residing in that state, secured insurance from a Minnesota agent on

property in that state, and received a policy written at a different rate than that suggested in his application, it was held that by accepting the policy the insured merely ratified the acts of the Minnesota agent, and the contract really became complete when the policy was issued and mailed by such agent. The general doctrine on this phase of the question is well stated in *Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516, where it was insisted by the insured that, since the policy contained terms and conditions not included in the application, it did not bind them until accepted by them or their agents in New York; but the court said that ordinarily it is not to be expected that an application for insurance will contain all of the terms and conditions which are included in the policy when it is issued. The application is for insurance on such terms and conditions as the company sells. It is to be presumed that the purchaser has made himself acquainted with what he is purchasing, and therefore the contract becomes complete on delivery without further assent on the part of the assured, unless the policy contains some extraordinary provisions which would entitle the insured to have the contract rescinded.

(g) Same—Place of delivery and payment of premium.

In discussing the question as to what law governs the validity of the contract, it was pointed out that, in determining the place of contract, a policy issued and mailed to the insured or his agent is to be regarded as delivered at the place of mailing.⁵ The same principle seems to have been applied in ascertaining the place of contract, for the purpose of determining what law governs the construction of the contract.

Reference may be made to *Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co.*, 53 N. E. 373, 173 Mass. 161; *Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co.*, 50 N. E. 516, 171 Mass. 265; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Gibson v. Connecticut Fire Ins. Co.* (C. C.) 77 Fed. 561; *Commonwealth Mut. Fire Ins. Co. v. Swift*, 174 Mass. 226, 54 N. E. 1097.

In other words, the place of delivery of the policy is an important factor in determining the place of final assent.

This principle seems also to have been applied in *Pietri v. Seguenot*, 69 S. W. 1055, 96 Mo. App. 258; *Watt v. Gideon*, 22 Pa. Co. Ct. R.

⁵ See ante, p. 564.

499, 8 Pa. Dist. R. 395; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89; *Knights Templars' & Masonic Mutual Aid Ass'n v. Greene* (C. C.) 79 Fed. 461. In the case last cited, however, the court seems not to have relied wholly on this doctrine, but to have been governed by other considerations.

As the premium is usually paid on the delivery of the policy, it may be that in the cases cited above the payment of premium was coincident with delivery, and thus became an important factor in determining the place of final assent. However that may be, in numerous cases stress has been laid on the payment of premium, and, in view of the fact that many policies provide that they shall not take effect until delivery and payment of premium, we are perhaps justified in stating the rule to be that the place of delivery and payment of premium is to be regarded as the place of final assent.

Payment of premium seems to have been regarded as an important or as a controlling factor in *Equitable Life Assur. Soc. v. Clemens*, 140 U. S. 226, sub nom. *Pettus*, 11 Sup. Ct. 822, 35 L. Ed. 497; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106; *The Waubaushene* (D. C.) 22 Fed. 109; *Mutual Benefit Life Ins. Co. v. Robison* (C. C.) 54 Fed. 580; *Equitable Life Assur. Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359; *Hicks v. National Life Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215; *Provident Savings Life Assur. Soc. v. Hadley*, 102 Fed. 856, 43 C. C. A. 25; *Fidelity Mut. Life Ass'n v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; *Kelley v. Mutual Life Ins. Co.* (C. C.) 109 Fed. 56; *Lancashire Ins. Co. v. Barnard*, 111 Fed. 702, 49 C. C. A. 559; *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, 115 Fed. 77, 52 C. C. A. 671; *Id.*, 124 Fed. 25, 59 C. C. A. 545; *Marden v. Hotel Owners' Ins. Co.*, 52 N. W. 509, 85 Iowa, 584, 39 Am. St. Rep. 816; *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 36 South. 790; *Expressman's Mut. Ben. Ass'n v. Hurlock*, 46 Atl. 957, 91 Md. 585, 80 Am. St. Rep. 470; *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; *Cravens v. N. Y. Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; *Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 50 S. W. 281, 149 Mo. 165; *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356; and *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

The contrary doctrine seems to have governed *Desmazes v. Mutual Ben. Life Ins. Co.*, 7 Fed. Cas. 529, *Shattuck v. Mutual Life Ins. Co.*, 21 Fed. Cas. 1183, *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 29 Fed. Cas. 964, and *Smith v. Mut. Life Ins. Co.* (C. C.) 5 Fed. 582, where the court took the ground that as the policy provided for the payment of premiums at the home office of the company, and the agents

were authorized only to receive applications for forwarding to the home office, and on the return of the policy to them deliver the same to the insured on payment of the first premium on the production of the company's receipt, the fact that the premiums were paid to the agent at a place other than the office of the company did not affect the place of contract. These cases must, however, be regarded as overruled by *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Pettus*, 11 Sup. Ct. 822, 35 L. Ed. 497.

Attention may also be called to *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813, where it was contended that, as the premium accompanied the application, the acceptance of the risk must be regarded as determining the place of contract. The policy did not require countersigning by the agent, but the application stipulated that the policy was not to be binding until the first premium had been paid during the lifetime and good health of the applicant. The court says that this condition was fulfilled by the fact that the premium accompanied the application. Moreover, since the policy provided that it should not be binding until delivery during the lifetime and good health of the applicant, such provision being contained in the same clause as that relating to the payment of the premium, acceptance of the premium and application by the company at its home office left nothing to prevent the immediate creation of the contract, and it must be regarded as completed at such home office.

A different view was taken in *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356. The court said that, however perfect in form the contract may have been, and although all of its other terms and conditions may have been complied with, payment of premium during the life and good health of the assured, and the delivery of the contract to him, were conditions precedent in order to complete its execution. In the absence of a showing, therefore, that the agents were empowered to bind the company, the fact that the premium was advanced and accompanied the application did not render the acceptance of the application at the home office in New York a completion of the contract, without the actual delivery of the policy into the hands of the insured, so that the transaction would become a New York contract.

The law of the place of payment of the insurance, which was also the place where premiums were to be paid, will govern the contract, though it contains a provision that it shall take effect on delivery, if there is no proof of the place of actual delivery (*Summitt v. United States Life Ins. Co.*, 123 Iowa, 681, 99 N. W. 563).

(h) Same—Countersigning by agent.

In view of the provisions generally inserted in insurance policies that they shall not take effect until countersigned by the agent through whom they are issued, it has been held that such countersigning is the act of final assent which determines the place of contract. As said in *Continental Life Ins. Co. v. Webb*, 54 Ala. 688, where the policy recited that it should take effect only when countersigned by certain agents in Alabama, the contract was an Alabama contract, since it did not become a perfect instrument until the act indicated was done. Up to that time it was merely an inchoate contract.

The doctrine seems to have been asserted, also, in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192, *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 181, 69 Am. Dec. 308, *Antes v. State Ins. Co.*, 84 N. W. 412, 61 Neb. 55, and *Todd v. State Ins. Co.*, 83 Leg. Int. (Pa.) 239.

A different view was taken in *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 29 Fed. Cas. 964, where it was said that the only object of the countersignature was to facilitate proof of the fact that the premium had been paid; but, in view of the decision in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Pettus*, 11 Sup. Ct. 822, 35 L. Ed. 497, this decision cannot be regarded as of much weight.

(i) Same—Stipulation of parties—Statutory provisions.

In view of the principles discussed in subdivisions (c) and (d), it is obvious that, in the absence of any objection based on considerations of public policy, the parties may stipulate as to the place of contract. The cases cited in the subdivisions mentioned may be referred to in this connection. A mere general declaration that the contract shall be construed by the laws of a certain state will not, however, make applicable the statute of that state relating to the necessity of giving notice of premiums becoming due if the contract also contained stipulations waiving such provisions and the right to notice generally. (*Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788.) So, too, a general recital in a fire policy that it was issued at the company's Omaha agency is not a contractual element and conclusive as to the place of contract (*Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545). Even where a life policy contains a provision that it shall be construed according to the laws of a cer-

tain state, such a stipulation will be disregarded, if no evidence of those laws has been introduced, as judicial knowledge cannot extend to them (*New York Life Ins. Co. v. Smith*, 35 South. 1004, 139 Ala. 303. Attention may also be called to *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294, where it was said that the place of actual payment of the premium is the place of contract, notwithstanding a stipulation that the premiums are to be paid in another state.

A North Carolina statute (Laws 1893, c. 299, § 8) provides that all contracts of insurance, applications for which are taken within the state, shall be deemed to have been made within the state and subject to the laws thereof. In view of this statute it was held (*Horton v. Insurance Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717) that a policy, the application for which was taken in North Carolina, was a North Carolina contract, no matter in what state the policy was issued. A similar statute exists in Alabama (Code 1896, § 2606; Act Feb. 18, 1897, § 31).

(j) Presumptions and burden of proof.

Unless a contrary intent is shown, the parties are presumed to have contracted in view of the law of the place of contract, according to *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813. In the important case of *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181, it was said that the presumption is that the law of the place of contract is contemplated by the parties, and that he who asserts the contrary has the burden of proof.*

* For cases involving this phase of the question as applied to contracts in general, see Cent. Dig. vol. 11, "Contracts," cols. 712, 713, § 727.

3. PAPERS ACCOMPANYING POLICY OR CONSTRUED THEREWITH IN GENERAL.

- (a) In general.
- (b) Premium notes.
- (c) Prospectus or other pamphlet.
- (d) Advertisements and circulars in general.
- (e) Circulars modifying strict provisions of contract.
- (f) Reference to circulars in aid of construction.
- (g) Published rules and by-laws.

(a) In general.

It is a general principle of the law of contracts that two or more instruments executed contemporaneously, by the same parties, in reference to the same subject-matter, constitute one contract.¹ In accordance with this principle it was held, in *Sheerer v. Manhattan Life Ins. Co.* (C. C.) 20 Fed. 886, where the policy was accompanied by collateral agreement in regard to the right to a paid-up policy, that stipulations in the policy regarding the issuance of paid-up policies and the provisions of the collateral agreement must be read together and construed as one contract, so that, if the provisions of the contract are modified by the provisions of the agreement, such modification must be given effect.

The courts will, however, exercise great caution not to give such collateral agreements greater effect than is warranted by strict construction. Thus, in *Constant v. Allegheny Ins. Co.*, 6 Fed. Cas. 356, plaintiff received from the defendant company its own policy and three other policies, written through an agent for other companies. The broker advised defendant that he doubted whether the three agency policies would be accepted, for the reason that the particular agent had a very bad reputation for settling losses. The secretary of defendant company wrote in reply that, if the vessel is not satisfactorily insured, he could have the policies canceled, but, in case of loss, his company felt itself bound for a satisfactory adjustment. On the faith of this letter plaintiff closed the transaction. One of the substituted companies having become insolvent, plaintiff claimed that this letter was a guaranty of solvency. The court held, however, that the letter could not be construed as a guaranty of the solvency of the companies, but merely an undertaking for a satisfactory adjustment of the loss and apportionment between the insurers.

¹ See Cent. Dig. vol. 11, "Contracts," cols. 736-741, § 746.

It is also a principle that generally the accompanying paper must be referred to in the policy, in order that it may be construed with it. In accord with this rule is *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87, where a cargo policy recited that freight and advances insured under the policy were subject to the terms and conditions of a freight policy attached thereto. It was held that, in construing this clause, reference must be made to the terms and conditions of the freight policy which were pertinent to the terms and conditions of the cargo policy. In other words, the two were to be construed together, so far as they were in *pari materia*.

The extent to which other policies will be referred to in construing the policy in suit has been considered in some cases. It has been held in Massachusetts (*Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. 337) that, where a policy on merchandise is involved, another policy issued by the same company on the building may be referred to as explanatory of the whole transaction. But where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other (*Westinghouse Electric Co. v. Western Assur. Co.*, 42 La. Ann. 28, 7 South. 73). Where a policy had been renewed on several occasions, extending over a long period (*Voss v. Connecticut Mut. Life Ins. Co.*, 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689), it was held that the original contract might be referred to in determining the rights of the parties under the last renewal.

It would seem to be elementary that, where insurance is effected by certificate under an open policy, such policy must be referred to in construing the contract evidenced by the certificate.

Underwriters' Agency v. Sutherlin, 46 Ga. 652; *Conner v. Manchester Assur. Co.* (C. C. A.) 180 Fed. 743.

(b) Premium notes.

In accord with the general rule that papers executed contemporaneously and as parts of the same transaction should be construed together is the principle that a policy of insurance and the notes given for premiums thereon, being executed contemporaneously and relating to the same parties and the same subject-matter, are parts of the same contract, and should be considered as such in ascertaining the terms of the contract.

This rule is approved in *Little v. Northwestern Mut. Life Ins. Co.* (Ind.) 5 Ind. Law J. 149; *Matten v. Lichtenwalner*, 6 Pa. Super.

Ct. 575; *Union Central Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 456, 28 S. W. 117; *Laughlin v. Fidelity Mut. Life Ass'n*, 8 Tex. Civ. App. 448, 28 S. W. 411.

It is, however, evident that in the *Laughlin* Case the court regarded the policy as the controlling document. A similar rule was approved in *Hull v. Northwestern Mut. Life Ins. Co.*, 39 Wis. 397, where it was held, in effect, that, if the policy and the premium note are inconsistent, they must be construed together, as qualifying and modifying each other. So, in *Fithian v. Northwestern Life Ins. Co.*, 4 Mo. App. 386, where there was an inconsistency between the provisions of the premium note and the policy in regard to forfeiture for failure to make proper payments, it was held that, in determining the provisions of the contract, the policy must control, rather than the provisions in the premium note. A somewhat broader view was taken in *Symonds v. Northwestern Mut. Life Ins. Co.*, 23 Minn. 491, where the same inconsistency appeared, and it was held that the policy and the note must be construed together, so as to give effect, if possible, to all the words of the contract, and to modify and qualify each other, so as to make them, in effect, consistent with each other.

In *Lewis v. Burlington Insurance Company*, 71 Iowa, 98, 32 N. W. 190, the general principle was asserted that a premium note and policy cannot be construed together, so that advantage may be taken of a default in payment, if the premium note is not attached to the policy as required by Acts 18th Gen. Assem. c. 211, § 2. The policy involved in this case was a tornado policy. A fire policy had been issued at the same time, covering the same property, and the premium note had been attached to the fire policy. On a subsequent appeal, reported in 80 Iowa, 259, 45 N. W. 749, it was held that attaching the note to the fire policy was not, so far as the tornado policy was concerned, a compliance with the statute. So, too, it was held, in *Summers v. Des Moines Ins. Co.*, 116 Iowa, 593, 88 N. W. 326, that under Code, § 1741, providing that an insurance company which neglects to attach to or indorse on its policies a copy of any application or representation of the insured which by the terms of the policy is made a part of the contract of insurance, or which may in any manner affect its validity, shall be precluded from setting up such representation in defense to an action on the policy, an insurance company which fails to attach to or indorse on a policy a copy of a premium note given therefor will be precluded

from setting up nonpayment of the note in defense, though the policy provides that it will be void if the premium is not paid when due.

(c) Prospectus or other pamphlet.

An interesting phase of this question is presented by those cases in which it has been attempted to construe the policy in connection with a prospectus or similar pamphlet issued by the insurer. This question arose in the early case of *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga. 534, where a prospectus, stating in effect that 30 days would be allowed for the payment of premiums after they became due, was appealed to by the beneficiary to avoid a forfeiture for nonpayment of premiums. While the court was inclined to give effect to the prospectus, it did not pass on the question definitely. Justice Nisbet, who wrote the opinion, took the position, however, that **as the prospectus did not constitute part of the contract, not being referred to in the policy, it could not be considered as affecting the construction of the provisions as to forfeiture.** The theory of the court seems also to be, first, that a contract of life insurance is a contract from year to year, and that the prospectus could not by any stretch of logic be construed to extend the contract beyond the year, and, second, that since the contract is one from year to year, and the payment of an annual premium is the making of a new contract, no new contract could be made after the death of the insured; the record in the case showing that, whereas the premium became due April 10th and was not paid, the insured died April 14th, and the tender of the premium was not made until after his death. The court bases its decision very largely on an English case involving a fire policy, where there was a side agreement to allow 15 days after nonpayment of the premium. The court held that the provision could not extend the term of the insurance, and that, as the insurance was one from term to term as the premiums were paid, there could be no extension of the term. Moreover, there had been a loss after the time limited for the payment of the second premium, and the court held that the privilege of making payment after the time fixed by the policy could not in any manner be extended beyond the time when the loss occurred. The Georgia court seems to incline to the opinion that the company in the present case would have been bound, had a tender of the premium been made before the day of payment named in the policy and before the expiration of the 30 days, the insured being in life; but, if made within

the 30 days, the insured being dead and the fact of his death known to the parties, there would be no contract, no consideration for the insurance, no mutuality. There can be no valid contract for the insurance of the life of a dead man.

The same policy was the basis of the action in *Ruse v. Mutual Benefit Life Ins. Co.*, 26 Barb. (N. Y.) 556. In view of the statement in the prospectus that every precaution is taken to prevent forfeiture, the court regarded the real question to be whether defendants were not estopped by the declaration from setting up and insisting upon the default as forfeiting the policy. Holding that the policy is an entire contract of insurance, and not one from year to year, the court says that the question is not, as defendants seem to suppose, whether the prospectus issued by the company, substantially declaring that the insured should have 30 days after April 10th in which to pay the premium without incurring a forfeiture, could or did operate as a continuance of the policy after April 10th, but rather whether the prospectus may not be looked upon as a waiver of the forfeiture, or as an estoppel to set up the condition of forfeiture against their own declaration, with reference to which it is to be presumed the insured accepted the policy. If defendants by their prospectus induced plaintiff to act as he did, and to rest upon its assurance of a credit of 30 days from and after April 10th for the payment of the premium, then the forfeiture was caused by their own act, and the company cannot insist upon it. The Court of Appeals, in 23 N. Y. 516, reversing the Supreme Court, took the position that, as the prospectus was not referred to in the policy, it could not be treated as part of the contract. The court based its reasoning on the general principle that, where two parties have entered into a written contract, all previous negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement.³ Such pre-

³ For the general doctrine as to the merger of prior negotiations and agreements in the written contract, see *Cleves v. Willoughby*, 7 Hill, 83; *Speckels v. Sax*, 1 E. D. Smith, 253; *Howard v. Thomas*, 12 Ohio St. 201; *Brigham v. Rogers*, 17 Mass. 571; *Renard v. Sampson*, 12 N. Y. 561; *Johnson v. Oppenheim*, 55 N. Y. 280; *Wilson v. Deen*, 74 N. Y. 531. See, also, the following cases, where insurance policies were involved: *Fowler v. Preferred*

Acc. Ins. Co., 100 Ga. 330, 28 S. E. 398; *Poste v. American Union Life Ins. Co.*, 52 N. Y. Supp. 910, 32 App. Div. 189; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Masons' Union Life Ins. Ass'n v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *McLaughlin v. Equitable Life Assur. Soc.*, 38 Neb. 723, 57 N. W. 557; *Union Central Life Ins. Co. v. Chowning*, 8 Tex. Civ. App.

liminary matter may sometimes be admissible under the rule which admits evidence of surrounding circumstances for the purpose of explaining an ambiguous question, but never where the terms of the contract are clear and explicit. The legal inference in all such cases, if the contract varies from what has been previously said or written, is that the parties upon further consideration have changed their views. It is only where the collateral writing is referred to in the policy that it has been held to be a part of the contract. It was contended in this case that, if the prospectus is not to be regarded as incorporated into the contract, it is nevertheless obligatory on the company as a representation. The court says, however, that a representation, if false, avoids the policy; but in this case it is not sought to avoid, but to enforce, the policy. The only mode, therefore, in which the prospectus can be made to aid the plaintiff, is by treating the company as absolutely bound by its terms to the same extent as if it had been incorporated into the policy.

This case came up once more in 24 N. Y. 653, on a motion for reargument based on the ground that the attention of the court was not called to several decisions in England where a contrary rule had been adopted in reference to the prospectus as forming a part of and controlling the terms and conditions of the policy. The court says that the English cases referred to certainly hold that the prospectus might equitably be regarded as forming a part and controlling the terms of the policy. It is not improbable that an examination of these cases would have led the court to a different conclusion than the one it arrived at upon this point. If this was the only point upon which the case turned, the court might feel inclined to order a reargument and permit the parties again to discuss it. But, as the second point raised was fatal to plaintiff's recovery, the court denied the motion.

In *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea (Tenn.) 488, the company had issued a prospectus declaring that not a single policy is rendered invalid, if, on the nonpayment of the premium, the assured applies to the company for a paid-up policy to the amount of payments already made. There was no provision in the policy for the issuance to the insured of a paid-up policy. The court said that

455, 28 S. W. 117; *Congower v. Equitable Mutual Life & Endowment Ass'n*, 94 Iowa, 499, 63 N. W. 192; *National Mutual Ben. Ass'n v. Heckman*, 86 Ky. 254, 5 S. W. 565; *Moore v. State Ins.*

Co., 72 Iowa, 416, 34 N. W. 183; *Baldwin v. Same*, 60 Iowa, 497, 15 N. W. 300; *Cornelius v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. 1037.

the statements of the prospectus, unless made a part of the contract, would merely be representations, and could only be looked to on the question of fraud which would avoid the contract. The fact that on the back of a contract it was said that the prospectus of the company may be had by applying at the principal office or to any agent does not show an intent that the prospectus should form a part of the contract.

The question was again before the Supreme Court of Georgia in *MacIntyre v. Cotton States Life Ins. Co.*, 9 S. E. 1124, 82 Ga. 478, where the policy provided that the annual premium might be half paid in cash and half by a loan, which should bear interest and be deducted from the sum insured. The agent, in securing the risk, used a printed circular, which specified that "the loan plan is as safe as to risks, as the all cash plan, because the loans bear interest." "We require interest on one loan, paid annually in advance, all other interest paid by dividends." The court held that the effect of both the policy and the prospectus was that the loan should bear interest until the maturing of the policy, and that therefore it need not decide, on that point, as to whether the prospectus was a part of the contract. As to the contention that the provisions of the prospectus constituted a warranty that the dividends would equal the interest on the loans, the court held that, nothing of the kind appearing in the policy, it could not be assumed that so important a provision was left out by mistake, and that when the contract was reduced to writing the warranty, if, indeed, the prospectus should be so construed, was deliberately abandoned. Moreover, a more reasonable interpretation of the prospectus was that the dividends should merely be applied to the payment of interest on the loans so far as they might go.

The principle that, to be available, the prospectus must be made a part of the policy by reference therein, is also supported by *Odell v. Manhattan Life Ins. Co.*, 15 Wkly. Law Bul. 197, 9 Ohio Dec. 589, where the court took the position that the real contract is the written policy, and, in the absence of fraud, mistake, or ambiguity, statements contained in any circular or prospectus issued by the company, not made a part of the policy or referred to therein, are not admissible in evidence, as it will be conclusively presumed that the whole engagement is embodied in the writing.

Quite similar to those of the *Ruse Case* were the facts in *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 2 S. W. 443, 4 Am. St. Rep. 218. It appeared that at the time the insurance was solicited

the agent presented to the insured a pamphlet issued by the company which contained certain provisions as to the nonforfeitable character of the policy, the surrender value, and the right to a paid-up policy. It was not pretended that any part of this pamphlet was embodied in the insurance policy, but it was alleged that it was represented by the agent of the company that the stipulations in said pamphlet formed a part of the contract, and that after the payment of the premiums, four in number, the policy could not be forfeited to the extent of the payments made. The insured paid nine premiums, and failed to pay the tenth, and the company contended that he was not entitled to a paid-up policy, because the wording of the pamphlet was not embodied in the policy. The fact of the exhibition of the pamphlet and the representations made by the agent were established by testimony and admitted by the company. The court held that the pamphlet was not the representation of the agent, but the statement of the principal, made when the contract was entered into as an inducement for the insured to take the insurance and pay the premium. It was not made a part of the policy that was to be signed by the company, because it had already been executed by its chief officers as containing the terms, or a part, at least, upon which every insurance policy was issued. The printed pamphlet was not only the inducement, but formed a part of the consideration, for which the premium notes were executed and the contract entered into by the assured. The right of the assured under it was the prime cause for his accepting the policy, and to hold that it was not intended as a part of the contract would be sustaining a fraud that no court of conscience could sanction.

(d) Advertisements and circulars in general.

In the early case of *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645, it appeared that the company appointed an agent in Savannah, who was not at first authorized to bind the company. The agent, on his own responsibility, published an advertisement stating that insurance could be effected through him; that he had a table of hazards and rates, and would obtain policies with the least possible delay. There was nothing to show that the company had any knowledge of this advertisement. It was held that the company could not be bound by any of the assumptions of power in such advertisement, though it was held liable on other grounds. A similar doctrine was asserted in *Armstrong v. State Ins. Co.*, 61 Iowa, 212, 16 N. W. 94, where it was said that an advertising card

furnished to the agent by the company, on which his name was printed as agent, was, nevertheless, no evidence of authority to bind the company.*

That advertisements or circulars published to induce persons to take out policies may bind the company as representations has, however, received sanction in several cases. In *Rohrschneider v. Knickerbocker Life Ins. Co.*, 76 N. Y. 216, 32 Am. Rep. 290, it appeared that the defendant company caused advertisements to be published and pamphlets to be circulated, representing that a person could get as much insurance in such company as in any other with half the money; that one-half the premiums could be paid in cash, and the other half in premium notes, which never would have to be paid, as the dividends always had paid and would pay such notes. Plaintiff, through these advertisements and pamphlets, was induced to insure, taking out an endowment policy. She paid one half the premiums in cash, giving her notes for the other half. The dividends did not pay the premium notes thus given, and the company attempted to reduce the amount of her endowment by the amount of the notes. The court held that she was entitled to recover the full amount, as the advertisements, etc., were distinctly false representations, known to be false, which induced the party to insure.

Corey v. Sherman (Iowa) 60 N. W. 232, 32 L. R. A. 490, was an action brought by members of a mutual insurance company to escape liability on their assessment notes given the company. At the time of the organization of the company and thereafter various notices and advertisements were published by the company to the effect that it had a guaranty fund pledged to the prompt payment of losses, should the fund from the assessments be inadequate. As a matter of fact the subscribers to the guaranty fund were at liberty to withdraw after three years, but this was not known to the prospective members, and many of them were induced to join the company by the representations as to the fund. After three years had elapsed the company became insolvent and the guarantors withdrew their guaranty. The court held that the members of the company who had been induced to join by the representations as to the

* A peculiar case is *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592, where the company advertised that it would not take cargo risks on certain vessels. The court held that, as to boats not named in the advertisement, this was at most a waiver of

the implied warranty of seaworthiness, and, though by inference such vessels not named were designated as suitable for transporting cotton, the advertisement could not be appealed to as excusing a deviation.

fund could defeat assessments on their notes by reason of the fraud so practiced on them. On rehearing, however, reported in 64 N. W. 828, 96 Iowa, 114, 32 L. R. A. 514, the court held that inasmuch as the association was a mutual concern, and the liability of the members on their assessment notes was fixed by the constitution and by-laws, of which they were presumed to have notice, the representations as to the guaranty fund would not relieve them from their liability on the notes; that while they might have been entitled to a cancellation of their contract for fraud, had they acted in time, yet, not having done so until the company had ceased to do business and had assigned its property, they could not, in justice to other members of the association, be relieved from their liability at such a late date. Justices Kinne and Deemer dissented on the ground that the fraud was practiced upon them before they became members of the company, and while they were not charged with knowledge as to the liability fixed by its constitution and by-laws.

While the principle that circulars issued by the company are admissible may perhaps be inferred from the decision in *Robinson v. St. Louis Mut. Life Ins. Co.*, 20 Fed. Cas. 1045, the issue has been raised and directly passed upon in several interesting cases. Thus in *Roach v. Kentucky Mut. Security Fund Co.*, 28 S. C. 431, 6 S. E. 286, a benefit association, having become insolvent, made arrangements to transfer its membership, and addressed a circular letter to its members recommending them to transfer their membership to the defendant association. It was held, in an action on the certificate issued by defendant in accordance with the transfer, that the circular letter was admissible in evidence on behalf of the plaintiff; the court regarding it as admissible as part of the *res gestæ*, though they could not see its relevancy. In *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919, the action was on a death claim for \$3,000, and it was claimed that the assessment levied to pay such claim had produced only \$600. Circulars issued by the company, stating that it had a large membership and a reserve fund at the time the claim matured, were regarded as admissible to show the falsity of the claim of the company.

A leading case is *Pacific Mut. Life Ins. Co. v. Frank*, 44 Neb. 320, 62 N. W. 454. Circulars issued by authority of the insurer and brought to the notice of the insured before the policy was written stated that the insurer wrote policies paying one-third for the loss of one foot, but contained no restrictions as to the persons in whose

favor such policies should be written. The company contended that such circular was not admissible in evidence, being in the nature of preliminary negotiations, not embodied in the final contract. But the court held that the effect of the circular is not to ingraft foreign provisions on the policy. It was admissible for the purpose of showing that the company authorized its agents to write the policy.

On the other hand, in *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355, a circular issued by defendants, showing the progress of the company, its mode of doing business, etc., was held to be clearly irrelevant and properly excluded; but there is nothing in the opinion to show for what purpose it was offered, or that it falls within the same category as the circulars in other cases. *Continental Life Ins. Co. v. Hamilton*, 41 Ohio St. 274, has also been cited as contrary to the proposition that circulars and advertisements are admissible. The particular point in this case was that the beneficiary claimed a paid-up policy on the ground that certain premium notes were paid by dividends, and offered in evidence a circular regarding dividends and a change in plan as to the payment of dividends to show that dividends were due. The court held merely that the circular was not evidence that any dividend had been declared on the policy in suit.

An interesting phase of the question is presented by *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573. Plaintiff's attorney, in his argument to the jury, read, to "illustrate his argument," a circular issued by the general agent of the defendant company to soliciting agents. This circular was of a sanctimonious character, and urged the agents to press home the lesson to be learned from the unexpected death of one having others dependent upon him, and to use their church connections to obtain insurance. The court held that this was improper and prejudicial, to the extent of preventing a fair trial, since it tended to influence the minds of the jury against the defendant, and did not in the slightest degree bear upon the issues of the case.

(e) Circulars modifying strict provisions of contract.

The courts are not agreed on the question whether the terms of the policy may be regarded as modified by circulars subsequently issued by the company. A circular addressed by the insurance company to its policy holders, stating that it would not insist on forfeiture of its policies because of nonpayment of interest, was

regarded in *Robinson v. St. Louis Mut. Life Ins. Co.*, 20 Fed. Cas. 1045, as a waiver of the right to insist on forfeiture. Similarly, in *Home Life Ins. Co. v. Pierce*, 75 Ill. 426, where the policy provided for forfeiture for nonpayment of premiums when due, but the company received payment of the same after due without objection, and sent out letters on which was printed in prominent characters, "Every policy is nonforfeiting," the court held that these facts were sufficient to prevent the company from insisting on a forfeiture for failure to pay premiums promptly. The advertisement was sent broadcast over the country, and its effect could be none other than to inspire confidence among the policy holders that forfeitures would not be insisted on.

An interesting case involving this question arose in New York. The policy was a paid-up policy, subject to the payment annually in advance of interest on certain notes given for premiums on the original policy. A forfeiture was claimed because an installment of interest was not paid until the day after it was due. To avoid this the plaintiff showed that the company had prepared and printed for use, and afterwards distributed in the course of its business, a pamphlet explanatory of the advantages offered by it, and the effect which should be expected to be given to its policies. It was stated in this pamphlet, as an inducement to insure, that "all its policies are nonforfeitable," and "it allows thirty days' grace in payment of premiums." This pamphlet accompanied the policy in the possession of the insured, and had been read and examined by the person to whom insured sent the money to make the payments. On this state of facts, the Supreme Court, in *Fowler v. Metropolitan Life Ins. Co.*, 41 Hun, 357, basing its decision largely on the dictum of the Court of Appeals in *Ruse v. Mutual Life Ins. Co.*, 24 N. Y. 653, held that, while interest on a premium note is not a premium in the strict legal sense, yet persons receiving policies would neither presume nor act on this distinction. They would assume ordinarily that whatever was to be paid to continue the policy in force would be a premium. Consequently the provisions of the pamphlet were to be given effect, so as to avoid a forfeiture. The Court of Appeals, in 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805, reversed the lower court. Remarking that the court had in the *Ruse Case* (23 N. Y. 516) expressly decided that no contemporary publication could be imported into a policy, so as to vary its terms, and that the decision in the same case in 24 N. Y. 653, does not decide otherwise, though the remarks of the judge somewhat weakened the

effect of the prior decision, it was held that, under the established rule that a written contract merges all prior negotiations in reference to the same subject, insured could not avail himself of the provisions in the pamphlet in order to avoid forfeiture of the policy, and that, moreover, his conduct in having always, prior to the last payment, been very prompt in paying his premiums and interest on the date specified, showed that he was not misled by the statements of the pamphlet. On appeal from a retrial of the cause, the Supreme Court, in 13 N. Y. Supp. 755, 59 Hun, 626, said that while the evidence showed that the insured and his agent were misled by the pamphlet, and on that account did not make a prompt payment, yet under the opinion of the Court of Appeals the representation in the pamphlet as to the days of grace in the payment of premiums and the reliance by assured thereon would not be sufficient to relieve the default in payment on the part of the assured.

In *Sleight v. Supreme Council of Mystic Tilers*, 121 Iowa, 724, 96 N. W. 1100, which was an action on a certificate of a beneficial association, a circular stating that a member could not be suspended, when sick or disabled and not financially able to pay assessments, for failure to pay the same, was offered in evidence. The court held that as the circular was not referred to or made a part of the certificate, which provided that such exemption from forfeiture should apply only to members of at least one year's standing, the statement could not affect the contract, especially as the circular was not identified as coming from defendant, nor proved to have ever been seen or relied on by assured before becoming a member of the society.⁴

In this connection reference may be made to *Simons v. New York Life Ins. Co.*, 38 Hun (N. Y.) 309, where a pamphlet containing a description of the tontine plan of insurance was read by the agent to the insured, and it was held that additional oral representations of the agent as to the merits of the plan could not be given in evidence.

(K) Reference to circulars in aid of construction.

That circulars issued by the company may be referred to for the purpose of aiding in the construction of the contract has been asserted in several cases. Such a rule may be deduced from *Bruce v. Continental Life Insurance Company*, 58 Vt. 253, 2 Atl. 710. It appeared that circulars issued by the company declared that the

⁴ For the general rule as to the admission of extrinsic evidence to vary the contract, see Cent. Dig. vol. 20, "Evidence," cols. 2572-2579, §§ 1818-1824.

policy would be nonforfeitable after the payment of two annual premiums; that it remained binding by its terms without further payment for as many tenths of the sum insured as there had been annual premiums paid. The court said that, if there was any ambiguity in the provisions of the policy, the insured had a right to construe it as the company had declared its meaning to be in the circular above referred to.

An interesting case involving this principle is *Fuller v. Metropolitan Life Ins. Co.* (C. C.) 37 Fed. 163. The policy contained a recital that it was on the reserve dividend plan, and that, if the stipulated premiums were paid for ten years, the company would pay to the designated person an equitable proportion of the reserve dividend fund. It was held that, in order to ascertain the meaning of these phrases and determine the plan on which the insurance was written, recourse could be had to contemporaneous insurance literature. Since it appeared that the only reserve dividend plan known to insurance experts at this time was the plan devised and copyrighted by one W. P. Stewart, recourse could be had to a volume published by him, entitled "Key to Reserve Dividend Plan," for explanation of the terms. The same policy seems to have been involved in *Fuller v. Metropolitan Life Insurance Company*, 70 Conn. 647, 41 Atl. 4, although no reference is made to that case. The court apparently makes use of the "Key to Reserve Dividend Plan" to explain the provisions of the policy, but only as a secondary means, evidently regarding the book as inadmissible in evidence. They do not seem to regard the policy as ambiguous at all, but believe that the plan outlined in the book mentioned is that substantially outlined in the policy itself.

(g) Published rules and by-laws.

Circulars and books purporting to have been issued by the insurer were regarded as admissible in evidence in *Walsh v. Ætna Life Ins. Co.*, 30 Iowa, 133, 6 Am. Rep. 664, though it was not shown that plaintiff had knowledge of them, or was influenced by them in her dealings with defendant. The documents were in the nature of publications to the world of the rules governing defendant in the transaction of its business, and for that reason would be binding on defendant, though not brought to the knowledge of plaintiff. On the other hand, it was said in *Hirsch v. Grand Lodge Order of Brith-Abraham*, 56 Mo. App. 101, that, where a member of a ben-

est society has been induced to join it by relying on an erroneous publication of its by-laws in relation to the benefits to be paid by it, he is not on that account entitled, on the theory of estoppel, to the payment of benefits in accordance with the by-laws as published, but is limited to his rights under the by-laws as they actually exist.

In *McCann v. Metropolitan Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026, rules of the company contained in a book received by the insured with his policy were introduced in evidence without objection on the part of defendant. It was held that the objection that such rules were not authorized by the company could not be raised on appeal. Though the printed rules are admissible, the construction placed thereon by the insurer is not admissible (*Myers v. Lucas*, 8 O. C. D. 431, 16 Ohio Cir. Ct. R. 545). A pamphlet containing rules to be observed in making proofs of death cannot affect the rights of the beneficiary, as the requirements of the policy only will govern (*Taylor v. Ætna Life Ins. Co.*, 13 Gray [Mass.] 434). A printed manual issued by the insurer, containing a classification of risks, may be referred to as an aid in construing the contract.

Loesch v. Union Casualty & Surety Co., 176 Mo. 654, 75 S. W. 621;
Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 22.

But a pamphlet containing the private instructions of the company to its agents was held to be inadmissible, in *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush (Ky.) 430, as it was in effect merely a declaration in its own favor.

4. APPLICATION AS PART OF THE CONTRACT.

- (a) In general.
- (b) Statutory provisions requiring a copy of the application to be attached to the policy.
- (c) Same—To what kinds of insurance statutes apply.
- (d) Same—Sufficiency of compliance with statute.
- (e) Same—Effect of noncompliance with statute—Admissibility of application in evidence.
- (f) Construction of application and policy.
- (g) Questions of practice.

(a) In general.

For the general purposes of construction, an application for insurance will be considered a part of the contract, if it is referred to in

the policy in such a way as to indicate a clear intent to make it a part thereof.

It is deemed sufficient to refer to *Lee v. Guardian Life Ins. Co.*, 15 Fed. Cas. 158; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309; *Merchants' Life Ass'n v. Treat*, 98 Ill. App. 59; *Blasingame v. Royal Circle*, 111 Ill. App. 202; *Hopkins v. Hopkins' Adm'r*, 17 S. W. 864, 92 Ky. 324, 13 Ky. Law Rep. 707; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, judgment affirmed on rehearing 84 N. W. 457, 81 Minn. 116; *State ex rel. Young v. Temperance Benev. Ass'n*, 42 Mo. App. 485; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647; *Steward v. Phoenix Fire Ins. Co.*, 5 Hun (N. Y.) 261; *Studwell v. Mutual Ben. Life Ass'n of America*, 61 N. Y. Super. Ct. 287, 19 N. Y. Supp. 709; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Shafer v. Keystone Mut. Ben. Ass'n*, 22 Pa. Co. Ct. R. 51; *McLendon v. Woodmen of the World*, 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444; *Parish v. Mutual Benefit Life Ins. Co.*, 19 Tex. Civ. App. 457, 49 S. W. 153; *Southern Mut. Ins. Co. v. Yates*, 28 Grat. (Va.) 585. And, if not referred to, it will not be considered as part of the contract. *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452; *Merchants' Ins. Co. v. Dwyer*, 1 Posey, Unrep. Cas. (Tex.) 441.

And so, too, a paper annexed to the policy and delivered with it, purporting to contain conditions of insurance, will be regarded as part of the policy, whether referred to in it or not.

Roberts v. Chenango County Mut. Ins. Co., 3 Hill (N. Y.) 501; *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223, 19 South. 132.

But if a policy was issued without any written application having been made, and without an agreement on the part of the insured to make one on which the policy should be based, an application thereafter made, at the request of the agent of the company, is not part of the contract of insurance (*Michigan Fire & Marine Ins. Co. v. Wich*, 46 Pac. 687, 8 Colo. App. 409).

While an express reference to the application as making part of the contract is not absolutely essential (*Northwestern Ben. & Mut. Aid Ass'n v. Hand*, 29 Ill. App. 73), it must clearly appear from the language of the policy that the parties intended to make the paper a part of the contract (*Supreme Lodge of Sons & Daughters of Pro-*

tection v. Underwood, 3 Neb. [Unof.] 798, 92 N. W. 1051). A reference in merely general terms is not sufficient.

Delonguemare v. Tradesmen's Ins. Co., 2 N. Y. Super. Ct. 629; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383.

It must appear that the paper is the application of the insured, and a mere reference to "an application" is not sufficient to identify the paper (*Landers v. Watertown Fire Ins. Co.*, 19 Hun [N. Y.] 174). So a mere reference to the place where the application may be found on file does not make it a part of the policy (*Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352). A reference by number to an application which was made in connection with a prior policy is not sufficient to make it a part of a policy taken out in a second company (*Vilas v. New York Cent. Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186, affirming 9 Hun [N. Y.] 121). But it has nevertheless been held that, if the application is identified as the one intended by both parties to be referred to, it is sufficient.

Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; *Nelson v. Equitable Life Assur. Soc.*, 73 Ill. App. 133.

When the policy refers to an application "indorsed hereon," attaching a copy of the application to the back of the policy with mucilage or some similar substance, and delivering the same to the insured, constitutes an "indorsement" of the application upon the policy, within the meaning of the contract (*Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93, 71 N. W. 831).

(b) Statutory provisions requiring a copy of the application to be attached to the policy.

In several of the states statutes have been adopted requiring a copy of the application referred to in the policy to be attached thereto, and declaring that, if not so attached, the application shall not be admissible in evidence.

The Pennsylvania statute (Act May 11, 1881; P. L. 20) provides that all life and fire insurance policies upon lives or property of persons within the commonwealth, whether issued by companies organized under the laws of the state or by foreign companies doing business therein, which contain any reference to the application of the insured, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain or have attached to said policies correct copies of the application as signed by the applicant. Unless so attached and accompanying the policy, no such application shall be received in evidence in

any controversy between the parties, nor shall such application be considered a part of the policy.¹

The Iowa statute (Code 1897, § 1741) provides that no application or representation made by a person obtaining insurance shall be admitted in evidence, unless a true copy thereof be attached to or indorsed on the policy.

The Massachusetts statute (St. 1887, p. 816, c. 214, § 73, as amended by St. 1892, p. 388, c. 372, and St. 1893, p. 1316, c. 434) provides, in effect, that in an action on a life policy, where the application is not attached thereto, and therefore not a part of it, the application is not admissible in evidence, and oral evidence is not admissible to prove that statements referred to in the policy were untrue.²

The Ohio statute (Rev. St. 1892, § 3621) provides that, when the application is made a part of the policy, a copy thereof must be delivered to the person taking out the policy, at the time the policy is delivered.

The Wisconsin statute (Rev. St. 1898, § 1941a) requires all fire insurance companies, except mutual companies, to attach to the policy or indorse thereon a true copy of the application or representations of the insured which, by the terms of the policy, are made a part thereof, and that the omission to do this shall not render the policy invalid, but shall preclude the company from pleading or proving such application or representations, or any part thereof.

The Kentucky statute (Ky. St. 1903, § 679) provides that an application for insurance shall not be considered a part of the policy, unless attached thereto. The statute relates to assessment or co-operative insurance companies, but is extended by section 656 to ordinary life companies.

The statutes requiring the application to be attached to the policy have been declared valid in several states. The validity of the Pennsylvania act was considered in *New Era Life Ass'n v. Musser*, 120 Pa. 384, 14 Atl. 155, and the court held, against the contention of the company, that the act is not unconstitutional as impairing the obligation of contracts, that it does not even impair the remedy, but affects only the evidence necessary to entitle the insured or his beneficiary to recover. In *Considine v. Metropolitan Life Ins. Co.*, 165 Mass. 462, 43 N. E. 201, it was contended that the Massachusetts statute was unconstitutional as a restriction on the liberty of contract. The court, however, upheld the statute, on the ground that the legislature undoubtedly had power to prescribe the form of a policy of insurance, and to provide that copies of all papers referred to in the policy as parts thereof should be attached thereto,

¹ P. & L. Dig. Pa. p. 2375, par. 68.

² St. 1894, p. 718, c. 522, § 73.

in order that the insured might know what the contract was that he entered into.³ This view was subsequently reasserted in *Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440.

It was held in Kentucky that the statute applies to foreign companies doing business in the state, as well as domestic companies (*Corley v. Travelers' Protective Ass'n*, 105 Fed. 854, 46 C. C. A. 278). So it was said, in *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285, 45 N. W. 221, that the provisions of the Wisconsin statute are binding on foreign corporations insuring property situated in the state, though the contract of insurance was made without the state. The converse of this proposition has been laid down in Pennsylvania, where it has been held (*Hebb v. Kittanning Ins. Co.*, 138 Pa. 174, 20 Atl. 837) that the Pennsylvania statute applies, not only to policies upon the lives or property of persons within the commonwealth, but to policies issued by Pennsylvania companies on lives and property without the state. The theory of the court is that the act was intended to provide for a uniform rule of procedure, and to apply to all insurance companies incorporated under the laws of Pennsylvania, and to all other companies insuring lives or property in Pennsylvania.

The applicability of the statute is, however, generally dependent on the place of contract. Thus, where the contract was completed in Massachusetts, the statute was regarded as applicable, though the application was made in New York (*Provident Sav. Life Assur. Soc. of New York v. Hadley*, 102 Fed. 856, 43 C. C. A. 25). Conversely, if the policy was not made in Massachusetts, it was not governed by the statute of that state.

Bottomley v. Metropolitan Life Ins. Co., 170 Mass. 274, 49 N. E. 438;
Johnson v. Mutual Life Ins. Co., 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833.

So, too, it has been held that, if a contract is in fact made within the state between a resident thereof and a foreign insurance company authorized to do business therein, the parties cannot avoid the statutory provision by inserting stipulations in the policy adopting the law of another state as the law of the contract (*Albro v. Manhattan Life Ins. Co.* [C. C.] 119 Fed. 629, affirmed in 127 Fed. 281, 62 C. C. A. 213). But since the Iowa statute affects the remedy, rather than the validity of the contract, it will not be enforced

³ See *In re House Bill No. 1,230*, Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344.

in an action brought in Colorado on a policy issued in Iowa (*Des Moines Life Ass'n v. Owen*, 10 Colo. App. 131, 50 Pac. 210).

A statute of this character is not retroactive (*Shafer v. Keystone Mut. Ben. Ass'n*, 22 Pa. Co. Ct. R. 51). Nor does it apply where no written application was made or referred to in the policy.

Lenox v. Greenwich Ins. Co., 185 Pa. 575, 30 Atl. 940; *Norristown Title, Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co.*, 5 Montg. Co. Law Rep'r (Pa.) 83; *Carrigan v. Massachusetts Ben. Ass'n*, 18 Phila. (Pa.) 528.

Where an insurance company neglects to attach to the policy a correct copy of the application, as required by the statute, it cannot object, in an action on the policy, that a copy of the application has not been filed (*Cohen v. Home Mut. Life Ass'n*, 4 Pa. Co. Ct. R. 146). And an affidavit of defense which fails to set out that there was attached to the policy a copy of the application, as required, is fatally defective.

Metropolitan Life Ins. Co. v. Jenkins (Pa.) 10 Atl. 474; *Hebb v. Kittingham Ins. Co.*, 138 Pa. 174, 20 Atl. 837.

(c) Same—To what kinds of insurance statutes apply.

The tendency of the courts is to construe these statutes liberally, and to regard them as applicable to all kinds of insurance contracts that may fairly be regarded as within their scope. Where the statute, as in Iowa, requires "all insurance companies" to attach to their policies a true copy of the application, it will, of course, include life insurance companies, as well as fire insurance companies (*Cook v. Federal Life Ass'n*, 74 Iowa, 746, 35 N. W. 500). And though the statute of which the Massachusetts law is a part designates certain kinds of life insurance by name, yet the particular section referring to the attachment of the application must be construed as applying to all kinds of life insurance.

Considine v. Metropolitan Life Ins. Co., 165 Mass. 462, 43 N. E. 201; *Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440.

As an endowment policy is in effect a life insurance policy, it has been held in Pennsylvania (*Hendel v. Reverting Fund Assur. Ass'n*, 2 Pa. Dist. R. 116) that the statute of that state applies to endowment policies. The Kentucky statute in terms refers only to assessment companies, but in view of another provision of the statute (section

656), applying to old line companies, declaring that such companies shall not make any insurance contract "other than is plainly expressed in the policy," it has been held that the application must be attached to the policies of such companies, as well as to those of assessment companies.

Manhattan Life Ins. Co. v. Myers, 59 S. W. 30, 109 Ky. 372, 22 Ky. Law Rep. 875; *Provident Savings Life Assur. Soc. v. Puryear's Adm'r*, 109 Ky. 381, 59 S. W. 15.

The Iowa statute, though not appearing in the chapter of the Code relating to mutual companies, has nevertheless been held to apply to such companies (*Corson v. Iowa Mut. Fire Ins. Ass'n*, 115 Iowa, 485, 88 N. W. 1086). And the Pennsylvania statute has been held to apply to policies on live stock (*Mutual Live-Stock Ins. Co. v. Dutton*, 6 Del. Co. R. 148).

The question has been raised whether the Pennsylvania statute applies to accident insurance companies. A policy insuring against death by accident was involved in *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618, and it was held that the statute applied. It is to be noted, however, not only that the company is a life insurance company, but that the risk assumed was death by accident; no indemnity being promised for disabling injury. On this ground the case was distinguished in *Standard Life & Accident Ins. Co. of Detroit, Mich., v. Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194, where an ordinary accident policy was involved. Such a policy, though it provided for an indemnity in case of death by accident, the court held was not included in the term "life insurance" as used in the statute. The policy in the *Pickett* Case it regarded as a life policy with a restricted liability. This view of the distinction between the policies was also followed in *National Accident Soc. of New York v. Dolph*, 94 Fed. 743, 38 C. C. A. 1. That the federal court relied on a distinction without a difference was subsequently recognized by the Supreme Court of Pennsylvania in *Zimmer v. Central Accident Ins. Co.*, 207 Pa. 472, 56 Atl. 1003, where it was held that a policy providing for indemnity for disabling injury, and also for loss of life caused by accident, is a life insurance policy within the meaning of the act.

In this connection reference may also be made to *Corley v. Travelers' Protective Ass'n*, 105 Fed. 854, 46 C. C. A. 278, where the Kentucky statute was applied to an accident policy.

It has been held in Massachusetts that the statute of that state, requiring the application to be attached to the policy, applies to co-operative assessment companies.

Considine v. Metropolitan Life Ins. Co., 165 Mass. 462, 43 N. E. 201;
Nugent v. Greenfield Life Ass'n, 172 Mass. 278, 52 N. E. 440;
Boyden v. Massachusetts Masonic Life Ass'n, 167 Mass. 242, 45 N. E. 735.

The Kentucky statute has been held (Supreme Commandery of the United Order of the Golden Cross of the World *v. Hughes*, 70 S. W. 405, 114 Ky. 175, 24 Ky. Law Rep. 984) to apply to assessment companies doing business on the lodge plan; that is to say, to fraternal benefit associations. This rule has also been adopted in Iowa.

Grimes v. Northwestern Legion of Honor, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183; *Moore v. Union Fraternal Acc. Ass'n*, 72 N. W. 645, 103 Iowa, 424; *McConnell v. Iowa Mut. Aid Ass'n*, 79 Iowa, 757, 43 N. W. 188; *Stork v. Supreme Lodge Knights of Pythias*, 113 Iowa, 724, 84 N. W. 721.

The rule has been reasserted in Kentucky in a recent case (*Grand Lodge, A. O. U. W., v. Edwards* [Ky.] 85 S. W. 701), where it was said that the statute applies to fraternal insurance associations, though the statute defining insurance companies (Ky. St. 1903, § 641) excepts fraternal orders doing business exclusively on the lodge plan.

On the other hand, in Pennsylvania, mutual benefit associations are not regarded as insurance companies, within the purview of the statute.

Dickinson v. Grand Lodge A. O. U. W., 159 Pa. 258, 28 Atl. 293; *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. 127, 29 Atl. 854; *Lithgow v. Supreme Tent Knights of Maccabees*, 165 Pa. 292, 30 Atl. 830; *Donlevy v. Supreme Lodge, Shield of Honor*, 11 Pa. Co. Ct. R. 477; *Espy v. American Legion of Honor*, 7 Kulp, 134.

(d) Same—Sufficiency of compliance with statute.

Under the terms of the various statutes it is evident that they require correct copies of the entire application to be attached to the policy. The question has therefore been raised as to what will be regarded as part of the application within the statute. As a general rule, irrespective of the statute, the medical examination, or at least so much of it as consists of the declarations made by the insured, is considered as a part of the application.

Northwestern Life Assur. Co. v. Tietze, 64 Pac. 773, 16 Colo. App. 205;
Keller v. Home Life Ins. Co., 69 S. W. 612, 95 Mo. App. 627; *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62

L. R. A. 774; *Holden v. Metropolitan Life Ins. Co.*, 42 N. Y. Supp. 310, 11 App. Div. 426; *Ames v. Manhattan Life Ins. Co.*, 52 N. Y. Supp. 759, 31 App. Div. 180, affirmed without opinion 167 N. Y. 584, 60 N. E. 1106. But see *Leonard v. New England Mut. Life Ins. Co.*, 22 R. I. 519, 48 Atl. 808; *Boehm v. Commercial Alliance Life Ins. Co.*, 30 N. Y. Supp. 660, 9 Misc. Rep. 529.

So it was held, in *Morris v. State Mut. Life Assur. Co.*, 39 Atl. 52, 183 Pa. 563, that the medical examiner's report is a part of the application. But it has been held in other Pennsylvania cases that a medical examiner's report in answer to questions directed to him (*United Brethren Mut. Aid Soc. v. Kinter*, 12 Wkly. Notes Cas. 76), or a report not signed by the applicant and explicitly designated as "no part of the declaration of the applicant" (*Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599), was not part of the application. So it has been held in Iowa (*Johnson v. Des Moines Life Ass'n*, 75 N. W. 101, 105 Iowa, 273) that a special report of a medical examiner is not part of the application. Under the provisions of the Pennsylvania act, a supplemental application must, however, be attached to the policy (*Fisher v. Fidelity Mut. Life Ass'n*, 41 Atl. 467, 188 Pa. 1).

The important question is whether what purports to be a copy of the application is a correct copy, so as to constitute a compliance with the statute. A copy need not be an exact fac simile, but it must at least be so exact that on comparison it may be said to be a true copy without resorting to construction. (*Johnson v. Des Moines Life Ass'n*, 105 Iowa, 273, 75 N. W. 101.) The rules laid down in *Nugent v. Greenfield Life Ass'n*, 52 N. E. 440, 172 Mass. 278, seem to be reasonable. The court in that case said that mere clerical errors, which do not affect or alter the sense of the document, and cannot vary or alter the rights or obligations of the parties, or in any way tend to mislead or prejudice any one, do not prevent a copy in which they may be found from being a correct copy within the meaning of the law; but errors of substance will render the copy incorrect, whether or not they are material to the questions on trial in the action in which it is in dispute. In accordance with these rules the court held that a copy in which the amount of other insurance was given as \$1,000, instead of \$100, and which answered in the negative a question left unanswered in the original application, was not a compliance with the statute. The rules stated in the *Nugent Case* were also stated in substance in *Albro v. Manhattan Life Ins. Co.* (C. C.) 119 Fed. 629, affirmed in 127 Fed. 281, 62 C. C. A. 213, and it was held that, as there were omitted

from the copy entire words under such circumstances that the legal effect of the application was different from its effect as actually drawn, the copy was insufficient.

These principles are also illustrated in the following cases, where the Iowa statute was involved: *Goodwin v. Provident Sav. Life Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Johnson v. Des Moines Life Ass'n*, 105 Iowa, 273, 75 N. W. 101; *Corson v. Anchor Mut. Fire Ins. Co.*, 85 N. W. 806, 113 Iowa, 641.

So, too, it has been held that the omission of the applicant's signature on the copy renders it insufficient.

Seller v. Economic Life Ass'n, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; *Susquehanna Mut. Fire Ins. Co. v. Hallock* (Pa.) 14 Atl. 167; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492, 40 N. W. 386.

A correct photographic copy of an application for life insurance, though reduced in size, is a compliance with the Pennsylvania statute, if it is legible (*Arter v. Northwestern Mut. Life Ins. Co.* [C. C. A.] 130 Fed. 768).

The Ohio statute (Rev. St. 1892, § 3621) provides that, when the application is made part of the policy, a copy thereof must be delivered to the person taking the policy at the time the policy is delivered. It has been held (*Dickmeier v. Prudential Ins. Co.* [Com. Pl.] 6 Ohio Dec. 161, 4 Ohio N. P. 13) that the failure to deliver such copy to the insured in his lifetime is not cured by delivery to his attorney or representative, or to the beneficiary, after his death.

The acceptance of the policy, with what purports to be a true copy, does not estop the beneficiary from afterwards objecting on the ground of discrepancy (*Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440). And even where there is indorsed on the policy a recital, "I accept this as a copy of my application, but I agree that the original shall be admitted as the correct application if the copy varies therefrom," such recital does not waive the provisions of the act requiring a correct copy to be attached to the policy (*Zimmer v. Central Ins. Co.*, 207 Pa. 472, 56 Atl. 1003). The correctness of the copy so attached will not be presumed (*Holleran v. Life Assur. Co. of America*, 18 Pa. Super. Ct. 573).

(e) Same—Effect of noncompliance with statute—Admissibility of application in evidence.

If the insurance company fails to attach to the policy a correct copy of the application, as required by the statute, it is estopped to

plead, in defense to an action on the policy, the falsity of any of the statements in such application.

Dunbar v. Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386; *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio, 614, 68 N. E. 4.

It will not be presumed that the application was attached (*Mahon v. Pacific Mut. Life Ins. Co.*, 144 Pa. 409, 22 Atl. 876), but it must be alleged in the answer, and if not alleged, the answer is demurrable.

Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826; *Cook v. Federal Life Ass'n*, 74 Iowa, 746, 35 N. W. 500; *Supreme Commandery of the United Order of the Golden Cross of the World v. Hughes*, 70 S. W. 405, 114 Ky. 175, 24 Ky. Law Rep. 934.

The failure of the insurer to comply with the statute not only renders the application itself inadmissible in evidence on its behalf to show misrepresentation by the insured, but parol evidence cannot be admitted to show that the insured made false statements therein.

Reference may be made to *Manhattan Life Ins. Co. v. Albro*, 127 Fed. 281, 62 C. C. A. 213, affirming (C. C.) 119 Fed. 629; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. 782; *Corson v. Iowa Mut. Fire Ins. Ass'n*, 115 Iowa, 485, 88 N. W. 1086; *Provident Sav. Life Assur. Soc. v. Beyer*, 67 S. W. 827, 23 Ky. Law Rep. 2460; *Western & Southern Life Ins. Co. v. Galvin*, 68 S. W. 655, 24 Ky. Law Rep. 444; *Considine v. Metropolitan Life Ins. Co.*, 43 N. E. 201, 165 Mass. 462; *Nugent v. Greenfield Life Ass'n*, 172 Mass. 278, 52 N. E. 440; *Brown v. Greenfield Life Ass'n*, 53 N. E. 129, 172 Mass. 498; *Andrews v. National Life Ins. Co.*, 7 Ohio Dec. 307; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686; *Susquehanna Mut. Fire Ins. Co. v. Hallock*, 14 Atl. 167, 22 Wkly. Notes Cas. 151; *Mahon v. Pacific Mut. Life Ins. Co.*, 144 Pa. 409, 22 Atl. 876; *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618; *Zimmer v. Central Acc. Ins. Co.*, 56 Atl. 1003, 207 Pa. 472; *Hill v. Kittanning Ins. Co.*, 5 Lanc. Law Rev. (Pa.) 197; *Connell v. Metropolitan Life Ins. Co.*, 8 Del. Co. R. (Pa.) 184; *Johnson v. Scottish Union & N. Ins. Co.*, 93 Wis. 223, 67 N. W. 416. And it is too late to offer to attach the application at the trial. *Imperial Fire Ins. Co. v. Dunham* (Pa.) 8 Atl. 579. But see *Provident Savings Life Assur. Soc. of New York v. Hadley*, 102 Fed. 856, 43 C. C. A. 25. Since the statute relates only to the remedy, it will not be enforced in another state. *Des Moines Life Ass'n v. Owen*, 50 Pac. 210, 10 Colo. App. 131.

Though the application is rendered inadmissible on behalf of the insurer by the failure to attach it to the policy, it is admissible on

behalf of the insured and against the company, as the latter will not be allowed to take advantage of its own neglect.

Norristown Title, Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co., 132 Pa. 385, 19 Atl. 270; *Moore v. Union Fraternal Acc. Ass'n*, 72 N. W. 645, 103 Iowa, 424.

The failure to attach the application does not affect the admissibility of the policy itself (*Moore v. Bestline*, 23 Pa. Super. Ct. 6); nor will it prevent the insurer from showing breaches of conditions contained in the policy.

Mackinnon v. Mutual Fire Ins. Co., 89 Iowa, 170, 56 N. W. 423; *Wilcox v. Continental Ins. Co.*, 85 Wis. 198, 55 N. W. 188.

So, too, where there is no written application, the statute does not prevent the insurer from showing that the oral representations were false.

Lenox v. Greenwich Ins. Co., 165 Pa. 575, 30 Atl. 940; *Norristown Title, Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co.*, 5 Montg. Co. Law Rep'r (Pa.) 83.

And even where the written application was not attached, it would, nevertheless, be admissible to show actual fraud (*Carrigan v. Massachusetts Ben. Ass'n [C. C.]* 26 Fed. 230); and the insurer might show that the policy was delivered while the insured was not in sound health, contrary to the provisions of the policy (*Hood v. Prudential Ins. Co.*, 22 Pa. Super. Ct. 244).

Where the application, though not attached to the policy, as required, was allowed to go to the jury without objection, the plaintiff was not estopped to object to an instruction based thereon. *Provident Sav. Life Assur. Soc. of New York v. Beyer*, 23 Ky. Law Rep. 2460, 67 S. W. 827.

(f) Construction of application and policy.

Statements in the application will usually be construed by the popular and proper sense of the words used (*Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362). Yet the meaning attached by the applicant to such words, if clearly ascertainable from the connection in which they are used, will prevail over a popular meaning (*Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159). Proof as to the course of business between the parties may be resorted to, to make clear any ambiguity or indefiniteness in the application (*Pabbri v. Phoenix Ins. Co.*, 55 N. Y. 129). If a letter has accompanied the application, it may be regarded as part of it for the purposes of con-

struction (*Ætna Life Ins. Co. v. Frierson*, 114 Fed. 56, 51 C. C. A. 424). If there is a conflict between the copy of the application attached to the policy and the original, the latter must, of course, prevail (*Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 384, 55 A. 291, 62 L. R. A. 774).

As the application is regarded as part of the contract, the policy must be construed in connection therewith, to arrive at a correct determination of the terms of the contract.

Kelly v. Life Ins. Clearing Co., 113 Ala. 453, 21 South. 361; *Northwestern Benev. & Mut. Aid Ass'n v. Bloom*, 21 Ill. App. 159; *Same v. Hand*, 29 Ill. App. 73; *Grand Lodge, A. O. U. W., v. Jesse*, 50 Ill. App. 101; *Merchants' Life Ass'n v. Treat*, 98 Ill. App. 59; *Mandego v. Centennial Mut. Life Ass'n*, 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877; *Weinberger v. Merchants' Ins. Co.*, 41 La. Ann. 31, 5 South. 728; *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137; *Studwell v. Mutual Ben. Life Ass'n of America*, 61 N. Y. Super. Ct. 287, 19 N. Y. Supp. 709; *Robson v. United Order of Foresters (Minn.)* 100 N. W. 381; *People v. Grand Lodge A. O. U. W. of New York*, 67 N. Y. Supp. 330, 32 Misc. Rep. 523; *Bobbitt v. Liverpool & London & Globe Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Kimbrow v. Continental Ins. Co.*, 101 Tenn. 245, 47 S. W. 413.

Where the terms of an order to insure have been materially departed from in the policy by fraud or mistake, the order will be considered as containing the contract between the parties. But the order can only be resorted to so far as it varies from the policy; in all other respects, the policy should be considered as the contract. (*Delaware Ins. Co. v. Hogan*, 7 Fed. Cas. 403.) In case of conflict between the provisions of a policy and the statements in the application for insurance, the former will control (*Goodwin v. Provident Sav. Life Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411); the application, in the absence of fraud or misrepresentation, being regarded as merged in the policy (*Folsom v. Mercantile Mut. Ins. Co.*, 9 Fed. Cas. 352). If, however, a clause in an application is so inconsistent with the conditions of the policy, as issued, that both cannot stand, and that in the application is one on which the issuing of the policy depends, it must control (*Phenix Ins. Co. of Brooklyn v. Lorenz*, 7 Ind. App. 266, 34 N. E. 495). On the other hand, if the application does not purport to state all the limitations on the liability of the insurer, the applicant will be presumed to have understood that the policy would state such limitations more particularly, and the policy will, of course, control in construing the contract (*Glass v. Masons' Fraternal Acc. Ass'n* [C.

C.] 112 Fed. 495). Mere expressions in the application tending to contradict the policy are not admissible for that purpose (*Saunders v. Agricultural Ins. Co. of Watertown*, 57 N. Y. Supp. 683, 39 App. Div. 631). So a statement in an application as to the insured's understanding of the contract cannot control the legal construction of the policy (*Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740).

(g) Questions of practice.

It is not generally necessary for the plaintiff to set out the terms of the application in his complaint.

Tischler v. California Mutual Fire Ins. Co., 66 Cal. 178, 4 Pac. 1169; *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408; *Himmelein v. Supreme Council American Legion of Honor (Cal.)* 33 Pac. 1130; *Supreme Lodge of Knights of Honor v. Wollschlager*, 22 Colo. 213, 44 Pac. 598; *Knights Templar & Masons' Life Indemnity Co. v. Dubois*, 26 Ind. App. 38, 57 N. E. 943; *Lauer v. Equitable Life Assur. Soc.*, 8 Ohio N. P. 117, 10 Ohio S. & C. P. Dec. 397.

If the defense rests on the application, a copy thereof should be attached to the answer, according to the practice in Indiana (*Supreme Lodge K. P. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850).

Ordinarily the policy is admissible in evidence without the application.

Edington v. Mutual Life Ins. Co., 67 N. Y. 185, reversing 5 Hun, 1; *Dougherty v. Metropolitan Life Ins. Co.*, 3 App. Div. 313, 38 N. Y. Supp. 258; *Albert v. Mutual Life Ins. Co. of New York*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

But, if the application is by express terms made part of the contract, it must be offered with the policy, to render the latter admissible.

Rogers v. Cedar Rapids Ins. Co., 72 Iowa, 448, 34 N. W. 202; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108; *Farmers' & Mechanics' Mut. Ins. Co. v. Meckes*, 10 Wkly. Notes Cas. 306; *American Underwriters' Ass'n v. George*, 97 Pa. 238.

The policy is, however, admissible, without offering the application, in the absence of proof that the application is the application of and was signed by the insured.

Commercial Union Assur. Co. v. Elliott (Pa.) 13 Atl. 970; *Cleavenger v. Franklin Fire Ins. Co. of Wheeling, W. Va.*, 47 W. Va. 595, 35 S. E. 998.

The application is, of course, ordinarily admissible in an action on the policy (*Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280); but it must appear to be the application of the insured.

Yore v. Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580. But see *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460.

If admitted in evidence, the whole application should be admitted, and no part thereof excluded (*Northwestern Life Assur. Co. v. Tietze*, 64 Pac. 773, 16 Colo. App. 205).

5. CHARTER, CONSTITUTION, BY-LAWS, AND STATUTES AS PART OF THE CONTRACT.

- (a) Statutes and ordinances as part of the contract.
- (b) Subjection of members of mutual company to charter, by-laws, and rules.
- (c) Charter, by-laws, and rules as part of the contract.
- (d) Subjection of member of mutual company to subsequent by-laws.
- (e) Members of mutual benefit associations bound by constitution and by-laws.
- (f) Constitution and by-laws of mutual benefit association as part of the contract.
- (g) Same—Construction.
- (h) Extent to which members of mutual benefit associations are bound by subsequent by-laws, etc.
- (i) Same—Assent of member.
- (j) Same—Effect of reservation of right to amend.
- (k) Same—Effect of agreement to be bound by laws subsequently enacted.
- (l) Same—Laws must be reasonable.
- (m) Same—Purpose and effect of laws and the relation thereof to prior legislation.
- (n) Same—Laws impairing contract or vested rights.
- (o) Same—Conclusion.

(a) Statutes and ordinances as part of the contract.

While it may be regarded as elementary that the particular statute under which a mutual company is organized must be regarded as part of the contract (*Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327), the rule may be still further extended, and it may be said that the general statutes of the state relating to insurance

in force at the time a policy is issued must be regarded as entering into and forming a part of it, to the same effect as if embodied therein.

Collier v. Mutual Reserve Fund Life Ass'n (C. C.) 119 Fed. 617; *Nielsen v. Provident Sav. Life Assur. Soc.*, 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146; *Kirkpatrick v. Modern Woodmen of America*, 103 Ill. App. 468; *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. 341; *In re Globe Mut. Ben. Ass'n*, 63 Hun, 263, 17 N. Y. Supp. 852.

So, too, a contract of insurance upon property within the fire limits of a city is presumed to have been entered into with reference to the ordinance of such city (*Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286); and an ordinance passed after the issuance of the policy and before the renewal thereof will enter into such renewal (*Brady v. Northwestern Ins. Co.*, 11 Mich. 425). Statutes passed between the original issuance of a policy and its renewal will enter into and control the renewal (*Ogden v. New York Mut. Ins. Co.*, 21 N. Y. Super. Ct. 248, affirmed in 35 N. Y. 418). A statute, having become part of the contract issued while it was in force, is not, as to that contract, rendered ineffective by its subsequent repeal (*Jarman v. Knights Templars' & Masons' Life Indemnity Co.* [C. C.] 95 Fed. 70).

Persons insuring in a mutual company are presumed to know the provisions of the statute under which the company was organized (*Corey v. Sherman* [Iowa] 60 N. W. 232, 32 L. R. A. 490). They cannot question the validity of acts passed before they became members (*Lycoming Fire Ins. Co. v. Newcomb*, 4 Leg. Gaz. [Pa.] 409); and if, after the passage of an act supplemental to the charter, a member renews his policy, he waives any objection based on the ground that the statute was not accepted by the company (*Lycoming Fire Ins. Co. v. Buck*, 4 Leg. Gaz. [Pa.] 182). Generally, it may be said that one who accepts a policy long after the supplemental act was passed cannot object that the act was not properly adopted by the company, where he is not injuriously affected (*Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen [Mass.] 217).

In the construction of a contract issued by an insurer incorporated in another state, the statutes of that state are not necessarily to be regarded as a part of the contract, and the court is not bound to adopt the construction of the contract made in the state of the insurer's domicile (*Washington Life Ins. Co. v. Glover*, 25 Ky. Law Rep. 1327, 78 S. W. 146).

(b) Subjection of members of mutual company to charter, by-laws, and rules.

One insured in a mutual company, either by taking out a policy or by taking an assignment of a policy, becomes a member thereof, and is therefore presumed to have knowledge of, and is bound by, the provisions of the charter, by-laws, and rules of the company.

Mutual Assur. Soc. v. Korn, 7 Cranch, 396, 8 L. Ed. 383; *Davis v. Life Ass'n of America* (C. C.) 11 Fed. 781; *Fry v. Charter Oak Life Ins. Co.* (C. C.) 31 Fed. 197; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.) 236; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Simeral v. Dubuque Mut. Fire Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425; *Corey v. Sherman* (Iowa) 60 N. W. 232, 32 L. R. A. 490; *Mutual Fire Ins. Co. v. Miller Lodge*, 58 Md. 463; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Miller v. Hillsborough Mut. Fire Assur. Ass'n*, 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278; *Woodfin v. Asheville Mut. Ins. Co.*, 51 N. C. 558; *Boyle v. North Carolina Mut. Ins. Co.*, 52 N. C. 373; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. 402; *Lycoming Fire Ins. Co. v. Buck*, 1 Luz. Leg. Reg. (Pa.) 351; *Standard Mut. Live Stock Ins. Co. v. Madara*, 13 Pa. Co. Ct. R. 555, 2 Pa. Dist. R. 600; *Stone v. Lorentz*, 19 Pa. Co. Ct. R. 51, 6 Pa. Dist. R. 17; *Wilson v. Union Mut. Fire Ins. Co.* (Vt.) 58 Atl. 799.

But see *Given v. Rettew*, 162 Pa. 638, 29 Atl. 703, where it was held that a policy holder in a mutual company, who insures on the cash plan, though he thereby becomes a member of the company, is not bound by a by-law making all members liable to future assessments, if such by-law was not brought to his notice before the policy was issued.

A member of a mutual insurance company cannot question the validity of the by-laws under which he became a member (*Pfister v. Gerwig*, 122 Ind. 567, 23 N. E. 1041). He is estopped from asserting the invalidity of the charter (*White v. Coventry*, 29 Barb. [N. Y.] 305), or that the company has not accepted its charter (*Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen [Mass.] 483). So an old member, by renewing his policy, indorses the charter of the company, and, if he intends to object to any part of it, he should do so then (*Lycoming Fire Ins. Co. v. Buck*, 1 Luz. Leg. Reg. [Pa.] 351).

(c) Charter, by-laws, and rules as part of the contract.

It naturally follows, from the rule that the members of a mutual company are bound by them, that the charter, by-laws, and rules,

if properly incorporated therein, must be regarded as part of the contract.

The general rule is expressed in *Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilman (Ill.) 236; *Day v. Mill Owners' Mut. Fire Ins. Co.*, 75 Iowa, 694, 38 N. W. 113; *Farmers' Mut. Hall Ins. Ass'n. v. Slattery*, 88 N. W. 949, 115 Iowa, 410; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457; *Douville v. Farmers' Mut. Fire Ins. Co.*, 113 Mich. 158, 71 N. W. 517; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 926; *Stone v. Lorentz*, 19 Pa. Co. Ct. R. 51, 6 Pa. Dist. R. 17. The extent to which the charter, by-laws, or rules of a mutual company shall be regarded as part of the contract is, however, a matter of statutory regulation in some states.¹

If no reference is made in the policy to the by-laws, they cannot be regarded as part of the contract (*Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290). It becomes, therefore, necessary to determine what is a sufficient reference to the by-laws to incorporate them in the contract. By-laws printed on the back of the policy and referred to on the face thereof are so incorporated as to become part of the contract.

Mullaney v. National Fire & Marine Ins. Co., 118 Mass. 393; *Wilson v. Union Mut. Fire Ins. Co.* (Vt.) 58 Atl. 799.

It has, indeed, been held that a general reference to the charter and by-laws is sufficient.

Simeral v. Dubuque Mut. Fire Ins. Co., 18 Iowa, 319; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428; *Fabyan v. Union Mut. Fire Ins. Co.*, 83 N. H. 203.

So, if the policy is made in terms subject to the provisions and conditions of the company's charter and by-laws, it legally adopts and embodies those provisions and conditions as part of the contract, to the same effect as if they had been set forth at large in the policy (*Smith v. Bowditch Mut. Fire Ins. Co.*, 6 Cush. [Mass.] 448).

It is, in some states, provided by statute that copies of the by-laws shall be attached to the policy. Thus the statute of Kansas (Gen. St. 1889, par. 3437; Gen. St. 1901, § 3500) requires that all pol-

¹ See Gen. St. Kan. 1889, § 3437, chapter 38 of the General Laws) § 266; Gen. St. 1901, § 3500; Mass. Rev. Laws 1902, c. 118, § 59; Comp. St. Neb. 1901, § 3454i (Laws 1897, c. 44, § 9); Id. § 3494z22 (Laws 1890, c. 46, § 10); Insurance Law of New York (being Birdseye's Rev. St. & Gen. Laws of New York, p. 1905; Act Pa. May 11, 1881 (P. & L. Dig. p. 2375, § 68); Acts Tenn. 1895, c. 220, § 3; Rev. St. Wis. 1898, §§ 1941-1961.

icies issued by mutual fire insurance companies organized under the laws of this state shall have attached thereto printed copies of the by-laws of the company, signed by the president and secretary of the company, as well as by the assured. It has been held that the signatures of the president and secretary attached to the policy only are not sufficient, notwithstanding the fact that the by-laws are printed on the same sheet of paper; and where the by-laws are not signed in accordance with the statute, by the president and secretary of the company and the assured, they do not become a part of the policy.

Capitol Ins. Co. v. Bank of Blue Mound, 48 Kan. 393, 29 Pac. 576.

Capitol Ins. Co. v. Bank of Pleasanton, 48 Kan. 397, 29 Pac. 578.

So, too, provisions of the constitution of a mutual company will not be regarded as part of the contract, though referred to therein, if a copy of such provision is not attached to the policy, as required by Act Pa. May 11, 1881 (P. L. 20), providing that policies containing any reference to the application, constitution, or by-laws of the company, as forming a part thereof, must contain or have attached thereto a correct copy of the matter so referred to (*Shoemaker v. Whitehall Mut. Fire Ass'n*, 23 Pa. Co. Ct. R. 174, 9 Pa. Dist. R. 579). Under this statute the copy, to conform to the requirements of the statute, must be substantially correct; but the omission of a word appearing in the by-law is immaterial, the error not being such as would probably mislead the insured (*Susquehanna Mut. Fire Ins. Co. v. Oberholtzer*, 172 Pa. 223, 32 Atl. 1105). The provisions of the Pennsylvania statute, not being limited to mutual companies, are equally applicable to ordinary life policies (*Fahey v. Empire Life Ins. Co.*, 5 Lack. Leg. N. 377). In Tennessee (*Shoun v. Armstrong* [Tenn. Ch.] 59 S. W. 790), where the statute (Acts 1895, c. 220, § 3) provides that every policy issued by a mutual company shall have attached thereto a printed copy of the by-laws and regulations of the corporation, it has been held that, though it did not affirmatively appear whether the by-laws of the corporation were made a part of the policy or not, it will be presumed that the provisions of the law were complied with, and that the charter and by-laws were attached to and became a part of the contract.

Since they are to be regarded as part of the contract, the charter and by-laws are to be referred to in construing the policy.

Greeff v. Equitable Life Assur. Soc. of United States, 57 N. Y. Supp.

871, 40 App. Div. 180; *Hyatt v. Walt*, 37 Barb. (N. Y.) 29; *Mutual Life Ins. Co. of Baltimore v. Bratt*, 55 Md. 200.

So, where a certificate of membership of a mutual company contains stipulations similar to those of an absolute fire policy, followed by "mutual policy conditions," and an agreement that the by-laws form a part of the policy, and are to be resorted to in order to determine the rights and obligations of the parties, the liability of such association is that of a mutual company only (*Manufacturers' Fire Ass'n v. Lynchburg Drug Mills*, 8 Ohio Cir. Ct. R. 112). But the provisions of the charter cannot enlarge or vary the obligations contained in a policy of insurance, though the policy provides that it is accepted on the conditions contained therein "and the charter of the company, which charter is to be resorted to and used to explain the rights and obligations of the parties hereto in all cases not herein otherwise especially provided for, and which is hereby made a part of this policy" (*American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877).

Clauses in the by-laws of a fire company, although made part of the contract and policy, need not necessarily be set out in an action on the policy, where such clauses do not affect the insured's right of action (*Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20).

(d) Subjection of member of mutual company to subsequent by-laws.

While it may be conceded that, under the general power to make such by-laws as may be necessary or advisable for the management of its corporate affairs, a mutual company has the right to pass by-laws not affecting contract rights of a member, and he will be bound thereby (*McKean v. Biddle*, 181 Pa. 361, 37 Atl. 528), a different question is presented where the new by-law, or the amendment to the charter or existing by-law, is designed to act retroactively and to affect some right secured to the member by the existing contract. The rule undoubtedly is that in the absence of any express stipulation giving the right, or the subsequent assent of the member, the company cannot, by the passage of a by-law impairing his contract, bind the member.

New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451; *Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610, 12 N. W. 874; *Stewart v. Lee Mut. Fire Ins. Ass'n*, 64 Miss. 499, 1 South. 743; *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292; *Fire Ins. Co. v. Conner*, 17 Pa. 136; *Bradfield v. Union Mut. Ins. Co.*, 9 Wkly. Notes Cas. (Pa.) 436; *Van Slyke v. Trempealeau County Farmers' Mut. Fire Ins. Co.*, 48 Wis. 683, 5 N. W. 236.

The assent of a member to a by-law adopted by the company after the making of his contract will not be presumed where such by-law

was in conflict with the charter of the company, and would change and impair his rights under his contract (*Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292).

Though perhaps, where by statute a company has the right to amend its charter, a policy holder cannot complain of a subsequent amendment of the charter (*Allen v. Life Ass'n of America*, 8 Mo. App. 52), the mere reservation of power to enact by-laws does not alter the general rule (*Farmers' Mut. Hail Ins. Ass'n v. Slattery*, 115 Iowa, 410, 88 N. W. 949). So, where a policy provided that the by-laws appearing on the back thereof should form a part of the contract, and be binding on the holder in the same manner as though they appeared on the face of the policy, and one of them authorized the board of directors to change the by-laws at any time, but there was no agreement on the part of the assured that the by-laws so changed should ipso facto become a part of the contract, the rights of a policy holder were governed by the by-laws as they appeared on his policy, and not as subsequently changed by the board of directors (*Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414, 46 Atl. 563).

It may be provided in the by-laws that members shall be notified of amendments or additions thereto, and that when such notice is given the amendment or addition shall become part of the member's contract with the company. Under such a provision a member, who has not been notified in the manner prescribed, and who has no knowledge of the amendment or addition, is not bound by it (*Morris v. Farmers' Mut. Fire Ins. Co.*, 65 N. W. 655, 63 Minn. 420), and whether the prescribed notice has been given is a question for the jury.

Resolutions passed by the board of directors of a mutual insurance company, do not affect a policy holder having no notice of their passage (*Martin v. Mutual Fire Ins. Co. of Montgomery County*, 45 Md. 51).

If the member of a mutual company agrees in his application to be governed by the by-laws in force or thereafter adopted, the general rule does not govern. Under such circumstances it has been held that the member is bound by the subsequently enacted by-laws as much as he is by those in force when his certificate was issued, if they are reasonable and adopted in conformity with the authority conferred on the company by the statute.

Montgomery County Farmers' Mut. Ins. Co. v. Milner, 90 Iowa, 685, 57 N. W. 612; *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 928.

The principles governing the foregoing cases have received the fullest discussion and illustration in those cases which involve the question as to the extent to which the members of mutual benefit associations are bound by amendments and additions to the by-laws. Reference to the succeeding subdivisions of this brief is therefore made for a more extended treatment of this subject.

(c) Members of mutual benefit associations bound by constitution and by-laws.

The rule that a member of a mutual company is bound by the provisions of the charter and by-laws of the company finds its counterpart in the rule applicable to members of mutual benefit associations. Such associations may be regarded as in the nature of mutual companies. Persons joining such associations obligate themselves, even without so expressing it, to conform to and comply with all the existing laws of the association. (*Miller v. National Council Knights and Ladies of Security* [Kan.] 76 Pac. 830.) Therefore members of mutual benefit associations are charged with notice of and will be bound by the provisions of the constitution and by-laws of the association.

The general rule is asserted in *Modern Woodmen v. Tevis*, 117 Fed. 869, 54 C. C. A. 293; *Clark v. Mutual Reserve Fund Life Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Fitzgerald v. Metropolitan Acc. Ass'n*, 106 Iowa, 457, 76 N. W. 809; *Willison v. Jewelers' & Tradesmen's Co.*, 61 N. Y. Supp. 1125, 30 Misc. Rep. 197; *May v. New York Safety Reserve Fund Soc.*, 13 N. Y. St. Rep. 66; *Steuve v. Grand Lodge A. O. U. W.*, 5 Ohio Cir. Ct. R. 471; *Espy v. American Legion of Honor*, 7 Kulp (Pa.) 134; *United Moderns v. Colligan* (Tex. Civ. App.) 77 S. W. 1032; *Frink's Adm'r v. Brotherhood Acc. Co.*, 75 Vt. 249, 54 Atl. 176; *McCoy v. Northwestern Mut. Relief Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681. But see *Watts v. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441, where it was held that, if the amount of assessments provided for in the certificate are lower than permitted by the charter, the member is not charged with notice of the charter provision. So, too, it has been held that an applicant for membership cannot be charged with knowledge of the by-laws prior to becoming a member. *Murphy v. Independent Order of S. & D. of America*, 77 Miss. 830, 27 South. 624, 50 L. R. A. 111.

If the association assumes to give notice to the member of a particular provision of the constitution, a member not notified of the existence of such provision will not be chargeable with knowledge thereof (*Sovereign Camp Woodmen of the World v. Fraley*, 94

Tex. 200, 59 S. W. 879, 51 L. R. A. 898, affirming [Tex. Civ. App.] 59 S. W. 905). But, where the existence of the by-laws is expressly recognized in the certificate, such laws are binding on the insured, though they are not posted in the company's principal place of business, and subject to public inspection, as required by Code 1873, § 1076 (*Fee v. National Masonic Acc. Ass'n*, 110 Iowa, 271, 81 N. W. 483). If a member has been expelled from a mutual benefit association, and is subsequently reinstated, the reinstatement will be regarded as the acquisition of new membership, so far as the operation of by-laws is concerned (*O'Brien v. Brotherhood of the Union*, 76 Conn. 52, 55 Atl. 577).

As the beneficiary of a certificate issued by a mutual benefit association cannot accept one part of the contract and reject another (*Palmer v. Commercial Travelers' Mut. Acc. Ass'n*, 53 Hun, 601, 6 N. Y. Supp. 870, affirmed in 127 N. Y. 678, 28 N. E. 256), the constitution and by-laws of such association will be regarded as binding on such beneficiary, as well as on the member.

Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293;
Cotter v. Grand Lodge A. O. U. W. of Montana, 23 Mont. 82, 57 Pac. 650.

(f) Constitution and by-laws of mutual benefit association as part of the contract.

The constitution and by-laws of mutual benefit associations, being binding on the member, are properly considered as forming a part of the contract between such member and the association.

This is the general rule asserted in *Conway v. Supreme Council Catholic Knights of America*, 63 Pac. 727, 131 Cal. 437; *Drum v. Benton*, 13 App. D. C. 245; *Supreme Council Catholic Knights and Ladies of America v. Beggs*, 110 Ill. App. 139; *Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833; *Fitzgerald v. Metropolitan Acc. Ass'n*, 76 N. W. 809, 106 Iowa, 457; *Fee v. National Masonic Aid Ass'n*, 110 Iowa, 271, 81 N. W. 483; *Miller v. National Council Knights and Ladies of Security (Kan.)* 76 Pac. 830; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Supreme Council Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; *Lake v. Minnesota Masonic Relief Ass'n*, 61 Minn. 99, 63 N. W. 261, 52 Am. St. Rep. 538; *Bost v. Supreme Council Royal Arcanum*, 87 Minn. 417, 92 N. W. 337; *Monahan v. Supreme Lodge Columbian Knights*, 88 Minn. 224, 92 N. W. 972; *Supreme Lodge Knights of Pythias v. Stein*, 75 Miss. 107, 21 South. 559, 37 L. R. A. 775, 65 Am. St. Rep. 589; *Davidson*

v. Knights of Pythias, 22 Mo. App. 263; *Grand Lodge Order of Sons of Hermann-Soehne v. Elsner*, 26 Mo. App. 108; *O'Brien v. Supreme Council Catholic Benevolent Legion*, 81 App. Div. 1, 80 N. Y. Supp. 775, affirmed without opinion 68 N. E. 1120, 176 N. Y. 597; *Newton v. Northern Mut. Relief Ass'n*, 21 R. I. 476, 44 Atl. 690; *Clement v. Clement (Tenn.)* 81 S. W. 1249; *Smith v. Covenant Mut. Ben. Ass'n*, 16 Tex. Civ. App. 593, 43 S. W. 819; *United Moderns v. Colligan (Tex. Civ. App.)* 77 S. W. 1032; *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13. If the association issues no policy or certificate, the constitution and by-laws constitute the whole contract. *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162.

So, too, if the association is composed of subordinate lodges, the constitution of the subordinate body to which a member belongs becomes a part of his contract of insurance with the principal society, in so far as his rights are based on his membership therein (*Polish Roman Catholic Union of America v. Warczak*, 55 N. E. 64, 182 Ill. 27, affirming 82 Ill. App. 351). If, at the time the membership was applied for and the certificate issued, certain by-laws are exhibited and read to the applicant as the by-laws of the association then in force, the association is estopped to deny that they are in force and part of the contract (*National Masonic Acc. Ass'n v. Titman*, 58 Ill. App. 642).

Though the rule stated above is generally recognized, it has been held in some cases that, to become part of the contract, the constitution and by-laws must be referred to in the certificate. Thus it has been held in Missouri that, in the absence of any reference in the policy to the constitution and by-laws, such instruments are not to be regarded as any part of the contract.

McDonald v. Bankers' Life Ass'n of Des Moines, Iowa, 154 Mo. 618, 55 S. W. 999; *Goodson v. National Masonic Acc. Ass'n*, 91 Mo. App. 339; *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486.

But, conceding that some reference is necessary to incorporate the constitution and by-laws in the certificate, it has been held that a reference in the application to such instruments as entering into and forming part of the contract is sufficient.

Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293; *Hutchinson v. Supreme Tent Knights of Maccabees of the World*, 68 Hun. 355, 22 N. Y. Supp. 801; *Willison v. Jewelers' & Tradesmen's Co.*, 30 Misc. Rep. 197, 61 N. Y. Supp. 1125; *McLendon v. Woodmen of the World*, 106 Tenn. 695, 64 S. W. 36, 52 L. R. A. 444.

A recital in the benefit certificate that it is issued upon the express condition that the member shall in every particular comply with the laws, rules, and regulations of the order is a sufficient reference to incorporate the constitution and other laws in the contract (*Grand Lodge A. O. U. W. v. Gandy*, 53 Atl. 142, 63 N. J. Eq. 692). It has also been held that where one who is a charter member of the association has his attention called to the constitution and laws, and a certificate is afterwards issued to him, conditioned that he comply with all the laws of the association, such laws must be regarded as incorporated in the contract (*Sabin v. Senate of the National Union*, 90 Mich. 177, 51 N. W. 202). Although it is the general rule in Texas that the constitution and by-laws are part of the contract, it was held in *Sovereign Camp Woodmen of the World v. Fraley*, 59 S. W. 879, 94 Tex. 200, 51 L. R. A. 898, that, if the constitution provides that certain conditions therein shall be made a part of every benefit certificate, such provision is a command to the officers of the supreme body to embody the prescribed condition in each certificate thereafter issued. In such case the provision must be actually incorporated in the certificate.

In discussing this phase of the question in connection with mutual insurance companies, reference was made to the statutory provisions governing the incorporation of the constitution and by-laws in the contract. So far as mutual benefit associations are concerned, it has been held that the **Pennsylvania statute (Act May 11, 1881 [P. L. 20])**, providing that policies which contain reference to the constitution or by-laws of the insurer shall contain correct copies of such instruments, does not apply to such associations, as they are not insurance companies within the meaning of the statute.

Donlevy v. Supreme Lodge Shield of Honor, 11 Pa. Co. Ct. R. 477, 1 Pa. Dist. R. 213; *Espy v. American Legion of Honor*, 7 Kulp. 134; *Dickinson v. Ancient Order United Workmen*, 159 Pa. 258, 28 Atl. 293; *Lithgow v. Supreme Tent Knights of Maccabees*, 165 Pa. 292, 80 Atl. 830.

So it has been held in Iowa (*Fitzgerald v. Metropolitan Acc. Ass'n*, 106 Iowa, 457, 76 N. W. 809) that Acts 18th Gen. Assem. c. 211, § 2, requiring insurance companies to attach to a policy a "copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof," does not make it incumbent on a mutual benefit association to attach a copy of its by-laws to a certificate of membership stating that the by-laws of the

association are made a part thereof. Under the Massachusetts statute (St. 1890, c. 421, § 21), providing that certificates of mutual benefit associations which contain a reference to the constitution or by-laws of the association as forming part of the contract shall also have attached thereto a correct copy of such by-laws, etc., a mere recital in the policy that the member agreed to be bound by the by-laws is not sufficient (*Boyden v. Massachusetts Masonic Life Ass'n*, 167 Mass. 242, 45 N. E. 735). So it has been held in Kentucky that, under the provisions of the statute (section 679) requiring certificates issued to persons within the state by any corporation transacting business therein to have attached thereto a copy of any provision of the constitution or by-laws of the association referred to therein, a mere reference to the constitution and by-laws is insufficient to make them a part of the contract.

Conley v. Travelers' Protection Ass'n, 105 Fed. 854, 46 C. C. A. 278;
Mooney v. Ancient Order of United Workmen, 114 Ky. 950, 72 S. W. 288;
Hunziker v. Supreme Lodge K. of P., 25 Ky. Law Rep. 1510, 73 S. W. 201.

(g) Same—Construction.

In construing the rules and laws of a mutual benefit association, the court will put upon them a liberal construction, and give to the language such meaning as to carry out the manifest intent of the parties.

Supreme Lodge Order of Mutual Protection v. Meister, 105 Ill. App. 471; *Knights Templars' & Masons' Life Indemnity Co. v. Vail*, 68 N. E. 1103, 206 Ill. 404, affirming 105 Ill. App. 331; *Supreme Lodge K. P. v. Schmidt*, 98 Ind. 374; *Woodmen of the World v. Gilliland*, 11 Okl. 384, 67 Pac. 485; *Frink's Adm'r v. Brotherhood Acc. Co.*, 75 Vt. 249, 54 Atl. 176; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561.

The practice or opinion of the association as to the meaning of the words used to express the rule or regulation in controversy is not binding on the courts, in construing the contract. If the language be plain, unambiguous, and well understood to have a fixed meaning, either generally or as a technical term of the law, the latter meaning will be given to the words used, as in other cases for the interpretation of contracts. (*Wiggin v. Knights of Pythias* [C. C.] 31 Fed. 122.) Where the only contract existing between a mutual benefit association and an insured is that embodied in the by-laws, they must be considered in their entirety, as essential to the proper construction of any part; and a claim cannot be based

upon any one section, to the exclusion of another (*Badesch v. Congregation Brothers of Willna*, 50 N. Y. Supp. 958, 23 Misc. Rep. 160).

Regarding the constitution and by-laws or rules of the association as part of the contract, it is obvious that, under the general rule that all papers in *pari materia* must be read together, a proper determination of the rights secured by the certificate can be had only by construing together the certificate and the constitution, by-laws, and rules.

Drum v. Benton, 13 App. D. C. 245; *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101; *Kirkpatrick v. Modern Woodmen*, 103 Ill. App. 468; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Miller v. National Council Knights and Ladies of Security (Kan.)* 76 Pac. 830; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Seymour v. Mutual Reserve Fund Life Ass'n*, 14 Misc. Rep. 151, 35 N. Y. Supp. 793; *Greeff v. Equitable Life Assur. Soc. of United States*, 57 N. Y. Supp. 871, 40 App. Div. 180; *People v. Grand Lodge A. O. U. W. of N. Y.*, 67 N. Y. Supp. 830, 32 Misc. Rep. 528; *O'Brien v. Supreme Council Catholic Ben. Legion*, 80 N. Y. Supp. 775, 81 App. Div. 1; *Espy v. American Legion of Honor*, 7 Kulp (Pa.) 184; *Home Circle No. 1 v. Shelton (Tex. Civ. App.)* 81 S. W. 84.

Though the member is induced to join by an erroneous publication of the by-laws, his rights are to be determined by the by-laws as they actually exist, and not by those set out in the erroneous publication (*Hirsch v. United States Grand Lodge of Order of Brith Abraham*, 56 Mo. App. 101). Where an order was chartered originally in Kentucky, and afterwards took out a second charter in Missouri, and the local lodge to which the member belonged was organized under the Kentucky charter, the certificate will be construed by that charter, rather than the Missouri charter; no question of public policy intervening (*Martinez v. Supreme Lodge Knights of Honor*, 81 Mo. App. 590).

In a general sense, the charter, constitution, and by-laws are the controlling factors in the construction of the contract.

In re Globe Mut. Ben. Ass'n, 63 Hun, 263, 17 N. Y. Supp. 852; *Syuchar v. Workingmen's Co-op. Ass'n*, 14 Misc. Rep. 10, 35 N. Y. Supp. 124.

If, however, the certificate as issued is within the power of the association under its charter or articles of organization, a conflict between the certificate and the by-laws will be determined by the

terms of the certificate, and the rights and liabilities of the parties controlled by the certificate, rather than the by-laws.

Davidson v. Old People's Mut. Ben. Soc., 39 Minn. 803, 39 N. W. 803, 1 L. R. A. 483; *Fitzgerald v. Equitable Reserve Fund Life Ass'n* (City Ct. N. Y.) 3 N. Y. Supp. 214, affirmed in 5 N. Y. Supp. 837, 15 Daly, 229; *McCoy v. Northwestern Mut. Relief Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681. Especially will this rule apply when the by-laws are not by sufficient reference made a part of the certificate. *Goodson v. National Masonic Acc. Ass'n*, 91 Mo. App. 339.

The theory is, as said in the Davidson Case, that the association must be deemed to have waived the provisions of the by-laws. Obviously, where the charter provides that benefits shall be paid as provided for either in the by-laws or in the certificate, the provisions of the certificate will govern in determining the time of payment (*Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311, 55 Am. St. Rep. 326).

(h) Extent to which members of mutual benefit associations are bound by subsequent by-laws, etc.

In the case of ordinary insurance, the whole contract is contained in the policy, and no question can arise as to the right of the insurer to modify the contract without the consent of the insured. When the insurer is a mutual benefit association, however, the relation between the parties is materially different, and of a twofold aspect. There is the relation between the association and the member merely as such, and the relation between the association as an insurer and the member as an insured. The contract between the association and the member is, moreover, contained not merely in the certificate issued to the member, but, as has been seen, also in the constitution and by-laws of the association. One of the most important questions arising between these associations and the members is to what extent the rights of members can be affected by the legislation of the association passed after the membership is acquired.

It may be conceded that a mutual benefit association, as an incident to its existence, has the power to alter or amend its laws, or repeal them. This power resides in the association for the purpose of carrying out the objects for which it was organized (*Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603). The legislative power of these associations is usually vested in a supreme body (*Steuve v. Grand Lodge A. O. U. W.*, 5 Ohio Cir.

Ct. R. 471, 3 O. C. D. 231), consisting of delegates from the subordinate lodges or councils. When assembled as a sovereign body, such delegates have general power to adopt, in the manner prescribed by the laws of the association, such amendments to the constitution or by-laws and such new laws as may be necessary (*Sovereign Camp Woodmen of the World v. Fraley*, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898). It has even been held that such an association cannot by its constitution deny its own right to enact by-laws permitted by its charter (*Blasingame v. Royal Circle*, 111 Ill. App. 202).

These associations are self-governing bodies, and the courts are disinclined to interfere with, or restrict their power to legislate for themselves in all matters consistent with their purpose and necessary to their welfare (*Hall v. Western Travelers' Acc. Ass'n* [Neb.] 96 N. W. 170). They will not interfere, except for the most urgent reasons (*State ex rel. Stone v. Grand Lodge A. O. U. W.*, 78 Mo. App. 546), as where the legislation is unreasonable (*State v. Grand Lodge A. O. U. W.*, 70 Mo. App. 456), or is clearly a violation of principles of public policy (*West v. A. O. U. W.*, 14 Tex. Civ. App. 471, 37 S. W. 966).

It is obvious that, independent of any other consideration, a member can be bound only when the amendment or the new law is adopted in accordance with the law of the association.

Metropolitan Safety Fund Acc. Ass'n v. Windover, 137 Ill. 417, 27 N. E. 538, affirming 37 Ill. App. 170; *United Brotherhood of Carpenters & Joiners of America v. Fortin*, 107 Ill. App. 306; *Mutual Aid & Instruction Soc. v. Monti*, 59 N. J. Law, 341, 38 Atl. 666; *Sovereign Camp Woodmen of the World v. Fraley* (Tex. Civ. App.) 59 S. W. 905. The mere fact that a by-law is in the form of a resolution does not render it any the less a by-law. *Dornes v. Supreme Lodge, Knights of Pythias of the World*, 75 Miss. 466, 23 South. 191.

Thus a by-law forfeiting the contract in case of suicide, to be valid, must be passed by the supreme body with which the contract was made, and is of no effect if made by a subordinate committee or board of control, to whom the supreme body has attempted to delegate its legislative power (*Supreme Lodge Knights of Pythias v. Stein*, 75 Miss. 107, 21 South. 559, 37 L. R. A. 775, 65 Am. St. Rep. 589). But if such law, after being enacted by the board, is duly reported to the supreme body, and approved by that body, there is, in effect, an enactment of the law by the supreme body (*Supreme Lodge Knights of Pythias v. Trebbe*, 53 N. E. 730, 179 Ill.

348, 70 Am. St. Rep. 120). Nevertheless, a law which it was within the power of such board to enact will be valid and binding to the same extent as a law enacted by the supreme body (Supreme Lodge K. of P. v. Kutscher, 53 N. E. 620, 179 Ill. 340, 70 Am. St. Rep. 115). Where the association had been reincorporated, and, without the knowledge or consent of the member, the obligation of the old corporation to the member was transferred to the new corporation, a law passed by such new corporation was not binding on the member, who had not assented thereto (*Richter v. Supreme Lodge Knights of Pythias*, 137 Cal. 8, 69 Pac. 483). So, where it is provided by statute that, before any amendment to or alteration of a constitution or by-laws shall take effect, a copy thereof, duly certified, must be filed with the auditor of public accounts,² an amendment not so filed is ineffective (*Knights of Maccabees of the World v. Nitsch* [Neb.] 95 N. W. 626). And where the statute (Ky. St. 1903, § 679) provides that all policies or certificates containing any reference to the constitution or by-laws of the association shall contain, or have attached to said certificate, a correct copy of such portions of the constitution and by-laws as are referred to, a subsequent by-law, not called to the attention of the member or attached to his certificate, is not binding on him (*Hunziker v. Supreme Lodge K. of P.*, 25 Ky. Law Rep. 1510, 78 S. W. 201). A member of a beneficial order is presumed to know of the existence of only such laws and rules as the corporation has authority to make, and there can be no presumption that he has notice of a law which is invalid (*Smith v. Supreme Council A. L. H.*, 88 N. Y. Supp. 44, 94 App. Div. 357).

Where the by-laws of a mutual benefit association provide that publication in the official organ of any notice required to be given the members shall be sufficient notice, and make it the duty of a certain official "to compile and arrange for publication all amendments to the by-laws," it is not necessary that an amendment, after adoption, should be published in the official organ. *Eversberg v. Supreme Tent Knights of Maccabees of the World* (Tex. Civ. App.) 77 S. W. 246.

The legislative acts of a mutual benefit association are presumed to be intended to operate prospectively only, and amendments to its constitution or by-laws will be construed as intended to affect only policies subsequently issued, and will not be given a retrospective operation, unless there are imperative reasons demanding

² Comp. St. Neb. 1901, c. 43, § 112.

such construction (Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93). Consequently, amendments to the constitution or by-laws, or new by-laws, will be construed as operating prospectively only, unless the intention to make them retroactive is clearly evidenced by clauses having that effect.

These principles are illustrated in *Berlin v. Eureka Lodge*, No. 9, K. P., 64 Pac. 254, 132 Cal. 294; *Ancient Order United Workmen v. Brown*, 37 S. E. 890, 112 Ga. 545; *Sovereign Camp Woodmen of the World v. Thornton*, 115 Ga. 798, 42 S. E. 236; *N. W. Benefit & Mut. Aid Ass'n v. Wanner*, 24 Ill. App. 357; *Modern Woodmen of America v. Wieland*, 109 Ill. App. 340; *Carnes v. Iowa Traveling Men's Ass'n*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Spencer v. Grand Lodge Ancient Order of United Workmen of State of New York*, 48 N. Y. Supp. 590, 22 Misc. Rep. 147, affirmed in 53 App. Div. 627, 65 N. Y. Supp. 1146; *Shipman v. Protected Home Circle*, 73 N. Y. Supp. 594, 66 App. Div. 448; *Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546; *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; *Grand Lodge A. O. U. W. v. Stumpf*, 58 S. W. 840, 24 Tex. Civ. App. 309. Of course, where prior certificates are expressly excepted from the operation of the new by-law, no question as to its retroactive effect can arise. *Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151.

(1) Same—Assent of member.

Whether or not a member is otherwise bound by subsequent by-laws, he will, of course, be bound if he assents thereto.

Sargent v. Supreme Lodge Knights of Honor, 158 Mass. 557, 33 N. E. 650; *Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151.

Conversely, other things being equal, such by-laws will not be binding unless assented to.

Courtney v. United States Masonic Ben. Ass'n (Iowa) 53 N. W. 238; *Cohen v. Supreme Sitting Order of Iron Hall*, 105 Mich. 283, 63 N. W. 304; *Startling v. Royal Templars*, 108 Mich. 440, 66 N. W. 341, 62 Am. St. Rep. 709; *Wheeler v. Supreme Sitting Order of Iron Hall*, 110 Mich. 437, 68 N. W. 229; *Grand Lodge A. O. U. W. v. Sater*, 44 Mo. App. 445; *Smith v. Supreme Lodge Knights of Pythias*, 83 Mo. App. 512; *International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Tex. Civ. App.)* 48 S. W. 1108; *Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N. E. 238; *Makely v. Supreme Council American*

Legion of Honor, 133 N. C. 367, 45 S. E. 649; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 286, 68 N. E. 932.

Generally compliance without objection will be regarded as an assent (*Steuve v. Grand Lodge A. O. U. W.*, 5 Ohio Cir. Ct. R. 471, 3 O. C. D. 231), but not if the compliance is merely in the expectation that the by-law will be repealed (*Supreme Council A. L. H. v. Batte* [Tex. Civ. App.] 79 S. W. 629). So, too, a compliance under protest will not be regarded as an assent.

Lippincott v. Supreme Council A. L. H. (C. C.) 130 Fed. 483; *O'Neill v. Supreme Council A. L. H. (N. J. Sup.)* 57 Atl. 463; *Supreme Council A. L. H. v. Champe*, 127 Fed. 541, 63 C. C. A. 282.

The member must exercise his option to accept or reject the new conditions within a reasonable time (*O'Neill v. Supreme Council A. L. H. (N. J. Sup.)* 57 Atl. 463); but the right to rescind is not lost by delay, unless, in consequence, the position of the association has been changed to its injury (*Daix v. Supreme Council A. L. H. (C. C.)* 127 Fed. 374). Of course, a subsequent by-law cannot be regarded as binding on one who, by reason of insanity, is incapable of complying therewith (*Grossmayer v. District No. 1, Independent Order of Benai Berith*, 174 N. Y. 550, 67 N. E. 1083).

As determining whether a member has acquiesced in a by-law, it may be shown that he voted for it in the meeting when it was adopted (*Koeth v. Knights Templars' & Masons' Life Indemnity Co.*, 55 N. Y. Supp. 768, 37 App. Div. 146). But the fact that a representative from the local lodge of such member was in attendance at the meeting of the superior body when the amendment was made does not constitute such a consent on the part of the member as will render the amendment binding on him (*Fargo v. Supreme Tent Knights of Maccabees of the World*, 89 N. Y. Supp. 65, 96 App. Div. 491). And if a member sent his proxy to a meeting, it will be presumed that such proxy was intended for the ordinary purpose of the meeting only; consequently, he will not be bound by reason of such proxy by the provisions of a resolution depriving him of vested rights (*Hill v. Mutual Reserve Fund Life Ass'n*, 39 S. E. 56, 128 N. C. 463).

Whether the member assented to the by-law is a question for the jury:

Pokrefsky v. Detroit Firemen's Fund Ass'n, 96 N. W. 1037, 131 Mich. 88; *Supreme Council A. L. H. v. Batte* (Tex. Civ. App.) 79 S. W. 629. The sufficiency of the evidence to show assent is considered in *Pokrefsky v. Detroit Firemen's Fund Ass'n*, 131 Mich. 88, 90 N. W. 689, and *Allen v. Merrimack County Odd Fellows' Mut. Relief Ass'n*, 72 N. H. 525, 57 Atl. 922.

(j) Same—Effect of reservation of right to amend.

Generally the right to amend the constitution and by-laws is expressly reserved, either in those instruments or in the certificate. It has been conceded in some cases that, in the absence of such a reservation, the association will have no power to so amend its laws as to affect the contract rights of the member.

Carnes v. Iowa State Traveling Men's Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Miller v. Tuttle* (Kan.) 73 Pac. 88; *Chadwick v. Order of Triple Alliance*, 56 Mo. App. 463; *McNeill v. Southern Tier Masonic Relief Ass'n*, 40 App. Div. 581, 58 N. Y. Supp. 119.

It may be inferred from this holding that, had the right of amendment been reserved, the court would have regarded amendments binding, though contract rights were affected. However that may be, it has been directly asserted in some jurisdictions that a reservation of the right to amend the laws authorizes the association to make any alterations in its laws that may seem necessary for the good of the association, and the member will be bound thereby, though it injuriously affects his interests.

This is apparently the principle governing *Haydel v. Mutual Reserve Fund Life Ass'n* (C. C.) 98 Fed. 200; *Robinson v. Templar Lodge*, No. 17, I. O. O. F., 49 Pac. 170, 117 Cal. 370, 59 Am. St. Rep. 193; *Hass v. Mutual Relief Ass'n*, 118 Cal. 6, 49 Pac. 1056 (but in this case the change was not detrimental to the member); *Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309; *McCabe v. Father Matthew Total Abstinence Ben. Soc.*, 24 Hun (N. Y.) 149; *May v. New York Safety Reserve Fund Soc.*, 14 Daly (N. Y.) 389; *Hutchinson v. Supreme Tent Knights of Maccabees*, 22 N. Y. Supp. 801, 68 Hun, 355; *Byrne v. Casey*, 8 S. W. 38, 70 Tex. 247; *Bollman v. Supreme Lodge Knights of Honor* (Tex. Civ. App.) 53 S. W. 722; *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362; *Hall v. Western Travelers' Acc. Ass'n* (Neb.) 96 N. W. 170.

It is not entirely clear whether the foregoing cases assert the principle without qualification. It is probable that in all of them, as in the leading case of *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409, the principle must be limited to such amendments and alterations as are for the good of the whole order, and are neither arbitrary and unreasonable, nor by way of repudiation of a debt.

(k) Same—Effect of agreement to be bound by laws subsequently enacted.

By far the larger number of cases involving the question as to the binding effect of subsequent by-laws have had to do with the

effect of agreements, usually contained in the contracts of mutual benefit associations, to the effect that the member will be bound by the laws then existing or thereafter enacted. It has been held in a few cases that in the absence of an agreement to that effect a member is not bound by constitutional amendments or by-laws enacted after he became a member.

Covenant Mut. Life Ass'n of Illinois v. Kentner, 58 N. E. 966, 188 Ill. 431, affirming 89 Ill. App. 495; *National Council Knights and Ladies of Security v. Dillon*, 108 Ill. App. 183; *Hobbs v. Iowa Mut. Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466.

But an agreement to conform to all regulations and by-laws of the association does not constitute an agreement to be bound by changes which may be made thereafter.

N. W. Benefit & Mut. Aid Ass'n v. Wanner, 24 Ill. App. 357; *Startling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709.

The Supreme Court of Kansas has, however, interpreted the condition differently, and has held that the condition in the certificate that the member will comply with all laws, rules, and requirements of the association constitutes not only an agreement on his part to comply with the laws then in force, but also with all reasonable rules and regulations thereafter made in the interest of the association (*Miller v. National Council K. & L. of Security* [Kan.] 76 Pac. 830). So a stipulation providing for payment "in an amount to be computed according to the laws" of the association will bind the member by any changes made in the laws after the procurement of his certificate and before the time of payment (*Bowie v. Grand Lodge of Legion of the West*, 99 Cal. 392, 34 Pac. 103). Similarly, a provision that the beneficiary's rights shall be determined by the laws in force at the time the certificate becomes payable contemplates the modification of the rights of the parties by subsequent by-laws (*Richmond v. Supreme Lodge Order of Mutual Protection*, 100 Mo. App. 8, 71 S. W. 736).

It is undoubtedly competent for the parties to make contracts with reference to the by-laws then existing, or which might thereafter be adopted (*Ross v. Modern Brotherhood of America*, 120 Iowa, 692, 95 N. W. 207); and when such an agreement is contained in the contract, both the member and his beneficiary will be bound by the laws of the association adopted after the membership was ac-

quired (*Supreme Tent Knights of Maccabees of the World v. Stensland*, 105 Ill. App. 267).

This rule is asserted in numerous cases. Reference may be made generally to *Masonic Mut. Ben. Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192; *Supreme Tent Knights of Maccabees v. Hammers*, 81 Ill. App. 560; *Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309; *Hobbs v. Iowa Mutual Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466; *Evans v. Southern Tier Masonic Relief Ass'n*, 78 N. Y. Supp. 611, 76 App. Div. 151; *French v. New York Mercantile Exch.*, 80 App. Div. 181, 80 N. Y. Supp. 812; *Reynolds v. Supreme Conclave Improved Order of Heptasophs*, 18 Lanc. Law Rev. 125, 24 Pa. Co. Ct. R. 638, 14 York Leg. Rec. 185; *Schmidt v. Supreme Tent Knights of Maccabees*, 97 Wis. 528, 73 N. W. 22. The law related to an increase of assessment in *Fullenwider v. Supreme Council Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239, affirming 73 Ill. App. 321; to the designation of beneficiaries in *Masonic Mut. Ben. Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192, *West v. A. O. U. W.*, 14 Tex. Civ. App. 471, 87 S. W. 966, and *Bollman v. Supreme Lodge Knights of Honor* (Tex. Civ. App.) 53 S. W. 722; to the amount payable on the certificate in *Richmond v. Supreme Lodge Order of Mutual Protection*, 100 Mo. App. 8, 71 S. W. 736, and *French v. Society of Select Guardians*, 51 N. Y. Supp. 675, 23 Misc. Rep. 86; to prohibited occupations in *Moerschbaeche v. Supreme Council Royal League*, 188 Ill. 9, 59 N. E. 17, 52 L. R. A. 281, affirming 88 Ill. App. 89, *State v. Grand Lodge A. O. U. W.*, 70 Mo. App. 456, *Schmidt v. Supreme Tent Knights of Maccabees of the World*, 97 Wis. 528, 73 N. W. 22, *Loeffler v. Modern Woodmen of America*, 100 Wis. 79, 75 N. W. 1012, and *Langnecker v. Grand Lodge A. O. U. W.*, 111 Wis. 279, 87 N. W. 293, 55 L. R. A. 185, 87 Am. St. Rep. 860; and to suicide as an excepted risk in *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, *Supreme Lodge Knights of Pythias v. Kutscher*, 53 N. E. 620, 179 Ill. 340, 70 Am. St. Rep. 115, *Supreme Lodge Knights of Pythias v. Trebbe*, 179 Ill. 343, 53 N. E. 730, 70 Am. St. Rep. 120, *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310, *Dornes v. Supreme Lodge Knights of Pythias of the World*, 75 Miss. 466, 23 South. 191, *Protected Home Circle v. Tisch*, 24 Ohio Cir. Ct. R. 489, *Chambers v. Supreme Tent Knights of the Maccabees of the World*, 200 Pa. 244, 49 Atl. 784, 86 Am. St. Rep. 716, *Supreme Lodge K. P. v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838, and *Hughes v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 98 Wis. 292, 73 N. W. 1015.

But even under such an agreement it is obvious that the member will not be bound by such laws as indicate on their face that they apply only to certificates thereafter to be issued (*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 Sup.

Ct. 108, 47 L. Ed. 139). The application of the subsequent by-law will also be restricted, where the member's agreement is to conform to laws thereafter enacted "not inconsistent with those that now exist" (Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402).

(1) Same—Laws must be reasonable.

Though in some of the cases cited in the foregoing subdivisions the principle that a member will be bound by the subsequent laws where there is an agreement to that effect or a reservation of the right to amend existing or enact new laws is stated without qualification, in by far the larger portion of the cases it is recognized that the principle must be modified according to the character and effect of the particular by-law involved; the real point of differences between the cases being in the determination of the character and effect of the law. In many of the cases it is said that the member will be bound by reasonable by-laws, and it may be regarded as elementary that in order to bind a member, either under the general reservation of power to amend or under an agreement to be bound, the law must be reasonable.

Reference may be made to *Modern Woodmen of America v. Wieland*, 109 Ill. App. 340; *Thibert v. Supreme Lodge Knights of Honor*, 81 N. W. 220, 78 Minn. 448, 47 L. R. A. 136, 79 Am. St. Rep. 412; *Tebo v. Supreme Council Royal Arcanum*, 89 Minn. 3, 93 N. W. 513; *Hall v. Western Travelers' Acc. Ass'n (Neb.)* 96 N. W. 170; *Supreme Council American Legion of Honor v. Adams*, 44 Atl. 380, 68 N. H. 236; *O'Neill v. Supreme Council A. L. H. (N. J. Sup.)* 57 Atl. 463; *Weller v. Equitable Aid Union*, 92 Hun, 277, 36 N. Y. Supp. 734; *Graftstrom v. Frost Council, No. 21, Order of Chosen Friends*, 43 N. Y. Supp. 266, 19 Misc. Rep. 180; *Beach v. Supreme Tent Knights of Maccabees of the World*, 77 N. Y. Supp. 770, 74 App. Div. 527; *Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546; *French v. New York Mercantile Exchange*, 80 N. Y. Supp. 812, 80 App. Div. 131; *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471, 76 Am. St. Rep. 347, affirming 45 N. Y. Supp. 1103, 19 App. Div. 160; *Strauss v. Mutual Reserve Fund Life Ass'n*, 36 S. E. 352, 126 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

The real point at issue, therefore, is whether a particular law involved in the case is reasonable or unreasonable. This is regarded as a question for the court, rather than for the jury (*Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471,

76 Am. St. Rep. 347). As might well be expected, the courts are far from being in accord as to what laws are or are not reasonable. No general rules for the determination of this question can be laid down, and it is therefore deemed sufficient to refer to the various cases without discussion.

The courts have pronounced unreasonable amendments or new laws changing the essential elements of the contract. *Weiler v. Equitable Aid Union*, 92 Hun, 277, 36 N. Y. Supp. 734. An amendment making past acts of a member a bar to the right to benefits is unreasonable. *Graftstrom v. Frost Council*, No. 21, Order of Chosen Friends, 43 N. Y. Supp. 266, 19 Misc. Rep. 180. So, too, is a by-law reducing the amount of benefit payable under the certificate. *Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940. A contrary doctrine is, however, expressed in *French v. N. Y. Mercantile Exch.*, 80 App. Div. 131, 80 N. Y. Supp. 312. A by-law making substantial changes in the methods of payment is unreasonable. *Beach v. Supreme Tent Knights of Maccabees of the World*, 77 N. Y. Supp. 770, 74 App. Div. 527. And so is a by-law prohibiting the occupation not prohibited when the member joined the association. *Tebo v. Supreme Council of Royal Arcanum*, 89 Minn. 3, 93 N. W. 513. But the contrary view is taken in *Gilmore v. Knights of Columbus*, 58 Atl. 223, 77 Conn. 58, and *Schmidt v. Supreme Tent Knights of Maccabees*, 97 Wis. 528, 73 N. W. 22. A by-law making suicide, sane or insane, an excepted risk, is not reasonable (*Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546), though the contrary view was expressed in *Supreme Tent Knights of Maccabees v. Hammers*, 81 Ill. App. 560. A by-law providing for forfeiture without notice is unreasonable. *Thibert v. Supreme Lodge, Knights of Honor*, 81 N. W. 220, 78 Minn. 448, 47 L. R. A. 136, 79 Am. St. Rep. 412.

The courts have pronounced reasonable amendments or by-laws requiring the serving of a probationary period as a condition precedent to reinstatement (*Alters v. Journeymen Bricklayers' Protective Ass'n*, 43 Wkly. Notes Cas. 336); and the same opinion has been expressed regarding a by-law determining the right to proceeds on the death of the designated beneficiary (*O'Brien v. Supreme Council Catholic Benevolent Legion*, 81 App. Div. 1, 80 N. Y. Supp. 775, affirmed without opinion 68 N. E. 1120, 176 N. Y. 597). A by-law making certain injuries excepted risks is reasonable. *Hall v. Western Travelers' Acc. Ass'n (Neb.)* 96 N. W. 170. And so, too, is a by-law defining the injuries for which indemnity is promised. *Ross v. Modern Brotherhood of America*, 95 N. W. 207, 120 Iowa, 692. A by-law increasing assessments for which a member is liable is reasonable, if necessary to carry out the purposes of the association. *Miller v. National Council Knights and Ladies of Security (Kan.)* 76 Pac. 830.

It was conceded in *Thibert v. Supreme Lodge Knights of Honor*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412, that laws in operation when a member enters the association may be reasonable and valid as to him, on the ground of his having assented thereto when accepting membership, and yet be unreasonable and invalid as to the present members when adopted as changes and amendments to existing by-laws, such members not having assented thereto in any manner.

(m) Same—Purpose and effect of laws and the relation thereof to prior legislation.

As a further modification of the general principle, it has been conceded in some cases that the amendment or new law must be intended and effective for the good of the association as a whole, if not, indeed, essential to its continuance.

Reference may be made to *Supreme Lodge K. P. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Miller v. National Council K. L. of Security* (Kan.) 76 Pac. 830; *Evans v. Southern Tier Masonic Relief Ass'n*, 88 N. Y. Supp. 162, 94 App. Div. 541.

The new law must be in harmony with the general policy of the association, and a member has a right to assume that the association will not change, as to him, the object and purposes on the basis of which he became a member.

Modern Woodmen of America v. Wieland, 109 Ill. App. 340; *Messer v. Grand Lodge A. O. U. W.*, 180 Mass. 321, 62 N. E. 252; *Weller v. Equitable Aid Union*, 92 Hun, 277, 36 N. Y. Supp. 734; *Bottjer v. Supreme Council American Legion of Honor*, 79 N. Y. Supp. 684, 78 App. Div. 546.

Such a requirement is not filled when the new law makes a radical change from the fundamental plan of insurance theretofore pursued by the association (*Smith v. Supreme Lodge Knights of Pythias*, 83 Mo. App. 512), nor where the change in the laws operates to make the burdens fall unequally upon the members (*Ebert v. Mutual Reserve Fund Life Ass'n*, 83 N. W. 506, 81 Minn. 116).

In accordance with this principle it has been held that a law imposing restrictions which did not exist, even by implication, when membership was acquired, is not binding.

This principle is illustrated by *Sovereign Camp Woodmen of the World v. Thornton*, 42 S. E. 236, 115 Ga. 798; *Smith v. Supreme Lodge Knights of Pythias*, 83 Mo. App. 512; *Spencer v. Grand*

Lodge of Ancient Order of United Workmen of State of New York, 48 N. Y. Supp. 590, 22 Misc. Rep. 147, affirmed in 53 App. Div. 627, 65 N. Y. Supp. 1146; **Grand Lodge A. O. U. W. v. Stumpf**, 24 Tex. Civ. App. 309, 58 S. W. 840.

Conversely, a new law, consistent with the original laws, and the effect of which is merely to carry out the purpose expressed in such original laws, is binding (*People v. Grand Lodge A. O. U. W.*, 32 Misc. Rep. 528, 67 N. Y. Supp. 330). Thus, where extrahazardous occupations are prohibited, a by-law adding to the list of such occupations is binding, on the theory that it is simply carrying out former conditions (*Gilmore v. Knights of Columbus*, 58 Atl. 223, 77 Conn. 58). So, where the requisite qualification for membership in the association was that the applicant should be a Mason in good standing, a by-law, passed in view of the law of the Masonic lodges, excluding saloon keepers from the privileges thereof, is applicable to the members of the association (*Ellerbe v. Faust*, 25 S. W. 390, 119 Mo. 653, 25 L. R. A. 149). But it was held in *Hobbs v. Iowa Mut. Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983, 31 Am. St. Rep. 466, 11 L. R. A. 299, that a law prohibiting certain occupations, not before prohibited even in general terms, is not binding. It was, however, held in *Mitterwallner v. Supreme Lodge Knights and Ladies of the Golden Star (Sup.)* 86 N. Y. Supp. 786, that a law providing that, in case a member commits suicide, the association shall be liable for only 75 per cent. of the face of the certificate, is binding, though the original contract and by-laws were silent on the subject; the theory of the case being that the member had no vested right to have such a risk covered.

In other cases the general principle that, under a reservation of the right to amend or an agreement to be bound, the member will be bound by subsequent laws, is recognized; but it was held that the reservation or agreement has no reference to matters of contract, but refers only to such amendments or laws as relate to the organization generally, its forms and methods of business, and the duties of members as such.

This doctrine is asserted in *Supreme Council American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153; *Messer v. Grand Lodge A. O. U. W.*, 62 N. E. 252, 180 Mass. 321; *Brower v. Supreme Lodge Nat. Reserve Ass'n*, 74 Mo. App. 490; *Morton v. Supreme Council of Royal League*, 100 Mo. App. 76, 73 S. W. 259; *Campbell v. American Ben. Club Fraternity*, 100 Mo. App. 249, 73 S. W. 342; *Sisson v. Supreme Court of Honor*, 78 S. W. 297, 104 Mo. App. 54.

(2) Same—Laws impairing contract or vested rights.

Though the decision in *Fullenwider v. Supreme Council Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239, which is regarded as a leading case supporting the proposition that by an agreement to comply with the laws thereafter enacted the member is bound by all subsequent by-laws and amendments, has usually been construed as referring as well to amendments and by-laws affecting contract rights as to those merely affecting the general rights of the member, this radical view of the principle has been qualified in most cases. Thus, in the leading case of *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, the court, though asserting the general right of mutual benefit associations to enact by-laws which would be binding on the members, referring especially to a by-law making suicide an excepted risk, nevertheless denies the power of the association to make laws operating to destroy the contract or to deprive the member of all rights under it. So, in *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310, where a by-law of the same character was in issue, the court based its holding on the ground that such a by-law impaired no vested right, and said: "There can be no law or regulation enacted that would destroy the benefit agreed to be conferred upon the member by the laws and regulations in force at the time he joined the order. His contract of insurance cannot be abridged or violated without his consent."

Whatever interpretation may be put on the decisions in the cases cited as supporting the general principle that the association may bind its members by subsequently enacted laws, it must be regarded as well established by the weight of authority that even by a reservation of the right to amend or alter its laws, or an agreement by the member to be bound by laws thereafter enacted, an association cannot by such amendment or alteration impair the obligation of its contracts or deprive the member of his vested rights. A leading case is *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603, where it was said that though the power of a mutual benefit association to alter or amend its laws or repeal them, when exercised in a proper way and for the welfare of the society, is an incident of its existence, there is no power in the society to amend or enact laws which shall work any repudiation of its obligation. It resides in the society only for the purpose of carrying out the objects for which it was formed. Even when

the power is expressly reserved in the charter, it cannot be construed as intending to reserve the power to avoid its contracts or work the destruction of vested rights. A member's contract of insurance may be modified or varied by a subsequent law, and he be bound by it, either through the reserve power in the charter to amend or enact such law or by his contract with reference to future enactments, only so far as it does not operate as a repudiation of the contract or a complete deprivation of the member's rights. So, in *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066, it was said that while the contract, in so far as it consists of the constitution and by-laws, may be changed by an amendment to those instruments, in so far as it consists of something specifically agreed to between the parties, and not necessarily a part of the constitution and by-laws, an amendment changing the contract is invalid. Though the member of a benefit association "agrees to conform to all the lawful regulations and by-laws made for the government of this association," this does not constitute an agreement to be bound by any changes which might be made in his contractual rights after the issuance of the certificate. A corporation has no authority to disturb or destroy rights which it has created, or to impair the obligation of contracts or change the responsibility to its members, or to draw them into new or distinct relations. (*Sieverts v. Nat. Benefit Ass'n*, 95 Iowa, 710, 64 N. W. 671.) Such an agreement cannot be reasonably construed as giving an assent to any change the company may see fit to make in its constitution or laws in the future, which will materially lessen the value of the certificate (*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 93).

These principles are supported by *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 Sup. Ct. 108, 187 U. S. 197, 47 L. Ed. 139; *Jarman v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 95 Fed. 70; *Lloyd v. Supreme Lodge Knights of Pythias*, 98 Fed. 66, 38 C. C. A. 654; *Supreme Council American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153; *Hogan v. Pacific Endowment League*, 33 Pac. 924, 99 Cal. 248; *Covenant Mut. Ben. Ass'n v. Baldwin*, 49 Ill. App. 203; *Covenant Mut. Life Ass'n of Illinois v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Carnes v. Iowa State Travelling Men's Ass'n*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Miller v. Tuttle* (Kan.) 73 Pac. 88; *Courtney v. U. S. Masonic Ben. Ass'n* (Iowa) 53 N. W. 238; *Startling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; *Ebert v. Mutual Reserve Fund Life Ass'n*, 83 N. W. 506, 81 Minn. 116; *Grand Lodge A. O. U. W. v.*

Sater, 44 Mo. App. 445; Brower v. Supreme Lodge Nat. Reserve Ass'n, 74 Mo. App. 409; Morton v. Supreme Council Royal League, 100 Mo. App. 76, 73 S. W. 259; Campbell v. American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342; Sisson v. Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Hall v. Western Travelers' Acc. Ass'n (Neb.) 96 N. W. 170; O'Neill v. Supreme Council A. L. H. (N. J. Sup.) 57 Atl. 463; Gundlach v. Germania Mechanics' Ass'n, 4 Hun (N. Y.) 339, 49 How. Prac. 190; Graftstrom v. Frost Council, No. 21, Order of Chosen Friends, 43 N. Y. Supp. 266, 19 Misc. Rep. 180; Farmers' Loan & Trust Co. v. Aberle, 46 N. Y. Supp. 10, 19 App. Div. 79; McNeill v. Southern Tier Masonic Relief Ass'n, 40 App. Div. 581, 58 N. Y. Supp. 119; Williams v. Supreme Council American Legion of Honor, 80 N. Y. Supp. 713, 80 App. Div. 402; Smith v. Supreme Council A. L. H., 88 N. Y. Supp. 44, 94 App. Div. 357; Parish v. New York Produce Exchange, 61 N. E. 977, 169 N. Y. 34, 56 L. R. A. 149; Langan v. Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932; Shipman v. Protected Home Circle, 67 N. E. 83, 174 N. Y. 398, 63 L. R. A. 347; Beach v. Supreme Tent Knights of Maccabees of the World, 69 N. E. 281, 177 N. Y. 100; Strauss v. Mutual Reserve Fund Life Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Strauss v. Mutual Reserve Fund Life Ass'n, 39 S. E. 55, 128 N. C. 465, 54 L. R. A. 605, 83 Am. St. Rep. 699; Bragaw v. Supreme Lodge Knights and Ladies of Honor, 38 S. E. 905, 128 N. C. 354, 54 L. R. A. 602.

The real issue, where the foregoing principles are recognized, is whether the particular by-law under consideration impairs the obligation of the contract or the vested rights of the member. There is no unanimity among the courts as to what by-laws are or are not open to the objection and no general rules can be deduced. Reference can be made in a general way, only, to the decisions dealing with this phase of the question.

The by-law will be regarded as impairing or destroying contract or vested rights when it diverts the benefit fund to uses not authorized by the charter. Parish v. New York Produce Exchange, 61 N. E. 977, 169 N. Y. 34, 56 L. R. A. 149. The same effect is attributed to a law changing the method of payment of benefits from payment in a lump sum to payment as an annuity. Weller v. Equitable Aid Union, 92 Hun, 277, 36 N. Y. Supp. 734. So, also, as to a law increasing the amount of assessments. Strauss v. Mutual Reserve Life Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Margesson v. Mass. Benefit Ass'n, 165 Mass. 262, 42 N. E. 1132. But see Fullenwider v. Supreme Council Royal League, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239, where it was held that a member has no vested right to insurance at a rate existing when he became a member. Contract rights are impaired by the law providing for forfeiture without notice (Court-

ney v. U. S. Masonic Ben. Ass'n [Iowa] 53 N. W. 238), or imposing additional conditions on reinstatement (*Sieverts v. National Ben. Ass'n of Minneapolis*, 95 Iowa, 710, 64 N. W. 671).

- ▲ A law reducing the amount of benefits payable under the certificate is objectionable as impairing the contract rights of the member. *Jarman v. Knights Templars' & Masons' Life Indemnity Co.* (C. C.) 95 Fed. 70; *Lippincott v. Supreme Council A. L. H.* (C. C.) 130 Fed. 483; *McAlarney v. Supreme Council A. L. H.* (C. C.) 131 Fed. 538; *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33; *Russ v. Supreme Council American Legion of Honor*, 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469; *Newhall v. Supreme Council American Legion of Honor*, 181 Mass. 111, 63 N. E. 1; *O'Neill v. Supreme Council A. L. H.* (N. J. Sup.) 57 Atl. 463; *Langan v. Supreme Council American Legion of Honor*, 66 N. E. 932, 174 N. Y. 266; *Beach v. Supreme Tent Knights of Macabees of the World*, 69 N. E. 281, 177 N. Y. 100; *Williams v. Supreme Council American Legion of Honor*, 80 N. Y. Supp. 713, 80 App. Div. 402; *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066; *Gaut v. Supreme Council A. L. H.*, 64 S. W. 1070, 107 Tenn. 603, 55 L. R. A. 465; *Supreme Council A. L. H. v. Batte* (Tex. Civ. App.) 79 S. W. 629. Contra, see *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409. It has also been held that a law reducing the amount of sick benefits impairs a vested right, if the member is, at the time the law is enacted, disabled and entitled to such benefits. *Becker v. Berlin Ben. Soc.*, 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624; *Poultney v. Bachman*, 62 How. Prac. 466; *Mutual Aid & Instruction Soc. v. Monti*, 59 N. J. Law, 341, 36 Atl. 666. But the opposite view was taken in *Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557, 22 Pac. 1125; *St. Patrick's Male Ben. Soc. v. McVey*, 92 Pa. 510.
- ▲ A by-law making suicide, sane or insane, an excepted risk, does not impair a vested right, and is not objectionable as destroying the contract. *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310; *Morton v. Royal Tribe of Joseph*, 93 Mo. App. 78. The same rule is expressed in *Shipman v. Protected Home Circle*, 67 N. E. 83, 174 N. Y. 398, 63 L. R. A. 347, limited, however, to suicide while sane, and it is conceded that, where a contract of a mutual benefit association is silent on the subject of suicide while insane, the member acquires a vested right to insurance covering that risk, and no subsequent amendment of the laws can affect such right. A by-law reducing the amount of the death benefit in case of suicide is an impairment of a vested right. *Bottjer v. Supreme Council American Legion of Honor*, 75 N. Y. Supp. 805, 37 Misc. Rep. 406. Similarly, where a contract insures against unintentional self-destruction after one year, a by-law extending the period to five years is inoperative. *Weber v. Supreme Tent Knights of Macabees of the World*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753.

So, too, is one making suicide an absolute exception. *Fargo v. Supreme Tent Knights of Maccabees of the World*, 89 N. Y. Supp. 65, 96 App. Div. 491.

Where one is engaged in an occupation not prohibited at the time of his becoming a member, he acquires a vested right to continue therein, of which he cannot be deprived by a subsequent by-law. *Deuble v. Grand Lodge A. O. U. W. of State of N. Y.*, 72 N. Y. Supp. 755, 66 App. Div. 323, affirmed without opinion in 172 N. Y. 665, 65 N. E. 1116; *Hobbs v. Iowa Mutual Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466. But if he enters on an occupation subsequent to becoming a member, and it is thereafter declared prohibited, the by-law prohibiting the occupation does not impair the obligation of the contract. *Loeffler v. Modern Woodmen of America*, 100 Wis. 79, 75 N. W. 1012. So, if one had been engaged in an occupation, but had ceased to be so engaged prior to the passage of a by-law prohibiting it, he acquired no vested right which would prevent such by-law from applying if he subsequently entered the occupation. *Langnecker v. Grand Lodge A. O. U. W.*, 111 Wis. 279, 87 N. W. 293, 55 L. R. A. 185, 87 Am. St. Rep. 860.

A by-law changing the method of determining the beneficiaries does not impair a vested right, as a member has no vested right to have the fund disposed of in the manner provided at the time of admission. *Masonic Mut. Ben. Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192; *Bollman v. Supreme Lodge Knights of Honor* (Tex. Civ. App.) 53 S. W. 722; *O'Brien v. Supreme Council Catholic Ben. Legion*, 68 N. E. 1120, 176 N. Y. 597; *Sanger v. Rothschild*, 123 N. Y. 577, 26 N. E. 3, affirming 50 Hun, 157, 2 N. Y. Supp. 794. If, however, the constitution provides that a member may designate as beneficiary one having no insurable interest, a subsequent law declaring that he cannot do so is invalid as impairing his contract. *Nelson v. Gibson*, 92 Ill. App. 595. See, also, *Hysinger v. Supreme Lodge Knights and Ladies of Honor*, 42 Mo. App. 627.

(c) **Same—Conclusion.**

From an examination of the cases in which the effect on pre-existing contracts of mutual benefit associations of amendments and alterations in the laws of the association has been in issue, the following rules may be deduced: In view of the general power of a mutual benefit association to enact laws for its own government, the members are generally bound by amendments or alterations of the laws made in accordance with the fundamental laws of the association and to which they have assented, so long as they relate only to the business methods of the association and the general duties of the members. Under the reservation of power to amend or alter the laws, or an agreement by the member to comply with

laws thereafter enacted, the association may, for the good of the order, adopt laws which affect the contract, so long as they are reasonable and in harmony with the general purpose and policy of the association; but the association cannot bind the member by laws which materially alter or diminish the value of his contract, or impair his vested rights.

6. PROPERTY AND INTERESTS COVERED BY POLICY OF MARINE INSURANCE.

- (a) Property covered in general.
- (b) Cargo and proceeds thereof.
- (c) Property covered by open or running policy.
- (d) Interests covered by the policy.

(a) Property covered in general.

So far as the ordinary subjects of marine insurance are concerned, there are very few cases that present any features of interest. It would serve no useful purpose to enter into a discussion of the cases wherein the determination of the subject-matter covered by marine policies was dependent on conditions of trade and navigation no longer existing. It is deemed sufficient to show the general principles governing the cases, and for specific illustrations to refer to collections of cases, where the particular facts are set out.¹

It is obvious that the identity of the subject-matter described is the first consideration in construing the policy. Therefore, where there is a mistake as to the vessel intended to be insured, and the policy is upon another vessel than that for which the application was made, no contract exists; and this results though the underwriter was put on inquiry, and with the exercise of diligence could have corrected the mistake (*Hughes v. Mercantile Mut. Ins. Co.*, 55 N. Y. 265, 14 Am. Rep. 254). If the insured vessel is lost, and the wreck is afterwards used in constructing what amounts to substantially a different vessel, the original policy of insurance does not attach to the reconstructed boat (*Sherlock v. Globe Ins. Co.*, 1 Wkly. Law Bul. 26). So, where a steamer was insured by name, and afterwards the machinery, boilers, and wheels were taken off and put on a new hull and cabin, with a view of disposing of the old hull, the company is not liable for the loss of the old hull and cabin, since

¹ See Cent. Dig. vol. 28, "Insurance," cols. 879-896, §§ 327-337.

the specific thing insured has ceased to exist (*Baker v. Central Ins. Co.*, 3 Ohio Dec. 478).

A policy on a vessel may be written as a shifting risk. Thus, a policy on the steamer N. provided that the insurance should cover any other steamer which should take her place "to the same extent as if this policy were originally and specifically written upon the steamer so substituted; * * * notice of such substitution to be given." The C. was substituted for the N., and due notice given. It was held that the policy, by its terms, thereafter attached to the C., and did not reattach to the N. when she resumed her place. (*New Haven Steamboat Co. v. Providence-Washington Ins. Co.*, 54 N. E. 1093, 159 N. Y. 547, reversing 10 App. Div. 278, 41 N. Y. Supp. 1042.)

Policies are sometimes written to cover "property on board." Such a policy will cover money, property of the master or his commissions, articles taken in payment of freight, though not the freight itself.

Holbrook v. Brown, 2 Mass. 280; *Wiggin v. Mercantile Ins. Co.*, 7 Pick. (Mass.) 271; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Whiton v. Old Colony Ins. Co.*, 2 Metc. (Mass.) 1.

A policy on advances covers advances made upon the vessel and cargo separately and independently (*Wright v. Williams*, 20 Hun [N. Y.] 320). In such a policy "advances" refers to matters independent of the ship, such as moneys advanced in her business (*Providence Washington Ins. Co. v. Bowring*, 50 Fed. 613, 1 C. C. A. 583, 1 U. S. App. 183). It does not, therefore, cover repairs, money advanced for her outfit (*Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399, 1 N. E. 837), or commissions for procuring the charter (*Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. 87). A master's draft, though not pledging the vessel or freight, will be covered by a policy "on advances and for disbursements secured by master's draft pledging the vessel and freight," where the owner gave a writing, which was attached to the draft, making it payable from the first freights received at the port of destination, and pledging the vessel, the owners, and the freight for such payment (*Neill v. Union Marine Ins. Co.* [D. C.] 95 Fed. 491, affirmed in 115 Fed. 776, 53 C. C. A. 338). A policy on advances and disbursements by a vessel at and from S. to P. covers advances and disbursements made on or for the outward voyage, in progress when the contract is made. The words "at and from" merely designate the time when

the risk begins. (*International Marine Ins. Co. v. Winsmore*, 124 Pa. 61, 16 Atl. 516.)

Since freight must be insured *eo nomine*, no other interest is covered by an insurance on freight (*Riley v. Delafield*, 7 Johns. [N. Y.] 522), and such a policy will not cover the interest of a charterer (*Cheriot v. Barker*, 2 Johns. [N. Y.] 346, 3 Am. Dec. 437). Where a vessel is insured under two charters, parol evidence is admissible to show which one is insured under a policy "on charter" (*Melcher v. Ocean Ins. Co.*, 59 Me. 217).² A policy insuring freight provided that it should cover, in event of deviation, for not exceeding 18 months from date of policy, at tariff rates of premium; and it was agreed that voyage policies on freight on board or not on board should attach at the first port specified as soon as the inward cargo was landed, and no sooner, whether the vessel was under charter or not, and should terminate at the port or ports of destination with the landing of cargo. "Time risks on freight shall attach and terminate in the same manner, applying to each cargo (or voyage, if in ballast and not chartered) successively, or to each charter successively in case vessel be chartered." It was held that, while the vessel was unloading, the policy covered only the freight of the voyage then ending, and did not insure any part of the freight of the next succeeding voyage, although there was a charter party outstanding. (*Lincoln v. Boston Marine Ins. Co.*, 159 Mass. 337, 34 N. E. 456.)

A policy on passage money covers the amount of the passage money contracted to be paid, or paid in advance, by passengers (*Ogden v. New York Mut. Ins. Co.*, 21 N. Y. Super. Ct. 248, affirmed in 35 N. Y. 418).

(b) Cargo and proceeds thereof.

A policy on cargo will not cover the hull of a boat (*Barry v. Boston Marine Ins. Co.*, 62 Mich. 424, 29 N. W. 31), nor will a policy on goods and merchandise cover a sloop in tow (*Oteri v. Home Mut. Ins. Co.*, McGloin [La.] 198). Cargo policies do not ordinarily cover live stock (*Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. [Md.] 136, 20 Am. Dec. 424), and, unless authorized by custom (*Allen v. St. Louis Ins. Co.*, 85 N. Y. 473, affirming 46 N. Y. Super.

² For the judicial history of this case, see *Melcher v. Ocean Ins. Co.*, 60 Me. 77; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27

L. Ed. 337, reversing 18 Fed. Cas. 547, which latter case reversed 18 Fed. Cas. 540.

Ct. 175), or specifically mentioned, goods carried on deck are not included in the policy on cargo.

Smith v. Mississippi Marine & Fire Ins. Co., 11 La. 142, 30 Am. Dec. 714; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178; *Atkinson v. Great Western Ins. Co.*, 4 Daly (N. Y.) 1; *Allegre's Adm'r v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 186, 20 Am. Dec. 424.

The custom being shown, however, such goods will be covered by the policy. *Hazelton v. Manhattan Ins. Co.* (D. C.) 12 Fed. 159; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Orient Mut. Ins. Co. v. Reymershoffer's Sons*, 56 Tex. 234.

A description of the vessel may be a necessary part of the description of the cargo covered by the policy. Thus, where the policy was on goods on board the brig A., such policy will not cover goods if it appears that they were actually shipped in a second vessel, also called A., which was in fact a brigantine (*Sea Ins. Co. v. Fowler*, 21 Wend. [N. Y.] 600). So, where the cargo to be shipped by the vessel of a certain line was actually shipped in a vessel merely chartered by the line under a contract of affreightment, the possession and control remaining in her owners, it is not covered (*Red Wing Mills v. Mercantile Mut. Ins. Co.* [D. C.] 19 Fed. 115).

A policy on cargo out and home covers cargo taken on board at any of the ports designated as outward ports (*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664); and, if the policy covers cargo and proceeds, it will cover such portion of the proceeds as is represented by a return cargo (*Haven v. Gray*, 12 Mass. 71). It will not, however, cover the identical outward cargo brought home (*Dow v. Whetten*, 8 Wend. [N. Y.] 160). While it is not necessary that the cargo should actually be laden at the initial port named in the policy (*McCargo v. Merchants' Ins. Co.*, 10 Rob. [La.] 334), a policy will not cover goods brought to the initial port on the outward voyage (*Murray v. Columbian Ins. Co.*, 11 Johns. [N. Y.] 302). A policy on time simply necessarily implies a trading voyage, with liberty to dispose of the goods insured; and the policy attaches, however often the goods may be changed.

Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283; *Phoenix Fire Ins. Co. v. Cochran*, 51 Pa. 143.

If the policy is on goods "laden or to be laden," it will cover goods to be laden at a future time (*Hinck v. Home Ins. Co.*, 19 La. Ann.

527). A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days (*Atkins v. Boylston Fire & Marine Ins. Co.*, 5 Metc. [Mass.] 439, 39 Am. Dec. 692). But a policy on a cargo to be shipped from a certain port "during six months from and after the first day of August" will attach to the cargo, though it is laden on board the vessel a few days before the 1st day of August; the stipulation relating to the time of leaving port, and not to the time of taking on board the cargo (*Sorbe v. Merchants' Ins. Co.*, 6 La. 185).

Where two policies were issued, covering all merchandise belonging to the insured from the moment it became his property in Yucatan until discharged from the steamer in Boston, fixing the rate, but left the amount of the premium and the insurance to be determined by the invoice, which might not arrive until after the cargo, such policies were nevertheless contracts for specific insurance, within a clause in a third policy declaring that goods covered by specific insurance should not be included in such policy (*Peabody v. Liverpool & London & Globe Ins. Co.*, 171 Mass. 114, 50 N. E. 526).

(c) Property covered by open or running policy.

An open or running policy is one in which an aggregate amount is expressed in the policy, to cover specific amounts and subjects to be indorsed thereon from time to time (*Corporation of London Assur. v. Paterson*, 106 Ga. 538, 32 S. E. 650). It is a contract to effect future insurance on shipments made in accordance therewith (*Oteri v. Home Mut. Ins. Co.*, McGloin [La.] 198), and constitutes in effect as many contracts of insurance as there are indorsements of separate subjects (*Douville v. Sun Mut. Ins. Co.*, 12 La. Ann. 259). Such a policy sometimes provides that the insured, desiring to cover any particular shipment of merchandise, shall present to the company an invoice of the goods. In such case only such goods are covered as are included in the bill of lading or invoice (*Douville v. Sun Mut. Ins. Co.*, 12 La. Ann. 259) furnished to the company previous to the loss. Shipments by a regular invoice or bill of lading will be covered by such a policy, though such invoice includes several small shipments united in one consignment to a single consignee (*Block v. Columbian Ins. Co.*, 42 N. Y. 393). If it is the custom to consider all cotton shipped to a merchant as covered by an open policy of insurance, unless the contrary is expressed in the bill of lading, the company is bound for all cot-

ton shipped, where no such reservation is expressed (*Bramstein v. Crescent Mut. Ins. Co.*, 24 La. Ann. 589).

When so stipulated in the policy, an indorsement of the particular risk is necessary to cover the property.

Shearer v. Louisiana Mut. Ins. Co., 14 La. Ann. 797; *Edwards v. St. Louis Perpetual Ins. Co.*, 7 Mo. 382; *Kratzenstein v. Western Assur. Co. of Toronto*, 53 N. Y. Super. Ct. 505. The requirement as to indorsement is, however, waived, if no space was left on the policy to make such indorsements (*Callaway v. Orient Ins. Co.* [D. C.] 63 Fed. 830), or where it had been the custom of the insurer to accept such risks, though not notified to them by the insured, but by the company's agent (*Insurance Co. of North America v. Bell*, 25 Tex. Civ. App. 129, 60 S. W. 262). Under a policy providing that notice of the shipments should be made on or before the last day of every month, but that shipments whose bills of lading contained a waiver of insurance should be excluded, the insured was excused from making return on a shipment, the bill of lading of which contained a waiver inserted without authority, thereby misleading him and delaying the giving of the proper notice (*Marine Fire Ins. Co. v. Burnett*, 29 Tex. 433).

The provision in an open policy that shipments shall be reported to the company will not be construed to mean all shipments, especially if it is known that the insured does not intend to insure all shipments (*Callaway v. Orient Ins. Co.* [D. C.] 63 Fed. 830); but no risk can be legally indorsed on such a policy without the assent of both parties (*Hartshorn v. Shoe & Leather Dealers' Ins. Co.*, 15 Gray [Mass.] 240). This opens the question whether the insurer can refuse to indorse a risk offered him. In *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397, where the policy contained a clause that the insured should forward advices of the shipment as soon as known to him, the fact that a loss occurred and became known to the insured before the shipment was reported to the insurer for indorsement on the policy was held not to release the insurer from his obligation to make the indorsement, provided it was reported as soon as known to the insured. A leading case is *E. Carver Company v. Manufacturers' Ins. Co.*, 6 Gray (Mass.) 214, where notice of the shipment was sent to the insurer on August 26th, being received by the insurer on the 27th. As a matter of fact the vessel was burned on the evening of the 26th, and the insurer refused to indorse the shipment on the policy. The court held that the insurer had no right under the circumstances to refuse to indorse the risk. The theory of the case seems to be that the insured had sent a proper notice to the insurer, the contract was practically

complete, and therefore the insurer had no right to refuse to perform his part of the contract. In this respect the case is regarded as differing from *Hartshorn v. Shoe & Leather Dealers' Ins. Co.*, 15 Gray (Mass.) 240, where the insured did not request any indorsement to be made on the policy until notice of the loss had been received. In such a case the court held that the company had the right to refuse to make the indorsement. So, in *Platho v. Merchants' & Manufacturers' Ins. Co.*, 38 Mo. 248, the application for indorsement was not made until after the loss, and the insured failed to bring his policy with him to have the proper indorsement made. The agent of the insurer reminded him that he must have the policy to make the proper entry. Though at this time the loss was unknown to the party, the knowledge thereof came to the agent on the same day, and, when the insured came with the policy to have the indorsement made, it was refused. The refusal was held to be justified. A similar principle was apparently applied in *Neville v. Merchants' & Manufacturers' Mut. Ins. Co.*, 19 Ohio, 452; that is, that, no agreement as to indorsement having been reached before the loss, the property was not covered. The mere fact that during a long course of dealing no risk has been rejected by the insurer does not abrogate the vital provision of these policies, requiring each risk to be approved and indorsed; nor does it bind the insurer to approve a risk the report of which is not received until after it is known that the shipment has been lost (*Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387, reversing [D. C.] 105 Fed. 642). However, where an indorsement is not entered through mistake, equity will enforce an entry of the risk (*Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548).

As to what constitutes a sufficient indorsement and acceptance of the risk, see *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387; *Schaefer v. Baltimore Marine Ins. Co.*, 33 Md. 109; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Edwards v. Mississippi Valley Ins. Co.*, 1 Mo. App. 192; *Heilner v. China Mut. Ins. Co.*, 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177; *Petrie v. Phenix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380, affirming 57 Hun, 591, 11 N. Y. Supp. 183.

(d) Interests covered by the policy.

It is, in general, sufficient that the subject-matter of insurance and the nature of the risk are set forth in the policy, without any statement as to the nature or extent of the interest insured, and in

case of loss the insured will be entitled to recover on proof of any insurable interest in the property covered by the policy (*Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684). Consequently one insuring a cargo generally may recover on proving that he has a special interest therein as common carrier (*Van Natta v. Mutual Security Ins. Co.*, 4 N. Y. Super. Ct. 490). Under a policy covering sundry cargoes belonging to insured "and his agents," the interest of the insured as owner and also his interest as agent is covered (*Marine Ins. Co., Limited, of London, Eng., v. Walsh-Upstill Coal Co.*, 68 N. E. 21, 68 Ohio St. 469). The general rule is that the policy covers only the interests intended to be covered at the time it was taken out (*Catlett v. Pacific Ins. Co.*, 5 Fed. Cas. 291). But extrinsic evidence may be resorted to, to determine what interests were intended by the description in the policy.

Catlett v. Pacific Ins. Co., 5 Fed. Cas. 291; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85.

In the absence of the words "for whom it may concern," or their equivalents, indicating an intent to cover the interest of persons other than the one to whom the policy is issued, such policy will be construed as covering only the interest of the latter.

Finney v. Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; *Wise, Assignee of Eubank, v. St. Louis Marine Ins. Co.*, 23 Mo. 80.

And where, under an open policy issued to forwarders "for whom it may concern," a certificate is issued in the name of the forwarders only, without the addition of the words "for whom it may concern," the insurance by that particular certificate will be regarded as covering only the interest of the forwarders (*Providence-Washington Ins. Co. v. The Sidney* [D. C.] 23 Fed. 88). So a policy in the name of one joint owner "as property may appear," without any clause stating the insurance to be for the benefit of all concerned, does not cover the interest of another joint owner (*Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, 2 L. Ed. 324). Though a policy containing the words "on account of whom it may concern" will be construed as an insurance on the interest of such persons as the one taking out the policy intended and was authorized to insure (*Forgay v. Atlantic Mut. Ins. Co.*, 25 N. Y. Super. Ct. 79), a policy will not cover an interest not intended, though it contains apt words for that purpose.

Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561; *Pacific Ins. Co. v. Catlett*, 4 Wend. (N. Y.) 75.

A policy "for account of whom it may concern" covers the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended is not then known (*Hagan v. Scottish Union & National Ins. Co.*, 22 Sup. Ct. 862, 186 U. S. 423, 46 L. Ed. 1229, reversing 102 Fed. 919, 43 C. C. A. 55). It does not cover the interest of a mortgagee of a vessel whose interest at the time of the loss has not become absolute by a failure to repay the advances (*McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448).

A time policy for a succession of voyages, made at the instance of A. on account of whom it may concern for a specific sum, is an agreement by the underwriters to insure all the interest, to the extent of the sum mentioned, which shall be owned in the vessel at the time of her loss within the policy (*Henshaw v. Mutual Safety Ins. Co.*, 11 Fed. Cas. 1189). If a policy on a vessel "for whom it may concern" contains a clause, "The above is to cover their claim for supplies furnished said vessel," the insurance covers both the interest in the vessel and in the supplies (*Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me. 55). Such a policy may cover the interest of the consignee of the cargo (*Aldrich v. Equitable Safety Ins. Co.*, 1 Fed. Cas. 336), or of a charterer who has obligated himself to advance freights (*The Clintonia* [D. C.] 104 Fed. 92). So a policy issued to a charterer, insuring the cargo against general average charges, "as well in his own or their own name as for and in the name of all and every other person or persons to whom the subject-matter of this policy may appertain," covers the entire cargo in a vessel whether owned by the charterer or by others (*Munich Assur. Co. v. Dodwell & Co., Limited*, 128 Fed. 410, 63 C. C. A. 152).

A policy taken out by one joint owner will cover the interest of another joint owner, if ratified by him (*Turner v. Burrows*, 8 Wend. [N. Y.] 144); but as a part owner has no general authority, by reason of the joint ownership, to insure for his co-owner, there must be a ratification, in order that the policy shall cover the interest of such a co-owner (*Knight v. Eureka Fire & Marine Ins. Co.*, 26 Ohio St. 664, 20 Am. Rep. 778).

7. PROPERTY COVERED BY POLICY—FIRE AND CASUALTY INSURANCE.

- (a) General rules.
- (b) Location of property.
- (c) Same—Shifting location.
- (d) Same—Temporary removal.
- (e) Use of property.
- (f) Buildings—Additions and appurtenances thereto.
- (g) Fixtures.
- (h) Manufacturers' and mercantile stock.
- (i) Same—Hazardous articles.
- (j) Machinery—Tools.
- (k) Household furniture—Grain and crops.
- (l) Property excluded.
- (m) Shifting risk.
- (n) General and specific insurance.
- (o) Modification and reformation.
- (p) Questions of practice.

(a) General rules.

As more fully appears from the rules discussed in dealing with the interests covered by insurance on property, the subject of insurance is always an interest in certain property, and never the property itself. In speaking of this, the Supreme Court of the United States says: "It is to be observed that, whether insurance be against fire or marine loss, or loss of life, it is neither the property nor the loss that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss either of property or life has occurred, and to give compensation to some one interested in the life or the property for the loss of that life or injury to the property." (Insurance Co. v. Thompson, 95 U. S. 547, 549, 24 L. Ed. 487.) Nevertheless, since in property insurance the destruction of certain tangible property is the casualty insured against, and since the interest covered must always be in such property, it is always necessary to determine just what the tangible property is on the destruction of which the company agrees to make good any loss accruing therefrom to the insured, and this tangible property is commonly spoken of as the "property covered" or as the "subject of insurance."

In construing the policy to determine what property will fall within its terms, the courts have frequently invoked the rule that,

since the terms of the policy are framed by the insurer, it must be liberally interpreted in favor of the insured.

This rule being of universal application, the citation of a few cases emphasizing it is deemed sufficient: *Liverpool & London & Globe Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399; *Zeigler v. Clinton Mut. County Fire Ins. Co.*, 84 Ill. App. 442; *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 178 Ill. 64, 52 N. E. 862, affirming 78 Ill. App. 137; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Hale v. Springfield Fire & Mar. Ins. Co.*, 46 Mo. App. 508; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 350; *Grandin v. Rochester German Ins. Co.*, 107 Pa. 26.

But where the words of description in a policy of reinsurance were furnished to the reinsurer by the reinsured, and the policy of reinsurance was in the exact language which the original insurer had prepared and furnished, it was held that any ambiguity must be determined against the original insurer (*London Assur. Corp. v. Thompson*, 170 N. Y. 94, 62 N. E. 1066).

Another rule, often applied in determining the property covered, is that, in case of conflict between the written and printed portions of the policy, the written portion will prevail.

Hagan v. Scottish Union & Nat. Ins. Co. (D. C.) 98 Fed. 129; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 393); *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200; *Pindar v. Kings County Fire Ins. Co.*, 36 N. Y. 648, 93 Am. Dec. 544; *Steinbach v. La Fayette Fire Ins. Co.*, 54 N. Y. 90; *Hall v. Ins. Co. of No. America*, 58 N. Y. 292, 17 Am. Rep. 255; *Johnston v. Niagara Fire Ins. Co.*, 118 N. C. 643, 24 S. E. 424; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. 366, 38 Atl. 1081; *Mascott v. Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420.

Where it is provided in the charter of a company that it can only insure property of a certain description or while located in a certain place, words in the policy of doubtful import will be construed as intended only to cover property within the limits prescribed.

Willey v. Farmers' Mut. Fire Ins. Co., 52 Mich. 446, 18 N. W. 2
O'Neil v. Pleasant Prairie Mut. Fire Ins. Co., 71 Wis. 621, 38 N.

W. 345; *Brandt v. Berlin Farmers' Mut. F. & B. V. Co.*, 84 N. W. 180, 108 Wis. 231; *Knapp v. North Wales Mut. Live Stock Ins. Co.*, 11 Montg. Co. Law Rep'r (Pa.) 119.

But such phrases in the charter will be strictly construed, so as to favor the validity of insurance written by the company.

Soli v. Farmers' Mut. Ins. Co., 51 Minn. 24, 52 N. W. 979; *Bergstrom v. Farmers' Mut. Ins. Co.*, 51 Minn. 29, 52 N. W. 980; *Langworthy v. C. C. Washburn Flouring Mills Co.*, 77 Minn. 256, 79 N. W. 974; *Coventry Mut. Live Stock Ins. Ass'n v. Evans*, 102 Pa. 281.

Oftentimes where the policy has been founded upon an application, and particularly where the application has been made a part of the contract, the court has referred to such application as an aid in determining just what property was intended to be covered by the insurance.

Reference may be made to the following cases: *Brugger v. State Inv. Ins. Co.*, 4 Fed. Cas. 472; *Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 300; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355; *Menk v. Home Ins. Co.*, 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; *Zeigler v. Clinton Mut. County Fire Ins. Co.*, 84 Ill. App. 442; *Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70; *Planters' Mut. Ins. Co. of Washington Co. v. Deford*, 38 Md. 382; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468; *Parks v. General Interest Assur. Co.*, 5 Pick. (Mass.) 34; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428; *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545; *De Graff v. Queen's Ins. Co.*, 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Bowman v. Agricultural Ins. Co.*, 2 Thomp. & C., 261, affirmed 59 N. Y. 521; *Howard Ins. Co. v. Bruner*, 23 Pa. 50; *Beatty v. Lycoming County Ins. Co.*, 52 Pa. 456; *Eddy St. Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426; *Brandt v. Berlin Farmers' Mut. F. & B. V. Co.*, 108 Wis. 231, 84 N. W. 180.

But where, under the policy, construed in the light of surrounding circumstances, a certain building was covered, it was held to make no difference that a printed article attached to the policy required the applicant to declare the construction of each building, how occupied, etc.; such conditions not having been incorporated into the body of the policy, nor insistence placed upon a compliance therewith (*Workman v. Insurance Co.*, 2 La. 507, 22 Am. Dec. 141). And under Laws Minn. 1895, p. 417, c. 175, § 52, providing

that the application of the insured should not be considered as a warranty or a part of the contract, except so far as it should be incorporated fully in the policy, the description of the property insured as contained in the application (which was not by the policy made a part thereof), was held not to limit the description stated in the policy (*Coleman v. Retail Lumberman's Ins. Ass'n*, 79 N. W. 588, 77 Minn. 31).

So far as fixing the property covered is concerned, it is not essential that the description be absolutely accurate. Any false portions of the description may be omitted, and the policy will still be valid, if enough remains to identify the property.

Hatch v. New Zealand Ins. Co., 67 Cal. 122, 7 Pac. 411; *Heath v. Insurance Co.*, 1 Cush. (Mass.) 257; *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708. But see *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, where it was said that an agreement to insure a stone house would effect no contract to insure a house partly stone and partly wood.

The case of *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232, involved a form of policy common in marine insurance, but of infrequent occurrence in other risks. The insurance was against loss of packages transported by mail, and was effected under a running policy providing that no risk should attach until a letter of advice was deposited in the post office while the property was in good safety. The evidence as to the mailing of the letter was involved, the court holding that it justified a finding that the letter was deposited in the mail box prior to the stealing of the money.

(b) Location of property.

Questions as to the location of the property and the description thereof as contained in the policy, where the identity of the property covered is not involved, doubtless belong, from a theoretical standpoint, to the risks assumed and excluded, rather than to the property covered. But from a practical standpoint the location of property may be, and generally has been, considered rather as a part of the description thereof. Without, therefore, attempting to draw any academic distinction between the two classes of cases, it may be laid down as a general rule that the location and situation of property as given in the contract constitute an essential ele-

ment in the description of the property, and where the property is not located as described no recovery can be had.

It is deemed sufficient to refer to *Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.*, 8 Fed. Cas. 300; *Severance v. Continental Ins. Co.*, 21 Fed. Cas. 1103; *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Shertzer v. Mutual Fire Ins. Co.*, 46 Md. 506; *Sampson v. Security Ins. Co.*, 133 Mass. 49; *Goodhue v. Hartford Fire Ins. Co.*, 184 Mass. 41, 67 N. E. 645; *Willey v. Farmers' Mut. Fire Ins. Co.*, 52 Mich. 446, 18 N. W. 212; *English v. Franklin Ins. Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906; *Todd v. Germania Fire Ins. Co.*, 1 Mo. App. 472; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Wright v. Bankers' & Merchants' Town Mut. Fire Ins. Co.*, 73 Mo. App. 365; *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. 311; *London & Lancashire Fire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. 424; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

Of course, a policy on a particular kind of property, without reference to location, does not require it to be in any particular place (*Line Lexington Ins. Co. v. Eastburn*, 3 Walk. [Pa.] 88). But where the contention was as to which of two places the parties had in mind as the location of the insured property, and there was no evidence that either party contemplated insurance without regard to the location of the property, a charge that, if insurer thought of one place and insured of another, the contract was good for any place in the town, and the question of location was not material, was error (*Montgomery v. Delaware Ins. Co.*, 55 S. C. 1, 32 S. E. 723).

Location is essential, also, in the case of reinsurance, and therefore, where the agreement was to pay all losses on all policies issued by the reinsurer upon risks "in the state of New York only, and not elsewhere," it was held that the reinsured could not recover for a loss paid by it on property located elsewhere, though the policy on such property was executed in New York and with a citizen of that state (*London & Lancashire Fire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. 424).

A clause specifying property as situated in a certain location, following the description of all the property insured, will apply to all the property.

Hews v. Atlas Ins. Co., 126 Mass. 389; *North American Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638.

But in *Ætna Ins. Co. v. Strout*, 16 Ind. App. 160, 44 N. E. 934, where the phrase preceded the description of part of the property, it was held not to apply thereto. That the position of such a phrase will not, however, be permitted to govern the evident intent of the parties, is shown by two cases in which a clause referring to the contents of barns, coming between the description of two barns, was held to create a case of ambiguity, so that it might be shown that it was in fact intended to insure the contents of the last-described barn.

Zeigler v. Clinton Mut. Co. Fire Ins. Co., 84 Ill. App. 442; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521, affirming 2 Thomp. & C. 261.

The most usual description of the location of personal property is as "contained in" a certain building. Under this description it is essential to determine whether the goods were actually within a building answering the description given in the policy; and this must, of course, depend largely on the phraseology and circumstances of each particular case. Sometimes the question has been as to whether the building would fall within the description, aside from any question arising from the use of additions, annexes, etc.

Property in "dwelling house" does not include such property when stored in the barn, on the theory that the barn is a part of the curtilage. *English v. Franklin Ins. Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377. Property in a "carriage house building belonging with her dwelling" includes property in a building used both as a carriage house and a paint shop, and situated 189 feet from the dwelling. *Robinson v. Pennsylvania Ins. Co.*, 87 Me. 399, 32 Atl. 996; *Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 385, 38 Atl. 320. Insurance on "a sawmill" and machinery "contained therein" will include a planer situated in the building and on the same floor with the sawmill machinery proper, though not a part thereof. *James River Ins. Co. v. Merritt*, 47 Ala. 387. "Three-story granite building" may be used to designate a building containing the insured property, though such building is three stories in front and rear and one story in the middle, with front only of granite. *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225. "Contents" in a granary does not include grain in another building. *Benton v. Farmers' Mut. Fire Ins. Co.*, 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237. "In buildings on the premises" does not include property 30 feet from any building. *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273. "In barn or in fields" includes a horse in a barn not specified in the policy. *Trade Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 48 Am. Rep. 792. A stipulation allowing removal from one building to another, and providing that the insurance

shall attach in "each location," does not insure the goods while in transit. *Goodhue v. Hartford Fire Ins. Co.*, 184 Mass. 41, 67 N. E. 645.

More frequently, however, the difficulty has arisen from the use of an addition, annex, or contiguous building.

Furniture contained in "additions attached" covers the furniture in a building contiguous to the main building, used in connection therewith; it being the only building so attached or connected. *Maisel v. Fire Ass'n of Philadelphia*, 69 N. Y. Supp. 181, 59 App. Div. 461. Grain in "St. Anthony Elevator," a term applied to an entire structure, includes grain both in the main building and in an annex operated therewith and connected by galleries. *Pettit v. State Ins. Co.*, 41 Minn. 299, 43 N. W. 378. But "grain in elevator of the O. T. Company" has been held, under the peculiar circumstances of the case, not to include grain in an elevator leased by the O. T. Company, though it was connected with the elevator owned by them and operated therewith. *Mead v. Phenix Ins. Co.*, 158 Mass. 124, 32 N. E. 945. Goods "in a brick building * * * known as * * * Car Factory" covers goods in a building erected as a wing, with a three-foot opening through the wall; both buildings being used and known as the "Car Factory." *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.) 265. "Contained in the chair factory" includes property stored in an engine house used and connected with the main factory building. *Liebenstein v. Baltic Fire Ins. Co.*, 45 Ill. 301. But "contained in two-story frame building occupied as a chair manufactory" does not include such property. *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303. Property in a "four-story building, known as T.'s Cold Storage Warehouse," covers property in a one-story annex forming an essential part of the warehouse. *Boak Fish Co. v. Manchester Fire Assur. Co.*, 84 Minn. 419, 87 N. W. 932. Machinery "in a brick building, occupied by him as tobacco factory, * * * premises * * * connected with the building by wooden bridges," may be shown to include machinery in an adjacent frame building, used as a part of the factory, and connected with the main building by bridges. *Harris v. Aetna Ins. Co.*, 2 Disn. (Ohio) 599. Goods in a wooden store building includes goods in a lean-to afterwards moved back from the main building, but still connected therewith by a platform and used for the storing of goods. *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656, 66 N. W. 712. "Contained in the first story of the four-story * * * building" may, at least where the description is written with a knowledge of the circumstances, include property in a one-story contiguous building indirectly connected with the four-story building. *Meadowcraft v. Standard Fire Ins. Co.*, 61 Pa. 91. "Communication made with adjoining stores does not prejudice this insurance" does not operate to extend the insurance to goods placed in the adjoining store. *Liddle v. Market Fire Ins. Co.*, 17 N. Y. Super. Ct. 179.

The description of the goods as located in a particular part of the building has also given rise to some litigation.

In the "third story" will include any room in such story, though the policy also contained a provision against moving the property without necessity. *West v. Old Colony Ins. Co.*, 9 Allen (Mass.) 316. In the "store part" does not include property in a part of the building in no way connected with the operation of the store. *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254.

But a policy upon goods in a building, not limiting their situation therein, will cover the goods in whatever part of the building they may be at the time of the loss.

Fair v. Manhattan Ins. Co., 112 Mass. 320; *Clarke v. Firemen's Ins. Co.*, 18 La. 431.

And if there be any uncertainty as to whether all the rooms were intended, it will be resolved against the insurers (*Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 350).

In some cases the location of personal property in certain described buildings has been considered with reference to the street number on such houses.

Eddy St. Foundry v. Hampden Stock & Mut. Fire Ins. Co., 8 Fed. Cas. 300; *Sampson v. Security Ins. Co.*, 133 Mass. 49; *Westfield Cigar Co. v. Insurance Co. of North America*, 165 Mass. 541, 43 N. E. 504; *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382, 47 N. E. 1026; *Edwards v. Fireman's Ins. Co. of Baltimore*, 87 N. Y. Supp. 507, 43 Misc. Rep. 354; *Eddy St. Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426.

In Nebraska it has been held that a misdescription of farm land on which personal property insured is situated is not material to the risk, and will not avoid the policy if the property itself is properly described.

Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; *Omaha Fire Ins. Co. v. Dufek*, 44 Neb. 241, 62 N. W. 465.

But in Minnesota such a misdescription of real property was considered fatal (*Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906).

In many cases the location of personal property is described without reference to any building. In such cases, as elsewhere, the contract will, if possible, be construed to support the indemnity, though violence will not be done to the plain meaning of the words.

Reference may be made to the following: *Fitchburg R. Co. v. Charlestown Mut. Fire Ins. Co.*, 7 Gray (Mass.) 64 ("line of their road" in-

cludes spurs. But, in connection with this case, see *Liverpool & L. & G. Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173, writ of certiorari denied 172 U. S. 647, 19 Sup. Ct. 885, 43 L. Ed. 1182, where the word "line," when used as a word of exclusion, was held not to include a switchyard); *Farmers' Loan & Trust Co. v. Harmony Fire & Marine Ins. Co.*, 51 Barb. 33, affirmed 41 N. Y. 619 ("premises owned or occupied" includes a dredge tied to a wharf occupied by plaintiff); *Webb v. National Fire Ins. Co.*, 4 N. Y. Super. Ct. 497 ("shipyard" may be shown to include boundary streets); *Cook v. Loew*, 69 N. Y. Supp. 614, 34 Misc. Rep. 276 ("lumber in the yard" does not include lumber in forest clearing).

Parol evidence cannot be received in an action on the policy to show that it was the intention of the parties to insure property located elsewhere than as described in the policy.

North American Fire Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; *Boak Fish Co. v. Manchester Fire Assur. Co.*, 84 Minn. 419, 87 N. W. 932; *Weisenberger v. Harmony Ins. Co.*, 56 Pa. 442; *Ætna Fire Ins. Co. v. Brannon* (Tex. Civ. App.) 81 S. W. 560.

But, where an ambiguity arises from an attempt to apply the description of the location as given in the policy to the premises as they really exist, parol evidence is admissible to explain the policy.

Zeigler v. Clinton Mut. County Fire Ins. Co., 84 Ill. App. 442; *Boak Fish Co. v. Manchester Fire Assur. Co.*, 84 Minn. 419, 87 N. W. 932; *Westfield Cigar Co. v. Insurance Company of North America*, 165 Mass. 541, 43 N. E. 504; *Westfield Cigar Co. v. Insurance Company of North America*, 169 Mass. 382, 47 N. E. 1026; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521, affirming 2 Thomp. & C. 261; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108.

And under such circumstances it is the province of the jury to resolve the ambiguity.

Beatty v. Lycoming County Ins. Co., 52 Pa. 456; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108.

It will be sufficient if the evidence reasonably establishes the location of the property. The same particularity is not required in the proof of the description as in an action of ejectment. (*Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.)

(c) Same—Shifting location.

Where, by the charter of a corporation and the policy, the insurance was on certain farm produce "on premises," and the application described a certain tract of land, the insurance could not be

extended to cover produce on another farm, subsequently rented by the insured (*Brandt v. Berlin Farmers' Mut. F. & B. V. Co.*, 108 Wis. 231, 84 N. W. 180). And insurance on the rolling stock of a railroad "on premises owned or occupied" by the railway company did not cover the property while on a road subsequently acquired. The insurance was based on the known amount and exposure of property on the lines owned by the company when the policy issued, and could not be subsequently extended by any purchases of the insured. (*Providence & W. R. Co. v. Yonkers Fire Ins. Co.*, 10 R. I. 74.) The same principle has been applied to the insurance of express matter, where the situation was reversed. The policy insured the property while on a line "owned, leased, or operated" by a certain railroad company. Subsequent to the date of the policy, and prior to the fire, the company lost control of the line on which the property was situated when destroyed. The court held that the property was, nevertheless, still covered, since the risk was taken with reference to the road controlled by the company at the time of the fire, rather than with reference to the care which the particular railroad company might exercise in the control of roads operated by it. (*Northern Pacific Express Co. v. Traders' Ins. Co. of Chicago*, 183 Ill. 356, 55 N. E. 702, reversing 83 Ill. App. 513.) And in *Liddle v. Market Fire Ins. Co.*, 17 N. Y. Super. Ct. 179, the description of property as located on the "corner of" certain streets was held not to include property in a building subsequently erected, which, together with the building described in the policy, formed the "corner" of the streets. Nor can insurance on property in a "new barn, wagon, and wareroom" be extended to cover the contents of a brick warehouse subsequently erected on a portion of the ground on which the barn had been standing (*Lycoming County Ins. Co. v. Updegraff*, 40 Pa. 311). But in *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352, 25 N. W. 796, the court refused to apply such principle to an insurance on horses insured while in use or running in "yard on his [insured's] farm" in a certain town. The nature of the property and its use, the court argued, were such that it would require explicit language to show an intention to confine the insurance to the property while located on the farm owned by the insured at the time of the issuance of the policy. So, also, a policy insuring property in insured's "frame stable and carriage house" on a certain lot has been held to include property while in a frame building, answering the description, which was subsequently erected (*Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 385, 38

Atl. 320). Likewise, "grain in the buildings or in stack" has been held a broad enough term to cover grain in stack on property subsequently purchased by the insured (*Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503).

(d) Same—Temporary removal.

As stated, the location is considered an essential part of the description; but, where the nature of the property is such that it must have been contemplated by the parties that it would be subject to temporary changes of location, the contract will be construed with reference thereto, and, if possible, as covering the property during such temporary changes. Thus, live stock has been held covered while in temporary outside use, though described in the policy as "contained in" a certain building.

Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229; *Haws v. Fire Ass'n of Philadelphia*, 114 Pa. 431, 7 Atl. 159; *American Cent. Ins. Co. v. Haws* (Pa.) 11 Atl. 107.

And the same principle has been applied to live stock described as "situated" on certain premises.

Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494, 95 Am. Dec. 748; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

Wearing apparel has also been held to have been covered while in use away from the building described as "containing" it.

Longueville v. Western Assur. Co., 51 Iowa, 553, 2 N. W. 394, 33 Am. Rep. 146; *Noyes v. Northwestern Nat. Ins. Co.*, 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631.

A clause describing a machine as "stored in" a barn was, in *Everett v. Continental Ins. Co.*, 21 Minn. 76, held not to limit the insurance to the time the machine was so situated. A specified carriage, described as "contained in" a certain building, has been considered as insured while in a repair shop some distance away (*McCluer v. Girard Fire & Marine Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249). And the same rule has been followed in the insurance of "carriages, buggies," etc., forming a part of a livery stock.

Niagara Fire Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694, 17 Am. St. Rep. 115; *London & Lancaster Fire Ins. Co. v. Graves*, 4 Ky. Law Rep. 708.

But in *Bradbury v. Fire Ins. Ass'n of England*, 80 Me. 396, 15 Atl. 34, 6 Am. St. Rep. 219, a contrary conclusion was reached; the

court arguing that the carriages, not being specifically described, could only be identified by the location given in the policy, and that they were not, therefore, covered while absent therefrom. A similar principle was also applied in *Annapolis & Elk Ridge R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37, 3 Am. Rep. 112, where the insurance was on two cars and an engine "contained in" the car house and the engine house. These buildings were not large enough to hold all the cars and engines of the road, and therefore the court decided it must have been intended to limit the risk to those cars which were within the buildings. The phrase "the contents of a barn," as describing property, has been given a like restrictive meaning. Construed otherwise, the court argued the policy might be considered as covering any property which had ever been stabled within the barn, though the total of such property would far exceed the capacity of the building whose "contents" were thus insured. Nor would it make any difference that the agent, at the time of the issuance of the policy, had told the insured that the policy would cover property when outside the barn. (*Farmers' Mut. Fire Ins. Ass'n v. Kryder*, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284.)

In order that the insurance may not cease, the removal must, of course, be temporary in its nature, and such as must have been in the contemplation of the parties when the contract was executed.

Lyons v. Providence Wash. Ins. Co., 14 R. I. 109, 51 Am. Rep. 364, reversing 13 R. I. 347, 43 Am. Rep. 32; *English v. Franklin Fire Ins. Co.*, 55 Mich. 273, 21 N. W. 340; *Benton v. Farmers' Mut. Ins. Co.*, 102 Mich. 281, 60 N. W. 691, 28 L. R. A. 237; *Towne v. Fire Ass'n of Philadelphia*, 27 Ill. App. 433.

It is now, however, provided in most of the standard policies that the insurance is against loss to the property "while located and contained as described herein, and not elsewhere."

Such is the provision of the standard policy in Connecticut, Louisiana, Michigan, Mississippi, New Jersey, New York, North Carolina, Rhode Island, South Dakota, and Wisconsin.

This stipulation has been held sufficient to confine the insurance to the property while in the location described, though by its nature and use (in the particular case, it having been a village fire apparatus) it was subject to be temporarily taken therefrom (*Village of L'Anse v. Fire Association of Philadelphia*, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410). Governed by the same principle are several other cases, in which the limiting clauses

were essentially the same as the standard form, though differing in phraseology. Under such provisions even a temporary removal of the property in its ordinary and customary use will leave it unprotected. Thus, no recovery can be had for property insured "while" in a certain building, if in fact it was destroyed in another building.

Green v. Liverpool & L. & G. Ins. Co., 91 Iowa, 615, 60 N. W. 189;
Eaton v. Phoenix Ins. Co., 15 Ky. Law Rep. 441; *Haws v. St. Paul
Fire & Marine Ins. Co.*, 130 Pa. 113, 15 Atl. 915, 2 L. R. A. 52, af-
firmed on rehearing 130 Pa. 113, 18 Atl. 621, 2 L. R. A. 52.

Where the application was for insurance on "grain, horses, mules, and colts while on premises only, and against loss by lightning while at large," and the insured property was described in the policy essentially as in the application, excepting that the word "only" was omitted, it was held that the property was not covered against loss by fire while on different premises (*Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70).

Nevertheless, the standard policy provision was in a Pennsylvania case (*McKeesport Mach. Co. v. Franklin Ins. Co.*, 173 Pa. 53, 34 Atl. 16) held not to prevent patterns described as being in a "pattern shop" from being covered while in use in another part of the insured factory. And in Minnesota (*De Graff v. Queen Ins. Co.*, 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685) a provision "that the said company shall not be liable for more than," etc., "except as hereinafter provided as specified upon the property described in the places herein set forth and not elsewhere," was held so ambiguous as to admit of a construction referring it merely to the prior description of the property, without particular reference to the place.

In *Willey v. Farmers' Mut. Fire Ins. Co.*, 52 Mich. 446, 18 N. W. 212, it was held (Sherwood, J., dissenting) that the horses and carriages insured as "personal property * * * on farm," in a mutual farm company, whose charter forbade the insuring of property and buildings within 100 feet of other buildings, were not covered while temporarily within a hotel barn, with an exposure within the prescribed distance. An implied liability could not be upheld, the court argued, where an express one would be illegal. But a provision in the charter of a mutual live stock company that the business of the company should be confined to certain counties was held, in *Coventry Live Stock Ins. Ass'n v. Evans*, 102 Pa. 281, not to deprive one who had removed horses insured in such counties to

another county from recovering on the policy for their loss. Of course, a permanent removal of insured animals will remove them from the provisions of the policy of a company whose by-laws provide that the stock insured shall be confined to a specified distance from a given point.

Reck v. Hatboro Mut. Live Stock & Protective Ins. Co., 10 Montg. Co. Law Rep'r (Pa.) 17. See, also, *Reck v. Hatboro Mutual Live Stock Ins. Co.*, 8 Montg. Co. Law Rep'r (Pa.) 202.

(e) Use of property.

Very similar to the description of the location of the property and the limitation of the insurance to the property while so located are clauses in policies limiting the insurance to the property while being used in a certain manner. Such provisions, while they may be considered as limitations of the risk, seem rather, from a practical standpoint, to define the time or circumstances under which the property will be covered. Such clauses are given effect by the courts. Thus, a stipulation that harvesting machinery shall be covered "while" in operation or in use, or in transit between different fields, will not cover such machinery under other circumstances.

Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595, 55 Pac. 417; *Benicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468, 32 Pac. 512; *Mawhinney v. Southern Ins. Co.*, 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87.

A machine, while at a blacksmith shop being repaired for the opening of the harvesting season, cannot be considered as "in transit from place to place in connection with harvesting" (*Mawhinney v. Southern Ins. Co.*, 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87). Nor will a policy insuring a machine "while in use" cover it while stored away in a shed after the close of the harvesting season (*Slinkard v. Manchester Fire Assur. Co.*, 122 Cal. 595, 55 Pac. 417). Where a threshing machine was insured "while not in use," it was held to be covered by the policy while it was standing near a farm house, preparatory to its intended use a few days later, particularly as the fire did not result from any hazard incident to the operation of the machine (*Minneapolis T. M. Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 58 N. W. 819, 23 L. R. A. 576, 47 Am. St. Rep. 572). But in the *Slinkard* Case it was said *arguendo* that a policy on a harvesting machine "while in use" would attach during temporary stoppages of this use while actually engaged in cutting grain.

(2) Buildings—Additions and appurtenances thereto.

The description of buildings, whether for domestic, mercantile, or manufacturing purposes, is usually of such a nature that there is no difficulty in determining the particular building on which the insurance will attach. A few cases, dependent on peculiar circumstances, have, however, arisen.

The word "building," where its use is the result of a clerical error, may cover two buildings. *Shanahan v. Agricultural Ins. Co.*, 6 Pa. Super. Ct. 65. "Two houses situated," etc., may, by the amount of insurance written, be shown to include both the front houses and out-buildings used for storage purposes on the rear of the lots. *Workman v. Insurance Co.*, 2 La. 507, 22 Am. Dec. 141. "Frame building and additions," used as a dwelling and greenhouse, may be shown to include a building used exclusively as a dwelling house; the greenhouse being a separate structure. *Holter Lumber Co. v. Fireman's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207. An agreement to insure a "stone dwelling house" will not attach to a dwelling house partly of frame and partly of stone construction. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52. A reference to a plan of the premises may bring within the policy a building shown on the plan, though not specially mentioned in the policy itself. *A. A. Griffing Iron Co. v. Liverpool & London & Globe Ins. Co.*, 68 N. J. Law, 368, 54 Atl. 409. "Five-story building" properly describes a building with five floors above ground. *Benedict v. Ocean Insurance Co.*, 31 N. Y. 389. A description of a building as "connected * * * with the adjoining building, situate at the corner of," etc., means that the insured building is so situated. *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257. "Barn No. 1, * * * occupied by tenant," may include a granary barn, which for several years had been fitted up as a dwelling and occupied by the hired man. *Saunders v. Agricultural Ins. Co.*, 57 N. Y. Supp. 683, 39 App. Div. 631, reversed on a point of evidence, 167 N. Y. 261, 60 N. E. 635. See, also, earlier report of the same case (37 N. Y. Supp. 769, 2 App. Div. 223), where the description, standing alone, was held not to cover such structure. Likewise, see the opinion of O'Brien, J., in the Court of Appeals, who stated that the result could only have been reached by trying the case on the theory of an action for reformation. "Woodhouse" covers a building with a partial partition, separating it into a carriage room and a woodhouse proper. *White v. Mut. Fire Assur. Co.*, 8 Gray (Mass.) 568.

Most of the litigation involving questions as to the portions of buildings covered has arisen in relation to either additions or fixtures. There are, however, a few special cases not falling within that category.

A cellar is included in a "two-story frame building," at least where reference is made to the application mentioning it. *Menk v. Home Ins. Co.*, 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St.

Rep. 158. A policy on front and rear buildings covers as appurtenances connecting or yard walls. *Monteleone v. Royal Ins. Co. of Liverpool & London*, 47 La. 1563, 18 South. 472, 56 L. R. A. 784. The term "decorations to walls and ceilings" does not cover painting of the outside walls of the building. *Sherlock v. German-American Ins. Co.*, 47 N. Y. Supp. 315, 21 App. Div. 18, affirmed in 162 N. Y. 656, 57 N. E. 1124. Insurance of an unfinished house does not cover materials for finishing the house, which are not in the house insured. *Ellmaker's Ex'rs v. Franklin Fire Ins. Co.*, 5 Pa. 183.

The question as to whether additions, annexes, extensions, etc., to a main building, will be covered by a policy, is dependent on the phraseology of the policy as applied to the actual situation and use of the property. The following decisions are illustrative of the questions involved in the insurance of dwelling houses and their surroundings:

Recovery may be had for an addition described, but not built until after the issuance of the policy. *Perry County Ins. Co. v. Stewart*, 19 Pa. 45. An insurance of a "building and additions thereto, with a shingle roof," occupied by assured as a dwelling, covers a carriage house under the same shingle roof as the main building, and connected therewith on the second floor, which was occupied as a bedroom. *Hannan v. Williamsburgh City Fire Ins. Co.*, 81 Mich. 556, 45 N. W. 1120, 9 L. R. A. 127; *Same v. Westchester Fire Ins. Co.*, 81 Mich. 561, 45 N. W. 1122. A policy on a brick dwelling house "and its additions, adjoining and connecting," embraces a frame addition. *Carpenter v. Allemannia Fire Ins. Co.*, 156 Pa. 37, 26 Atl. 781. A brick building, "including frame additions," covers only frame structures attached to the brick, and not a building 29 feet away. *Franklin Fire Ins. Co. v. Hellerick (Ky.)* 49 S. W. 1066. A two-story brick building "and additions thereto," occupied as a dwelling, includes a separate building in the same yard, partially occupied by insured's servants; there being no other building to which the words could possibly apply. *Phenix Ins. Co. v. Martin (Miss.)* 16 South. 417. "Additions" will not include a separate factory building to the rear of the dwelling and saloon building insured, though the space between the two is roofed over and boarded up. *Rickerson v. German-American Ins. Co.*, 85 Hun, 266, 32 N. Y. Supp. 1026.

In the case of mills and manufactories, the use to which the addition or annex is put is considered of special importance in determining whether it is covered by the policy.

A "one-story frame building, to be occupied by furnaces for smelting zinc," may be shown to consist of two buildings connected by pipes and a platform, one occupied by the furnace for producing gas or

heat, and the other for retorts; the latter being marked on the plat "Furnace A." *Southwest Lead & Zinc Co. v. Phoenix Ins. Co.*, 27 Mo. App. 446. A description of a building as a "sawmill, size 29 by 48 feet," includes the whole of the structure used as a sawmill and sash manufactory, erected at two different times, and with no partition wall, though such completed structure was wider than the dimensions given. *Garrison v. Farmers' Mut. Fire Ins. Co.*, 58 N. J. Law, 235, 28 Atl. 8. Insurance of the main building of a plant, with "all additions thereto adjoining and connecting," covers a separate engine house and a drying house, both connected with the main building by a movable bridge. *Marsh v. New Hampshire Fire Ins. Co.*, 70 N. H. 590, 49 Atl. 88; *Marsh v. Concord Mut. Fire Ins. Co.*, 71 N. H. 253, 51 Atl. 898. A policy on a "planing mill and additions" may include an engine room, from which a shaft furnishes the motive power to the mill, and to which a spout carries the shavings therefrom. *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. 594. The term "elevator building and additions" covers a warehouse 2½ feet distant from the elevator proper, and attached to it by strips of board nailed upon each building; the warehouse being used only as a bin for the storage of grain, conveyed thereto from the elevator by spouts, and discharged therefrom by a conveyor running from both buildings. *Cargill v. Millers' & Manufacturers' Mut. Ins. Co.*, 33 Minn. 90, 22 N. W. 6. The phrase "mill building and all additions thereto adjoining and connecting, * * * occupied by the insured as a pail shop," covers a dryhouse 12 feet from the main building, and connected therewith by a movable bridge; the only other building being a boiler house, and all being connected by steam pipes, and each being a necessary part of the plant. *Marsh v. Concord Mut. Fire Ins. Co.*, 71 N. H. 253, 51 Atl. 898.

But the phrase "additions, alterations, and repairs," as used in a policy insuring a manufacturing plant, and describing it by a plan, confining it to buildings described by numbers, refers only to property described in the policies, and does not cover a separate building, unconnected with the others specified in the plan. *Arlington Mfg. Co. v. Norwich Union Fire Ins. Co.*, 107 Fed. 682, 46 C. C. A. 542. Insurance on a "three-story brick building, occupied as a pottery, * * * known as the 'Pottery Building,'" does not cover a separate two-story boiler house, though the second story is partially used as a storeroom by the pottery company. *Forbes v. American Ins. Co.*, 164 Mass. 402, 41 N. E. 656. A description of property as a "pulp mill building and additions," and "machinery," describing it, contains nothing to suggest a tramway. *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

Where the description of the buildings insured is definite and certain, so that, as applied to the actual situation and condition of the property, no doubt can be entertained as to what buildings or

additions are referred to, parol evidence is not admissible to show a different intent.

Arlington Mfg. Co. v. Norwich Union Fire Ins. Co., 107 Fed. 662, 46 C. C. A. 542; *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801, reversing *Landers v. Insurance Co.*, 43 Hun, 634.

Nor can the jury be permitted to say that the policy was in fact intended to cover other buildings (*Arlington Mfg. Co. v. Norwich Union Fire Ins. Co.*, 107 Fed. 662, 44 C. C. A. 542). But where the designation, as applied to the actual situation, leaves an ambiguity as to the property intended to be covered, parol evidence is admissible to explain the policy and put the court in the position of the parties.

Arlington Mfg. Co. v. Norwich Union Fire Ins. Co., 107 Fed. 662, 46 C. C. A. 542; *Holter Lumber Co. v. Fireman's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856, reversing 28 N. Y. Supp. 1110, 78 Hun, 616; *Harris v. Aetna Ins. Co.*, 1 Cln. R. 361, 2 Disn. (Ohio) 599; *Connecticut Fire Ins. Co. v. Hilbrant* (Tex. Civ. App.) 73 S. W. 558.

And in such cases the question is one for the jury.

Southwest Lead & Zinc Co. v. Phoenix Ins. Co., 27 Mo. App. 446; *Connecticut Fire Ins. Co. v. Hilbrant* (Tex. Civ. App.) 73 S. W. 558.

A statement that parol evidence is admissible to explain the contract does not mean that either party should be permitted to state what buildings he intended to cover by the policy (*Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856, reversing 28 N. Y. Supp. 1110, 78 Hun, 616). The same case further held that it was error to permit the secretary of another company, for the purpose of showing what property was covered, to testify as to the manner in which he would describe the buildings; there being nothing to show that the method of the witness was the general custom, or that the insured knew of any such custom. It has also been held that, where the policy has been assigned to one who has no knowledge of a course of dealing between the parties to the contract, such course of dealing will not be admissible to show what building was intended by them to be covered (*Connecticut Fire Ins. Co. v. Hilbrant* [Tex. Civ. App.] 73 S. W. 558). The fact that one, after taking insurance on a plant generally, takes further insurance on a specific building in the plant, is not evidence that such building was

not included in the first policy (*Marsh v. Concord Mut. Fire Ins. Co.*, 51 Atl. 898, 71 N. H. 253). But in *Saunders v. Agricultural Ins. Co.*, 167 N. Y. 261, 60 N. E. 635, reversing 57 N. Y. Supp. 683, 39 App. Div. 631, where the case was considered as having been tried on the theory of an action for reformation, it was held that a prior policy in another company, used by the insured to indicate to defendant the insurance desired, was admissible against insured, as showing a variance in defendant's policy, which insured must have noticed, and which must have indicated to her that the same property was not covered by both policies.

(g) Fixtures.

Insurance on a store building has been held to include the counters and shelves, if they could not be removed without injuring the building. Whether they could be so removed was a question for the jury, and the fact that a pen was drawn through the printed questions in the application dealing with such property indicated only that such questions were considered immaterial. (*Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 South. 355.) Likewise, the insurer of a building has been held liable for the loss of steampipes, etc., built into and forming a part of the building, though attached to the policy was a slip itemizing insured's property in and about the building, and including such fixtures under a separate item not covered by the defendant's policy¹ (*Niagara Fire Ins. Co. v. D. Heenan & Co.*, 181 Ill. 575, 54 N. E. 1052, affirming 81 Ill. App. 678). But in *West v. Farmers' Mut. Ins. Co.*, 117 Iowa, 147, 90 N. W. 523, a furnace standing on a specially prepared foundation, and put in under a contract that it should be satisfactory, and evidently intended by the owner to form a part of the building, was held covered by a provision of the policy insuring the house, though by taking the furnace to pieces and removing the sections it could have been disconnected from the pipes or flues and removed without injury to the building. The same case further held that a boiler attached to pipes which conveyed hot water to several rooms in the house, its contents being heated by the kitchen range, but it being itself no part of the range, and being supplied from a tank in the attic, was a part of the realty, and covered by the provision insuring the house. The question at issue in such case was whether the property was covered by a provision of the policy insuring the

¹ As to fixtures in general, see Cent. Dig. vol. 23, "Fixtures," col. 1085 et seq.

house, or by a provision insuring the "contents," and the court held that the burden of showing the intention of the owner as to what should be considered fixtures, so as to be included in the house, as against the contents, was upon the insurance company, and that such burden might be sustained by the circumstances of affixing.

An insurance of a building, "including gas, steam, and water pipes, and all other permanent fixtures contained therein," does not constitute a specific assumption of liability as to counters, shelvings, and fixtures, within the meaning of a further provision that the insurer shall not be liable "unless liability is specifically assumed" for loss to "store or office furniture or fixtures" (*Banyer v. Albany Ins. Co.*, 83 N. Y. Supp. 65, 85 App. Div. 122). And it has been held that an insurance on "such other furniture and fixtures as is usual to saloons" will not include a safe (*Moriarty v. United States Fire Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. 132), or chairs (*Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759). Nor is parol evidence admissible to show the meaning of the words "barroom fixtures" as used in an insurance policy (*Hegard v. California Ins. Co.* [Cal.] 11 Pac. 594). But in *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414, it was held that the words "store fixtures" might be shown by custom to include all furniture and other articles in a shop or warehouse necessary or convenient for use in the course of trade. And where the property was placed in the building by a tenant and insured by him as office fixtures, insurance could be recovered thereon as such, though as between insured and his landlord the property was so attached to the realty as to become a part thereof (*Clark v. Svea Fire Ins. Co.*, 102 Cal. 252, 36 Pac. 587). Under a policy insuring "family groceries, * * * lamps, and scales, and other such merchandise," the insurer was held liable for a loss of lamps and scales used by insured as store fixtures, and not kept for sale (*Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 South. 399). Similarly, in *Pencil v. Home Ins. Co.*, 3 Wash. St. 485, 28 Pac. 1031, where a policy gave insurance to a specified amount, certain portions thereof on different parts of the stock, on the safe, and on the store fixtures, it was held that recovery could be had for the safe under a complaint alleging a total loss of fixtures.

(b) Manufacturers' and mercantile stock.

Policies on manufactories, mills, etc., often include stocks of raw materials and also the finished product on hand. Such policies are construed with reference to the purpose for which the property is

held and its necessity for the ordinary processes of the business carried on in the manufactory insured.

"Carriage makers' stock * * * in process of manufacture" embraces unmanufactured stock of the kind mentioned. *Spratley v. Hartford Ins. Co.*, 22 Fed. Cas. 973. Insurance on "a stock of eggs (in pickle)" may, if it was so intended, cover eggs both while being pickled and while being disposed of afterwards. *Hall v. Concordia Fire Ins. Co.*, 90 Mich. 403, 51 N. W. 524. Milk cans are "packages," within a policy on a creamery building, "butter and cheese, * * * and all materials and supplies for the same, including packages." *Cronin v. Fire Ass'n of Philadelphia*, 112 Mich. 106, 70 N. W. 448. Coal in the yards of a meat packing establishment may, if found by the jury to have been intended for use therein, be included in the term "articles used in packing." *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259. "Grain and seed" may, at least where it was so intended, cover oil cake into which the flax seed originally insured has been converted. *Marsh Oil Co. v. Aetna Ins. Co.*, 79 Mo. App. 21, 2 Mo. App. Rep'r, 400. Likewise "contents" of a smokehouse may include cured meat after it has been stored in another building. *Graybill v. Penn Tp. Fire Ins. Ass'n*, 170 Pa. 75, 32 Atl. 632, 29 L. R. A. 55, 50 Am. St. Rep. 747.

A fire policy "on a new bark now being built" will not attach upon articles made for the vessel and delivered in the shipyard where she was being constructed, though they were in condition to be attached and fitted to her as soon as she should be ready to receive them (*Mason v. Franklin Fire Ins. Co.*, 12 Gill & J. [Md.] 468). The court held that the ordinary rule that insurance on a ship covers her tackle, apparel, and furniture, and that the sails of a vessel taken on shore for repair are also covered, would not apply to a case where the insurance was on a bark "being built," of which the articles over which the controversy arose never constituted a part. And in another case it was held that such a policy would not cover timbers cut to be used in the construction of the bark, but which had not been so used, but were scattered about the yard. Such timbers might be worthless for any other purpose, and might be material for the construction of the bark, but they did not constitute the vessel, or any part of her. (*Hood v. Manhattan Fire Ins. Co.*, 11 N. Y. 532, reversing 9 N. Y. Super. Ct. 191.)

Sometimes questions arise as to whether insurance on the stock in trade of a manufacturer will cover the machinery, and, conversely, whether insurance on the machinery will cover the stock in trade.

The words "stock in trade," as applied to a bakery, include the tools, fixtures, and implements necessary to carry on the business.

Moadinger v. Mechanics' Fire Ins. Co., 2 N. Y. Super. Ct. 527. But a policy on the manufactured "stock" and "material" in smelting works will not cover retorts. *American Smelter Co. v. Providence Washington Ins. Co.*, 64 Mo. App. 438, 2 Mo. App. Rep'r, 1146. A policy on "refined oil" in a refinery does not include lard oil used in the process of refining. *Weisenberger v. Harmony Ins. Co.*, 56 Pa. 442.

Conversely, "machinery and implements used in his business as a machinist" will not include machines for sale, particularly where there is another policy on "stock manufactured and in process." *Michel v. American Cent. Ins. Co.*, 44 N. Y. Supp. 832, 17 App. Div. 87.

Sometimes in the insurance of mercantile stock, also, the question turns on the manner or purpose for which the goods are kept.

Thus, though the word "property" includes articles kept wholly or in part for use, as well as those kept for sale, yet, if the policy is upon "merchandise," it will only cover articles kept entirely for the purpose of sale. *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.) 221. The term "merchandise," in a policy "on grain and other merchandise" in warehouses, will not include scales or machinery not kept for purposes of sale. *Kent v. Liverpool & L. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463. Insurance on a stock in trade of cutlery and jewelry will not cover blankets spread on the outside of the store, whereby the building and its contents were preserved. *Welles v. Boston Ins. Co.*, 6 Pick. (Mass.) 182. But a policy issued to a painter, who kept nothing for sale except his productions, on his paints, oils, brushes, and other "merchandise," covered articles necessary and convenient for use in his business, though not kept for sale. *Hartwell v. California Ins. Co.*, 84 Me. 524, 24 Atl. 954. And a policy on a "wholesale stock of drugs * * * and other goods on hand for sale, * * * while contained in the building," will cover goods of the character described, though they are not part of the wholesale business. *Wilson Drug Co. v. Phoenix Assur. Co.*, 110 N. C. 350, 14 S. E. 790.

The most frequent question, however, arising in relation to stocks of mercantile goods, has to do with the effect of a clause of a general character, embracing goods such as are usually found in stocks of like character. What will be embraced by such a clause is, of course, dependent, not only on the words used, but also on the nature of the business.

Insurance on "dry goods, groceries," etc., "and such other articles * * * as are usually kept for sale in a country store," may cover lumbermen's tools, secondhand furniture, and camp equipment. *Steele v. Germania Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85. The term "dry goods" may cover boots, shoes, hats,

and caps. *Bassell v. American Fire Ins. Co.*, 2 Fed. Cas. 1007. A policy on a "stock of watches, watch trimmings," etc., may cover, not only watches, but also silverware, clocks, jewelry, etc. *Crosby v. Franklin Ins. Co.*, 5 Gray (Mass.) 504. Binding twine may be included in an insurance on binders "and all such goods * * * kept for sale in a general implement store." *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa, 70, 64 N. W. 687. The word "guano" will cover fertilizers owned by insured and carried as a part of their stock, where at the date of the policy they owned no guano, but did own other fertilizers. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. A trade usage may be shown, whereby the word "rags" is used to include all articles used in the manufacture of paper, and "old metals" to include such articles as old rubber and old glass, and the company will be presumed to have knowledge of such usage. *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277.

On the other hand, insurance upon a stock "of hair, wrought, raw, and in process, as retail hair store," does not include fancy goods made of other materials, although such as are usually kept in a retail hair store. *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225. A description of property as "lumber, lath and pickets" does not include shingles, though, had the word "lumber" been used alone, the result might have been different. *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. 366, 38 Atl. 1081. The phrase "jewelry and clothing, being stock in trade," does not include musical and surgical instruments, firearms, and books. *Rafel v. Nashville Mar. & Fire Ins. Co.*, 7 La. Ann. 244.

Parol evidence is, of course, admissible to show the trade meaning of the general terms used.

Reference may be made to *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Storm v. Phenix Ins. Co.*, 61 Hun, 618, 15 N. Y. Supp. 281.

And it has been held that, where language of the policy as to what portion of the stock was covered was ambiguous, it was proper to introduce evidence as to what was intended by the parties.

Hall v. Concordia Fire Ins. Co., 90 Mich. 403, 51 N. W. 524; *Graybill v. Penn Tp. Mut. Fire Ins. Co.*, 170 Pa. 75, 32 Atl. 632, 29 L. R. A. 55, 50 Am. St. Rep. 747.

But, where the evidence was as to the meaning of the phrase "dry goods and groceries," the court held that it must at least deal with the meaning of the terms as used at the place where the insurance was effected (*Germania Fire Ins. Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 674). Where an issue is thus raised as to the meaning

of the general term, it is for the jury to determine whether the property destroyed falls within the description given in the policy.

Bassell v. American Fire Ins. Co., 2 Fed. Cas. 1007; *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa, 70, 64 N. W. 687; *Steele v. German Ins. Co. of Freeport*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Huckins v. People's Mut. Fire Ins. Co.*, 31 N. H. 238.

(1) Same—Hazardous articles.

It may be stated as a general rule that where a policy by its written portions covers either a manufacturing plant or a mercantile stock of goods, all articles, regardless of their hazardous nature, which are ordinarily included within such stocks of goods or manufacturing plants, will be covered though it is provided in the printed portions of the policy that it shall be void in case certain classes of hazardous goods are included in the stock; and, of course, parol evidence is properly admitted to show what articles are commonly carried in similar stocks.

Applied to manufacturing plants or stocks: *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; *Wheeler v. Traders' Ins. Co. (N. H.)* 1 Atl. 293; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. 485; *Mascott v. Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75; *Mascott v. First Nat. Fire Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255.

Applied to mercantile stocks: *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.) 545; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 393); *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Pindar v. Kings County Fire Ins. Co.*, 36 N. Y. 648, 93 Am. Dec. 544; *Steinbach v. La Fayette Fire Ins. Co.*, 54 N. Y. 90; *Barnum v. Merchants' Fire Ins. Co.*, 97 N. Y. 188; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. 350; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521. See, also, *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142. But, see, *Steinbach v. Insurance Co.*, 13 Wall. 183, 20 L. Ed. 615.

It is, however, incumbent on the insured to show that the hazardous article is one in common use in manufacturing plants or stocks of goods similar to the one insured.

Georgia Ins. Co. v. Jacobs, 56 Tex. 366; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

The rule that the use of general terms in the description of the subject of the insurance will do away with printed provisions of a contradictory nature has been applied, also, where the policy especially exempted the company from loss by the use of a certain article. In one case (*Harper v. New York City Ins. Co.*, 22 N. Y. 441), where the policy was upon printing and book materials in a building "privileged for a printing office and bindery," it was held that, since camphene was a necessary material for the printing of books, it must be considered as a part of the stock insured, and that, therefore, a clause exempting the company from liability for loss occasioned by camphene related only to a loss occasioned by the use of camphene for purposes other than that of printing. And in another case (*Archer v. Merchants' & Mfgs.' Ins. Co.*, 43 Mo. 434) a policy on a wagon maker's shop, where the use of camphene was customary, was held to cover camphene and risks arising therefrom, though there was a printed provision exempting the company from liability for damages occasioned by the use of such article.

The cases are conflicting as to the effect of a printed stipulation against the keeping or use of certain articles, unless special provision is made therefor, coupled with a permission for the use of a certain kind or quantity of such articles.² Some of the courts have decided that if the general words descriptive of the stock insured are broad enough to cover the articles which in the printed clause are forbidden unless specially mentioned, such articles will all be covered, though there is a further clause permitting the insured to keep a portion, or a certain quantity, of such articles. Such permission is not construed as limiting the effect of the general words describing the subject of the insurance.

Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Steinbach v. La Fayette Fire Ins. Co.*, 54 N. Y. 90.

But in Pennsylvania it has been held that the insertion of the permission, considered with the general prohibition, plainly shows that it was not intended that the policy should cover other prohibited goods than those specified (*Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521). And it may be that the case of *Steinbach v. Insurance Co.*, 13 Wall. 183, 20 L. Ed. 615, is open to this construction.

² Keeping or use of hazardous articles as a ground of forfeiture, see post, vol. 2, p. 1687.

The insurance was of a German jobber, expressed to be on a "stock of fancy goods, toys, and other articles in his line of business." It was provided that the keeping of extrahazardous goods (including fireworks) without special permission should forfeit the policy, and special permission was given for the sale of firecrackers. The court, without, however, specially mentioning any limiting effect which the permissive clause might have on the general terms of the description, held merely that parol evidence was not admissible to show that fireworks were within the ordinary trade of a German jobber, so as to be covered by the words "other articles in his line of business."

Where the policy is specifically written, so as to cover only goods of a certain class of hazard, goods of a more hazardous nature will not be considered as included in the general terms used, and a further clause forfeiting the policy in case goods so excluded are kept will be given full force and effect. Furthermore, the classification of goods given in the policy will be followed in determining whether the goods fall within the classes covered.

Pindar v. Continental Ins. Co., 38 N. Y. 364, 97 Am. Dec. 795; *Same v. Resolute Fire Ins. Co.*, *Id.*; *Id.*, 47 N. Y. 114.

Similarly a policy upon goods described merely as a "stock" of goods, or as located in a certain place, will not cover articles specified in the policy to be not covered thereby (*Johnston v. Niagara Fire Ins. Co.*, 118 N. C. 643, 24 S. E. 424), or to be not insurable unless by special agreement (*Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72). And where it was provided that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction thereon," it was held that insurance on plaintiff's "stock of family groceries and meat store" would not include extrahazardous goods, so as to amount to a waiver of the restrictions against keeping them (*People's Ins. Co. v. Kuhn*, 1 Cent. Law J. 214). So, also, a stipulation in the policy covering fireworks that it should be void whenever any article subject to legal restriction should be kept in quantities or in a manner not allowed by law has been held effective where part of the fireworks kept were entirely prohibited by law. It could not be presumed, the court argued, that the policy was intended to cover an article so specially hazardous that the assured was by law prohibited from keeping it (*Jones v. Fireman's Fund Ins. Co.*, 51 N. Y. 318).

(j) Machinery—Tools.

An insurance of machinery or tools will be construed with reference to the factory or establishment of which it forms a part, and with reference to the use for which it is designed.

An insurance of a "gristmill" may include, not only the building, but the machinery to make it a gristmill. *Driggs v. Albany Ins. Co.*, 10 Barb. (N. Y.) 440. The words "starch manufactory" will include the machinery necessary to the process of such a manufactory. *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill. 553. Insurance on a steam sawmill embraces the machinery necessary to make it a steam sawmill in all its parts. *Bigler v. New York Cent. Ins. Co.*, 20 Barb. (N. Y.) 635. The phrase "engine and machinery * * * for the manufacture of tinware" covers dies used in giving form to the various utensils manufactured. *Seavey v. Central Mut. Fire Ins. Co.*, 111 Mass. 540. "Tools," as used in a policy insuring a manufactory of machinery, includes patterns used in casting. *Lovewell v. Westchester Fire Ins. Co.*, 124 Mass. 418, 26 Am. Rep. 671. "Tools used in the manufacture of boots and shoes" covers patterns used for making such articles. *Adams v. New York Bowery Fire Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149. A plate used for making impressions on the covers of books may be shown to be a "cut," within the meaning of such term as used in a policy insuring a printing and binding establishment. *Houghton v. Watertown Fire Ins. Co.*, 131 Mass. 300.

But the words "instruments, appliances, and material incidental to a dental office" do not include dental books. *American Fire Ins. Co. v. Bell* (Tex. Civ. App.) 75 S. W. 319. Nor do "all other kinds of implements of trade" of a glove manufacturer cover stationery and boxes. *Stemmer v. Scottish Union & National Ins. Co.*, 33 Or. 65, 53 Pac. 498.

A policy insuring "farming utensils" will cover a hay press. *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273. And a "threshing outfit" includes a self-feeder. *Minneapolis Threshing Mach. Co. v. Darnall*, 83 N. W. 266, 13 S. D. 279.

(k) Household furniture—Grain and crops.

The term "household furniture," as used in describing the property insured, will not be confined to such articles as are usually kept in a furniture store, but will include all articles necessary and convenient for housekeeping.

Patrons' Mut. Aid Soc. v. Hall, 19 Ind. App. 118, 49 N. E. 279; *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563, 46 N. W. 659; *Huston v. State Ins. Co.*, 100 Iowa, 402, 69 N. W. 674; *Bowne v. Hartford Fire Ins. Co.*, 46 Mo. App. 473. See, also, *German Fire Ins. Co. v. Seibert*, 24 Ind. App. 279, 56 N. E. 686, where, under the phraseology used, "wearing apparel," mentioned in the policy, was held covered.

A policy on "grain" will also be given broad construction, so as to cover such products of the field as are usually understood by that term.

Insurance on "grain" covers millet hay. *Norris v. Farmers' Mut. Fire Ins. Co.*, 65 Mo. App. 632, 2 Mo. App. Rep'r, 1171. Or broom corn in the bale, though not baled panicles from which the seed has been threshed. *Reavis v. Farmers' Mut. Fire Ins. Co.*, 78 Mo. App. 14, 2 Mo. App. Rep'r, 119. "Grain in stacks and granary on farm" covers unthreshed flax in stacks, which has been raised solely for the seed, and not the fiber. *Hewitt v. Watertown Fire Ins. Co.*, 55 Iowa, 323, 7 N. W. 596, 39 Am. Rep. 174.

A policy on "crops" will cover a growing crop in the field.

Mutual Fire Ins. Co. of Montgomery County v. Dehaven (Pa.) 5 Atl. 65, 18 Wkly. Notes Cas. 125; *De Haven v. Mutual Life Ins. Co.*, 1 Montg. Co. Law Rep'r (Pa.) 98.

(1) Property excluded.

The same broad interpretation given to language used in describing the subject of insurance is not given to language used in excluding certain articles from the protection of the policy. The doctrine already considered, that in construing the language adopted by the company the construction favorable to the insured will, if possible, be adopted, requires that language used to limit the subject of insurance be strictly construed. Thus a policy upon rolling stock of a railroad "upon the line of the road hereby insured, and its branches, spurs, side tracks, and yards owned and operated by the insured, * * * but this insurance shall not apply on the line of any road leased by the insured, unless the name of such leased road is specified as being the insured in part under this policy," has been held to cover rolling stock destroyed in a yard "operated" by the insured in connection with its own line of road, but not owned by it, though the name of the owner of the yard was not specified. The context was held to show that "line of road" meant the line, as distinguished from spurs, yards, and side tracks. (*Liverpool & L. & G. Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173, writ of certiorari denied 172 U. S. 647, 19 Sup. Ct. 885, 43 L. Ed. 1182.) Likewise, a provision that all losses on rolling stock should be settled in accordance with the rules of the Master Car Builders' Association has been held not to exclude cars which were not in good repair (*Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co.*, 31 Tex. Civ. App. 104, 71 S. W. 419).

An exception from the policy of "plate glass in windows, where-

of the dimensions are nine feet or more," does not except from the protection of the policy an immovable plate glass front, though of greater dimensions than those specified (*Hale v. Springfield Fire & Marine Ins. Co.*, 46 Mo. App. 508). An exclusion of "store and other fixtures" will not exclude fixtures in a part of the insured building, used as a shoe factory (*Thurston v. Union Ins. Co.* [C. C.] 17 Fed. 127). So, also, a fire policy insuring a building, but expressed not to cover "fences and other yard fixtures, sidewalks, store furniture, and fixtures," will cover a wooden awning in front of the building, though not shelving in the building, or an office boarded off at one end of the interior (*Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202). But a policy providing that the insurer shall not be liable, "unless liability is specifically assumed," for loss to "store or office furniture or fixtures," and describing the property insured as a building, "including * * * all * * * permanent fixtures contained therein," does not cover counters, shelving, and office fixtures in the building, which might be removed without injury to them or the building (*Banyer v. Albany Ins. Co.*, 85 App. Div. 122, 83 N. Y. Supp. 65). A policy on a hotel, its furniture, etc., which excepts "goods held on storage," covers furniture stored to be used in the business of the hotel (*Continental Ins. Co. v. Pruitt*, 65 Tex. 125); and an exclusion of "plate" does not exclude silver forks and teaspoons and table spoons (*Hanover Fire Ins. Co. v. Mannasson*, 29 Mich. 316). An exclusion of "mills and manufactories will not exclude a place where brooms are made by hand (*Franklin Fire Ins. Co. v. Block*, 57 Pa. 74).

In *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291, the plaintiff was authorized to reinsure in the defendant company the risks taken by plaintiff on certain classes of goods; the amount of any one risk in one building to be limited to \$5,000. More than this amount was re-insured on goods in a building under the same management, but divided into stores which were separate, but which had the same outer walls, the same floor levels, and openings into each other on each floor. The court held that the stores all constituted one and the same building, within the meaning of the contract of reinsurance, and that consequently the reinsurance was beyond the authority of the plaintiff.

(m) **Shifting risk.**

A policy describing in general terms goods of such a nature that the parties to the contract must have understood that they would

be continually changing will cover, not only the property forming the subject of insurance when the policy issued, but all such property as, during the life of the policy, may fall within the terms thereof. The most common illustration of this rule is an insurance of a mercantile or manufacturing stock.

Bates v. Equitable Fire & Marine Ins. Co., 2 Fed. Cas. 1021; *Manchester Fire Assur. Co. v. Felbelman*, 118 Ala. 308, 23 South. 759; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Peoria M. & F. Ins. Co. v. Anapow*, 51 Ill. 283; *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Walton v. Louisiana Ins. Co.*, 2 Rob. (La.) 562; *West v. Old Colony Ins. Co.*, 9 Allen (Mass.) 316; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424, affirming 15 Barb. 413; *Whitwell v. Putnam Fire Ins. Co.*, 6 Lans. (N. Y.) 166; *Sharpless v. Hartford Fire Ins. Co.*, 140 Pa. 437, 21 Atl. 451; *Lucas v. Liverpool & London & Globe Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, affirming 24 N. Y. Super. Ct. 501; *Smith v. Carmack* (Tenn. Ch. App.) 64 S. W. 372.

The rule is not, however, confined to stocks of goods, but has been applied wherever the wording of the policy and the nature of the goods insured has seemed to warrant it.

Farmers' Mut. Fire Ins. Ass'n v. Kryder, 5 Ind. App. 430, 81 N. E. 851, 51 Am. St. Rep. 284 ("contents" of the barn); *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457 (furniture and clothing in a dwelling house); *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 South. 708 (cotton "in cotton house adjacent to gin," and "all while contained in the above-described gin house building"); *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400 (live stock on premises); *New York Gaslight Co. v. Mechanics' Fire Ins. Co.*, 2 N. Y. Super. Ct. 125 (fixtures to the amount of \$5,000 placed or to be placed in buildings).

Under the same general principle, the sale of a portion of a stock of goods has been held not to forfeit the policy as to the property retained by the insured, though it was also provided that the policy should become void in case of a partial transfer or change of title in the property insured (*West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573).³ And even though the insured sell his entire interest in such property it will not forfeit the policy, but only suspend it, for lack of a subject, and if subsequently the insured comes again into possession of the stock (*Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150), or if the policy be as-

³ Effect of change of interest to terminate policy, *see post*, vol. 2, p. 1713.

signed with the company's consent to the vendee (*Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424, affirming 15 Barb. 413), the policy will at once reattach to the stock as it then exists.

Where the vendee, to whom the policy had been assigned, moved his own stock of goods to the store where the insured goods were situated, the policy was held to attach to the aggregate stock (*Walton v. Louisiana Ins. Co.*, 2 Rob. [La.] 562). And in *Cummings v. Cheshire County Mut. Fire Ins. Co.*, 55 N. H. 457, where the insurance was upon "a dwelling house and the furniture and clothing therein," an assignment of the policy to the purchaser of the house, who moved into it, was held sufficient to cause the policy to attach to his furniture and clothing, though he had not purchased the furniture and clothing of the original insured.

There are two diametrically opposed cases as to the effect of a change of interest in a partnership holding a policy on a fluctuating stock of goods. In Vermont (*Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552) it has been held that where a surviving partner, in accordance with a previous agreement, acquires all the interest of his deceased partner in an insured fluctuating stock of goods, the policy will not, of itself, attach on subsequently acquired goods. In New York, on the other hand (*Hoffman v. Ætna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, affirming [1863] 24 N. Y. Super. Ct. 501), a change of interest in the partnership has been held not to affect the rule.

It is, of course, essential that it be shown that the goods for which a recovery is sought had at the time of the loss become an integral part of the stock.

Peoria M. & F. Ins. Co. v. Anapow, 45 Ill. 86; *Id.*, 51 Ill. 283.

The rule as to a shifting risk is not applicable to property specifically described. Thus, an insurance on lithographic presses in a building, the presses insured being permanently fixed for the purpose of being used, will not cover subsequently acquired presses (*Mauger v. Holyoke Mut. Fire Ins. Co.*, 16 Fed. Cas. 1163). And insurance on "engines, shafting, and belting," referring to stationery engines on a farm, will not include a subsequently acquired portable engine (*Wilson v. Union Mut. Fire Ins. Co.*, 55 Atl. 662, 75 Vt. 320). It has also been held that, where the amount of insurance was specifically distributed by the policy on the factory, machinery, apparatus, and furniture insured, a permission to erect a warehouse, "to be included under the policy," did not extend the insur-

ance to such building (*Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319, 37 N. E. 1064). And where it was provided that a mortgage on any of the insured property should forfeit the policy, and the furniture covered at the issuance of the policy far exceeded the amount of insurance, it was held that subsequently acquired furniture, on which there was a mortgage, was not covered, and that conversations between insured and the agent were admissible to show that such property was not within the contemplation of the parties (*Phoenix Ins. Co. v. Dunn* [Tex. Civ. App.] 41 S. W. 109).

(n) General and specific insurance.

Policies are sometimes written to cover generally property of a certain kind belonging to the insured, wherever situated, but excluding property specifically insured. Such a policy will not cover property of the kind designated which is covered by specific insurance, though otherwise it falls within the description in the general policy. Thus, where a policy of insurance was written to cover all of the insured's cotton, wherever situated, but provided, further, that it should not cover property covered in whole or in part by any more specific insurance, it did not cover cotton insured in another company as "cotton in bales contained in S.'s warehouse," etc. Insurance on cotton in a particular warehouse is more "specific" than insurance on cotton in whatever warehouse situated.

United Underwriters' Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565;
Macon Fire Ins. Co. v. Powell, 116 Ga. 703, 43 S. E. 73.

So, also, where one policy insured merchandise generally, situated within a certain building, and provided that property "specifically insured" should not be covered, and another insured poultry contained within the building, it was held that the general policy did not cover the poultry, though the business of insured was such that the amount of poultry within the building was constantly changing (*Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 44 N. E. 746, 162 Ill. 322, reversing 55 Ill. App. 329).

Parol evidence was held admissible to show that a policy on certain merchandise, "either on board the J. S. in this port, or in the brick store," etc., was intended as specific insurance, covering only property shipped on the J. S. (*Stacey v. Franklin Fire Ins. Co.*, 2 Watts & S. 506). Parol evidence has also been admitted to show that a partial cancellation of a policy issued by another company

than defendant was intended to release from its protection a certain horse, which was covered by defendant's policy only in case it was not covered by the first policy (*Pfeifer v. National Live Stock Ins. Co.*, 62 Minn. 536, 64 N. W. 1018). But, where the only testimony as to the existence of another policy consisted of hearsay, it was held that the alleged fact that such other policy covered a portion of the same property as defendant's policy, thereby releasing defendant pro tanto, could not be proved by a deposition to which such other policy was not attached (*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730).

The sufficiency of the evidence to show that the property actually fell within the terms of the other policy and was insured thereby was considered in *McFadden v. Union Assur. Soc. (C. C.)* 112 Fed. 35. And in *Hough v. People's Fire Ins. Co.*, 36 Md. 398, the circumstances surrounding the issuance of the policy and the insertion thereon of numbers in pencil, corresponding with the numbers of receipts for certain bales of cotton, were held to show that the policy covered specific bales of the cotton in a warehouse, and not any bales which the insured might have stored therein.

(c) Modification and reformation.

Questions as to the reformation and modification of the contract are more fully treated under the briefs dealing with those subjects. A collection of cases considering such cases as related to the property and interests covered may not, however, be out of place here.

The policy is, of course, always open to modification as to the property covered by an agreement between the insured and a proper officer or agent of the company.

Thuringia Ins. Co. of Erfurt, Germany, v. Goldsmith (C. C. A.) 132 Fed. 456; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. 577, 60 Am. St. Rep. 210; *Butterworth v. Western Assur. Co.*, 132 Mass. 489; *Goodall v. New England Fire Ins. Co.*, 25 N. H. 169; *Northrup v. Piza*, 60 N. Y. Supp. 363, 43 App. Div. 284, affirmed 60 N. E. 1117, 167 N. Y. 578; *Solms v. Rutgers Fire Ins. Co.*, 4 Abb. Dec. (N. Y.) 279, reversing 21 N. Y. Super. Ct. 578; *Sharpless v. Hartford Fire Ins. Co.*, 8 Pa. Co. Ct. R. 387; *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552; *Warner v. Peoria Marine & Fire Ins. Co.*, 14 Wis. 318; *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. 351, 9 C. C. A. 1, 19 U. S. App. 510; *Shertzer v. Mut. Fire Ins. Co.*, 46 Md. 506.

Fraud or mistake in describing the property or interests will justify a reformation by the courts.

Brugger v. State Inv. Ins. Co., 4 Fed. Cas. 472; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Hartford Fire Ins. Co. v. Haas*, 10 Ky. Law Rep. 573, 9 S. W. 720, 87 Ky. 531, 2 L. R. A. 64, affirming 8 Ky. Law Rep. 610; *Pictet Spring Water Co. v. Citizens' Ins. Co. (Ky.)* 71 S. W. 514; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, affirming 6 Hun. 353; *New York Ice Co. v. Northwestern Ins. Co.*, 12 Abb. Prac. (N. Y.) 414; *Strong v. North American Fire Ins. Co.*, 1 Alb. Law J. (N. Y.) 162; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Le Gendre v. Scottish Union & National Ins. Co.*, 88 N. Y. Supp. 1012, 95 App. Div. 562; *Spring Garden Ins. Co. v. Scott*, 27 Leg. Int. (Pa.) 76; *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622; *Blake Opera House Co. v. Home Ins. Co.* (1889) 73 Wis. 667, 41 N. W. 968.

It must, however, plainly appear that it was the intention of both parties to cover the property for which recovery is sought.

Severance v. Continental Ins. Co., 21 Fed. Cas. 1103; *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371, 79 Am. Dec. 539; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240, 14 Am. Rep. 249, 46 How. Prac. 498, affirming (1873) 35 N. Y. Super. Ct. 394; *Mead v. Westchester Fire Ins. Co.*, 3 Hun (N. Y.) 608; *Snow v. National Cotton Oil Co.* (Tex. Civ. App.) 34 S. W. 177.

(p) Questions of practice.

The complaint must, of course, allege that the property which was destroyed was the insured property, and the description given in the complaint must be substantially correct, and agree with that given in the policy.

In *Hartford Fire Ins. Co. v. Hadden*, 28 Ill. 260, a minor variance between the description of the interest in the declaration and a true interest was held not fatal. And in *Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 316, an immaterial error in the description in the policy was held not to create a variance between it and the true description in the complaint. But in *Summers v. Home Ins. Co.*, 53 Mo. App. 521, the complaint was held defective, as not showing that the property destroyed was the property insured. See, also, *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534, 38 Pac. 136, and *Powers v. New England Fire Ins. Co.*, 35 Atl. 331, 68 Vt. 390, where the description of the property in the policy did not agree with the contract alleged to have been made.

Points dealing with the admissibility of parol evidence to show what was covered by the insurance have been considered under the

preceding substantive paragraphs. Reference may, however, be made to the following cases.

Leftwich v. Royal Ins. Co. of Liverpool, 46 Atl. 1010, 91 Md. 596; *Clinton v. Hope Ins. Co.* (1868) 51 Barb. (N. Y.) 647; *Royal Ins. Co. v. Walrath*, 17 Ohio Cir. Ct. R. 509, 9 O. C. D. 699; *Eakin v. Home Ins. Co.*, 1 White & W. Civ. Cas. Ct. App. § 1234; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428; *McMaster v. Pres., etc., Ins. Co. of No. Am.*, 55 N. Y. 222, 14 Am. Rep. 239.

Instructions admitted to state correct principles of law were, in the following cases, held to have been pertinent, and properly given under the issues of the case.

Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; *Hooker v. Continental Ins. Co.* (Neb.) 96 N. W. 663.

8. INTERESTS COVERED BY POLICY—FIRE AND CASUALTY INSURANCE.

- (a) General rules.
- (b) Joint owners.
- (c) Stock of goods.
- (d) Insurance of liability and of property for which liable—Contractor's insurance.
- (e) Property "held in trust."
- (f) Insurance on property "sold but not delivered."
- (g) Insurance "for account of whom it may concern"—Agents, trustees, estates, etc.
- (h) Loss payable to appointee—Mortgagee or lessee.
- (i) Use and occupancy—Profits.

(a) General rules.

Under the almost universal requirement in fire policies for a true statement of the interest of the insured, if less than unconditional and sole ownership, under penalty of avoidance of the policy,¹ the doctrine is of academic, rather than practical, importance, that a policy on specific property will cover any insurable interest which the insured may have therein.

For the reason indicated, cases dealing with this doctrine are necessarily rare; the question almost always turning upon the effect of the forfeiting clause. Reference may, however, be made to the following decisions: An equitable interest may be insured without mention thereof. *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.)

¹ Necessity of disclosure of interest, see post, vol. 2, p. 1332.

40, 20 Am. Dec. 507. And not only so, but where the insured sells the property before loss, retaining a partial interest therein, the policy protects such insurable interest as he has at the time of the loss. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90, affirming 12 Wend. 507. Insurance on a house which insured has engaged to move covers expenses incurred and profits derived from the labor. *Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268. Insurance of one "as his interest may appear" authorizes the insured, in case of loss, to show what his interest was, though there was the usual condition requiring a true statement of interest. *Dakin v. Liverpool & L. & G. Ins. Co.*, 77 N. Y. 600, affirming 13 Hun, 122. A policy upon whisky in bond, without reference to the government tax, entitles the insured to recover for the tax for which he is liable. *Hedger v. Union Ins. Co. (C. C.)* 17 Fed. 498. In connection with this case, see *Security Ins. Co. v. Farrell (Ill.)* 2 Ins. Law J. 302, decided under the erroneous theory that the distiller would not be liable for the tax under such circumstances, and *Farrell v. United States*, 99 U. S. 221, 25 L. Ed. 321, holding the distiller liable, though there had been a fire.

Under the principle that all of insured's interest will be covered, it has been held that a policy on "his" building covered the building of which the insured was in possession, but which he did not own (*Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451); and that insurance on "his stock" covered insured's interest in a partnership stock.

Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; *Irving v. Excelsior Fire Ins. Co.*, 14 N. Y. Super. Ct. 507.

On the other hand, a policy insuring "his stock," etc., has been held not sufficient to cover a marital right of user; and, furthermore, one seeking recovery for a damage to such right must allege in his declaration that the damage was to that interest (*Cohn v. Virginia Fire & Marine Ins. Co.*, 6 Fed. Cas. 33). An insurance "on his new hotel," the property belonging in fact to a partnership, covered only insured's legal interest—one-half—and not any equitable interest he might have as against his partner on an adjustment of the affairs of the firm (*Bailey v. Hope Ins. Co.*, 56 Me. 474).

The last two cases may perhaps be explained on the theory that the word "his" indicates a specific proprietary interest; it being a general rule that insurance on a specific interest of insured will be extended no further.

Most of the cases dealing with the effect of a particular description of insured's interest have also been considered under the forfeiture

provisions, to which reference has been made. The following cases, in addition to those noticed in succeeding paragraphs, may, however, be cited as examples of the rule stated: *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20; *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.) 325; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390; *Tanenbaum v. Simon*, 81 N. Y. Supp. 655, 40 Misc. Rep. 175, affirmed without opinion 82 N. Y. Supp. 1116, 84 App. Div. 642; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810, affirming 71 N. Y. Supp. 918, 64 App. Div. 182; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546.

Words descriptive of a class of property, in a policy providing for a forfeiture in case there is any incumbrance on the property, will not be construed as including goods of that class on which there is such an incumbrance. *Cooper v. Insurance Co.*, 96 Wis. 362, 71 N. W. 606. See, also, *Phoenix Ins. Co. v. Dunn* (Tex. Civ. App.) 41 S. W. 109.

In the absence of words which, under the circumstances, indicate a contrary intent, no property or interest other than that of the insured named will be covered.

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168; *Hebner v. Sun Ins. Co.*, 157 Ill. 144, 41 N. E. 627, affirming 55 Ill. App. 275; *Dwelling House Ins. Co. v. Freeman*, 10 Ky. Law Rep. 496; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Duncan v. Sun Mut. Ins. Co.*, 12 La. Ann. 486; *Eichelberger v. Miller*, 20 Md. 332; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468; *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.) 325; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390; *Wise v. St. Louis Marine Ins. Co.*, 23 Mo. 80; *Milliken v. Woodward*, 64 N. J. Law, 444, 45 Atl. 796; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, affirming 12 N. Y. Super. Ct. 522; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. Rep. 749; *Burgher v. Columbian Ins. Co.*, 17 Barb. (N. Y.) 274; *Wyman v. Prosser*, 36 Barb. (N. Y.) 368; *Mead v. Mercantile Mut. Ins. Co.*, 67 Barb. (N. Y.) 519; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Hubbard v. Austin*, 8 Ohio Com. Pl. 111, 6 Ohio N. P. 249; *Diffenbaugh v. Union Fire Ins. Co.*, 150 Pa. 270, 24 Atl. 745, 30 Am. St. Rep. 805; *Annely v. De Saussure*, 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725; *Snow v. National Cotton Oil Co.* (Tex. Civ. App.) 34 S. W. 177. But see *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, and *Hayes v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754, where the subject of an insurance in terms covering liability was said to be the "property." See, also, *Oliver v. Mutual Commercial Marine Ins. Co.*, 18 Fed. Cas. 664.

And especially is this true where it is expressly provided that goods held in trust or on commission must be specifically insured as such.

Rafel v. Nashville Marine & Fire Ins. Co., 7 La. Ann. 244; *Getchell v. Ætna Ins. Co.*, 14 Allen (Mass.) 325; *Brichta v. New York Lafayette Ins. Co.*, 2 N. Y. Super. Ct. 403.

(b) Joint owners.

The rule that the interest of one not named in the policy will not be covered, in the absence of special words, has been applied to the case of insurance taken out by one joint owner in his own name, and without mention of the other interests. In such a case, the insurance will apply only to the undivided interest of the person named as insured.

Hebner v. Sun Ins. Co., 157 Ill. 144, 41 N. E. 627, affirming 55 Ill. App. 275; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Burgher v. Columbian Ins. Co. of Philadelphia*, 17 Barb. (N. Y.) 274; *Annely v. De Sausure*, 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725.

And where the insurance was taken out by a partner it was held that it would not cover the interest of another partner, though such interest was subsequently purchased by the insured (*Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202). Nor will an insurance of a sole trader cover the interest of a partner who subsequently buys into the business (*Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. Rep. 749).

But where the insurance was taken out in the name of an individual on property belonging to a limited partnership represented by the same name, it was held that recovery could be had thereon for the full amount of the loss, and would not be limited to insured's personal interest in the goods (*Clement v. British America Assur. Co.*, 141 Mass. 298, 5 N. E. 847). Likewise a policy running to insured, his successors and assigns, he in fact having an interest in a certain company, and having applied for the insurance as an agent thereof, has been held to cover the interests of all (*Goodall v. New England Fire Ins. Co.*, 25 N. H. 169). And in *Manhattan Ins. Co. v. Webster*, 59 Pa. 227, 98 Am. Dec. 332, where the company's agent stated that it made no difference whether or not the names of both joint owners were in the policy, and received a premium proportionate to the whole, it was held that on a total loss the whole insurance might be recovered in a suit in the name of the joint owner to whom the policy had been issued.

The cases are conflicting as to what interests are covered in case

of change of membership when the firm is insured as such. In Vermont it has been held that where the insurance was taken out in the name of the partnership, and the surviving partner, in accordance with a previous agreement, purchased the entire interest of his deceased partner, the policy covered the entire interest in the property so purchased, but not property subsequently acquired. (*Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552.) But in New York the holding was that the subsequently acquired property would also be covered (*Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, affirming 24 N. Y. Super. Ct. 501).

Insurance taken out in the name of a partnership, after the death of one of the partners, will at most cover only the moiety of the surviving partner (*Work v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 11 Cush. [Mass.] 271).

(c) Stock of goods.

It has been frequently contended that a policy describing property of a kind which is usually owned in part by other people than the proprietor should be construed as covering, not only the property of the proprietor named as insured, but the property of the other owners whose goods are kept with his. This contention has, however, rarely been sustained, in the absence of special words indicating such an intent. Thus, a policy insuring plaintiff on "his carriages, * * * and all such goods usually kept in a livery barn and sale stable," has been held not to include goods held in trust or on commission (*Corkery v. Security Fire Ins. Co.*, 99 Iowa, 382, 68 N. W. 792). And insurance covering wearing apparel was held not to entitle the insured to recover for the loss of wearing apparel of his hired housekeeper and her children (*Dwelling House Ins. Co. v. Freeman*, 10 Ky. Law Rep. 496). So, also, in *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468, though the question was held to be dependent on intent, yet the use of the words "our property" and "our stock in trade" in the application of those carrying on a commission business was held to show that only insured's property was intended to be covered.

Where it is further provided that goods held in trust or on commission must be insured as such, it would seem that there could be no question as to the effect of insurance failing to specifically mention such property.

Applied to insurance on a "stock of clothing, manufactured and in process of manufacture," *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.) 325; to insurance by a pawnbroker on "jewelry and cloth-

ing, being his stock in trade," *Rafel v. Nashville Marine & Fire Ins. Co.*, 7 La. Ann. 244; to a policy on "furniture and goods contained in" the counting room of one handling goods on commission, *Brichta v. New York Lafayette Ins. Co.*, 2 N. Y. Super. Ct. 403. And see, also, *Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350, 16 N. W. 273, where one handling goods on commission was named as insured in a policy referring to goods "stored in" a warehouse, and where the court, to show that goods not owned by insured were not covered, relied on a provision rendering the policy void in case the interest of insured was other than sole ownership, and not so represented.

Such a provision will, indeed, prevent the insured from collecting from the company even his own charges and interest in such goods.

Getchell v. Aetna Ins. Co., 14 Allen (Mass.) 325; *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20.

But in *Aetna Ins. Co. v. Jackson*, 16 B. Mon. 242, the Supreme Court of Kentucky held that, though the policy provided that goods held in trust must be insured as such, nevertheless the phrase "all articles making up the stock of a pork house" would include all articles properly belonging to a pork house, regardless of ownership; it appearing to be customary in that vicinity for proprietors of pork houses to handle and sell large quantities of pork and similar articles belonging to other people.

(d) Insurance of liability and of property for which liable — Contractor's insurance.

A specific insurance on whisky, including the government tax thereon, for which insured should be liable, was held, in *Germania Fire Ins. Co. v. Thompson*, 95 U. S. 547, 24 L. Ed. 487, to cover any loss for which insured might be liable as sureties on the distiller's bond. And insurance on "the liability of the insured as carriers and warehousemen" has been construed as strictly confined to such liability, and as not including the liability arising from insured's contract to insure the goods (*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390). The Massachusetts Supreme Court, on the other hand, in *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, held that a policy stated to be on "liability for loss and damage by fire occasioned by sparks of locomotives to property of others situate on lands not owned or occupied by the assured," but further promising to make good "all such loss or damage * * * as shall happen by fire to the prop-

erty," and specifically speaking of the "property" as being insured, insured the property, and not the liability. It should, however, be noted that the only question before the court was as to the necessity and method of giving notice and proofs of loss; nothing being said as to whether the interest of any other person than the insured railroad company was covered, and it not appearing that such interest was not equal to the full value of the property.

Where insurance is on property of a certain class, for which the insured may be liable, it will be given a broad construction, as covering not only the liability of the insured, but as covering the property and all interests therein. Nor is it necessary that insured should be "liable" for the loss of the property, in the sense that he must account to the owner. All property of the class described, in relation to which the insured is charged with a duty, so that a liability may arise, is covered by the policy.

Home Ins. Co. of New York v. Peoria & Pekin Union Ry. Co., 52 N. E. 862, 178 Ill. 64, affirming 78 Ill. App. 137; *Phoenix Ins. Co. v. Belt Ry. Co. of Chicago*, 54 N. E. 1046, 182 Ill. 33, affirming 82 Ill. App. 265; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72; *Germania Ins. Co. v. Anderson*, 15 Tex. Civ. App. 551, 40 S. W. 200.

And where the description of the interest of the insured bailee or carrier is more specific, it will be construed, if possible, so as to coincide with the intent of the parties, and cover the property for which the insured is in fact liable.

Hope Oil Mill, Compress & Manufacturing Co. v. Phoenix Assur. Co., 74 Miss. 320, 21 South. 132; *Missouri, K. & T. Ry. Co. v. Union Ins. Co.* (Tex. Civ. App.) 39 S. W. 975.

But where tangible property was described as insured, and nothing was said in the policy as to any interest other than that of the insured railroad company, and the description was as applicable to its own property as to the property of others for which it would be liable, it was held to cover only the property owned by the road (*Monadnock R. Co. v. Manufacturers' Ins. Co.*, 113 Mass. 77).

The words "contractor's insurance for 30 days," indorsed on a policy issued to the owner, were held, in *German Fire Ins. Co. of New York City v. Thompson*, 43 Kan. 567, 23 Pac. 608, to be so ambiguous as to render admissible evidence that all the parties interested understood that it was desired to insure the interest of the contractor for 30 days, and after that time, the interest of the owner of the building.

(c) Property "held in trust."

An insurance on property "held in trust" by the insured may cover, not only the insured's interest therein, but the whole ownership, in whomsoever it may be vested. The insurance is expressed to be on the property, and not on the insured's interest therein. The statement that the property is "held in trust" is a statement that the insured has not the entire beneficial ownership; therefore, it is argued, it is sufficient to cover interests aside from those of the insured, and will cover such interests, at least if such was the intention of the parties when the policy issued.

Reference may be made to the following cases: *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 780; *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3; *Hough v. People's Fire Ins. Co.*, 36 Md. 398; *Johnson v. Campbell*, 120 Mass. 449; *Stillwell v. Staples*, 19 N. Y. 401, affirming on this point 13 N. Y. Super. Ct. 63; *DeForest v. Fulton Fire Ins. Co.*, 1 N. Y. Super. Ct. 94; *Thomas v. Cumiskey*, 108 Pa. 354; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. 366, 38 Atl. 1081; *Smith v. Carmack* (Tenn. Ch. App.) 64 S. W. 372; *Lucas v. Liverpool & L. & G. Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383. See, also, *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72, where the expression "freight cars owned or used" was held to cover cars belonging to another road, but in the possession of the insured, and used by them as common carriers.

The term "held in trust," as applied to property the subject of insurance, should be understood in its ordinary commercial sense of goods intrusted to the person named as insured by the legal owners. This is evident from the fact that ordinarily, where it is used, the insured holds no goods "in trust," in a strict technical sense, either at the time of the issuance of the policy or at the time of the fire, and to so limit its meaning would defeat the evident intent of the parties.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Millaudon v. Atlantic Ins. Co.*, 8 La. 557; *Hough v. People's Fire Ins. Co.*, 36 Md. 398; *Parks v. General Interest Assur. Co.* 5 Pick. (Mass.) 34; *Stillwell v. Staples*, 19 N. Y. 401, affirming on this point 13 N. Y. Super. Ct. 63; *Siter v. Morris*, 13 Pa. 218; *Roberts v. Firemen's Ins. Co. of Chicago*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642; *Lucas v. Liverpool & L. & G. Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383.

The term will also include property in which the insured has an interest as bailee, commission man, etc., though it is specially stipulated between the bailor and the bailee that the bailee shall not be liable as an insurer of the goods against fire.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; *Pittsburgh Storage Co. v. Scottish Union & National Ins. Co. of Edinburgh*, 168 Pa. 522, 32 Atl. 58. See, also, *Ferguson v. Pekin Plow Co.*, 42 S. W. 711, 141 Mo. 161, where the absence of a contract requiring the commission merchant to insure, and of knowledge on the part of the principals that insurance had been taken out, was held not to affect the case.

So, where the insurance was on a stock of musical goods, "his own or held in trust," and it was further provided that goods held in storage must be specifically insured, it was held that a piano was covered which was received from its owner, after the issuance of the policy, for the purpose of being forwarded for repairs. The stipulation in relation to goods held in storage could only have been intended, the court argued, to apply to property forming a part of the stock at the time the policy issued. (*Lucas v. Liverpool & L. & G. Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383.) The phrase will not, however, cover oil in a pipe line not under the control of the insured, and on which he had merely been requested by the owners to obtain insurance (*Grandin v. Rochester German Ins. Co.*, 107 Pa. 26). It has been held that, though it is not necessary, in order that an owner may take advantage of an insurance on property "held in trust" by his bailee, that the owner should have knowledge thereof, and though, if such insurance is customary under similar circumstances, no ratification by the owner is needed, yet, if there is in fact no such custom or rule of trade, there must be a ratification or adoption of the contract by the owner within a reasonable time.

Pittman v. Harris, 24 Tex. Civ. App. 503, 59 S. W. 1121; *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Tex. Civ. App.) 73 S. W. 545.

The Supreme Court of the United States, in *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868, after reiterating the rule as to varying a written contract by parol evidence, and stating that an insurance policy was no exception thereto, pointed out, further, that the admission of parol evidence to show what interests were in fact intended to be covered by such phrases as "on account of whomsoever it may concern" and "for and on ac-

count of the owner" was not in violation of such rule, but necessary as explaining a latent ambiguity. Having laid down these general principles, the court proceeded to construe a policy insuring a warehouse company on property "held in trust" by "turning, then, to the policy issued to the plaintiff below, and construing it by the language used." The policy being so construed, the court held that the intention was plain to insure not only insured's interest in the property, but the entire ownership thereof. This argument and holding do not, however, appear to have been made in the face of any evidence introduced by the defendant to show that only certain interests were intended to be covered. Nevertheless, they were considered in *Robbins v. Firemen's Fund Ins. Co.*, 20 Fed. Cas. 858, as direct authority for a holding that such evidence was entirely inadmissible to confine insurance on property "held in trust" to the interest of the insured in such property; and the New York Court of Appeals (*Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591), while holding such evidence admissible to limit the interests covered, thought it was necessary to distinguish the case from the *Baltimore Warehouse Co. Case*. But, whether or not the Supreme Court meant to hold parol evidence of intention inadmissible to limit the effect of the words "held in trust," it made it plain in *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730, that it did not mean to hold that parol evidence was inadmissible to show that certain interests were covered by such words. The insured in that case was a compress company, holding cotton, for which it had issued receipts to the owners, which receipts had been by the owners exchanged with railroad companies for bills of lading. The insurance company insisted that the words "held in trust" could, at most, cover only insured's interest and the interest of the owners, and that, therefore, no recovery could be had on account of any interest of the railroad company. But the court, citing the *Warehouse Company Case* as authority, decided otherwise, and held that, it having been shown that the intention to cover the railroad interests was made known when the policy issued, the company was estopped to say that the insurance extended only to the interests of the legal owners.

It is the doctrine of the Maryland court that the effect of the words "held in trust" cannot be limited by parol evidence. Therefore it was decided that it could not be shown, even in an action between the bailor and third parties, that it was the intention of the bailee, in securing such insurance, to protect itself merely from

loss not covered by policies taken out by those who had deposited the property. (*Hough v. People's Fire Ins. Co.*, 36 Md. 398.)

The New York courts have strongly intimated that they favored the doctrine that the expression "his own or held in trust," occurring in a fire policy insuring a warehouseman or similar bailee, is the equivalent of "for the benefit of whomsoever it may concern," and that, therefore, parol evidence should be admitted, not only to show the interests which it was intended to cover, but also to show that certain interests were not within the contemplation of the parties.

Lee v. Adsit, 37 N. Y. 78; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Richardson v. Home Ins. Co.*, 47 N. Y. Super. Ct. 138.

In both the *Lee* and the *Lowell Mfg. Co.* Cases, however, the controversy was between the consignor and consignee, so that the ordinary rule as to parol evidence was not, in the opinion of the court, applicable, and it was not, therefore, necessary to directly decide whether the evidence would have been admissible, had the controversy been between the parties to the contract. And a similar decision has been made in Texas (*Pittman v. Harris*, 24 Tex. Civ. App. 503, 59 S. W. 1121).

In Alabama (*Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3) it was held that the words "his own or held in trust," in the absence of evidence to the contrary, included a piano held for purposes of sale, and that the fact that nothing was said by the owner in regard to insurance on the property, and that the insured bailee did not include it in his proofs of loss, did not amount to evidence that it was not intended that the piano should be covered. And in Massachusetts it has been decided that where the insured, a consignee, told the company that he wished the insurance in order to protect himself against loss on his advances, a subsequent conversation with the consignor, tending to show that his interests were considered as covered by the insurance on the property "held in trust," could not be shown (*Parks v. General Interest Assur. Co.*, 5 Pick. 34).

(f) Insurance on property "sold but not delivered."

The insurance of property "sold but not delivered," or "sold but not removed," is very similar in its effects to an insurance on property "held in trust," etc. The words are construed by the courts as affecting an insurance, not only of any interest in the property answering the description which may still inhere in the vendor,

but as covering, also, any interest which was in the contemplation of the parties when the policy was issued.

Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146.

The two phrases are not, however, identical in meaning. In the absence of circumstances indicating a contrary intent, the words "sold but not delivered" will apply only to property for which a contract of sale has been made, but of which the ownership has not been changed by a delivery of the property. The words "sold but not removed," on the contrary, are meant to cover as well property of which a binding delivery has been made, but which has not been in fact removed from the actual custody and care of the vendor or commission man.

Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; *Lockhart v. Cooper*, 87 N. C. 149, 42 Am. Rep. 514.

It has also been held that the phrase "sold but not delivered" does not cover property on which a mere option has been given (*Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471). But in *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277, where the insured property consisted of lumber piled on docks, and was described as "property held by it in trust, or sold and not delivered, and piled on the docks," and where, to the knowledge of the agent taking the risk, it was customary to sell portions of the lumber, pile it by itself, and mark it for the purchaser, it was held that there was no delivery, within the meaning of the policy, of the lumber which had been sold and piled by itself.

(g) Insurance "for account of whom it may concern"—Agents, trustees, estates, etc.

Principles similar to those controlling the insurance of property "held in trust" govern also insurance "for account of whom it may concern." Such a policy will not be confined to the interest of the insured, but may cover the interests of the owners, and may be adopted by them, even after the loss.

Hagan v. Scottish Union v. National Ins. Co. (D. C.) 98 Fed. 129; *Fire Ins. Ass'n v. Merchants' & Miners' Transportation Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Stetson v. Ins. Co.*, 4 Phila. (Pa.) 8.

An interest will not be protected, however, which was not within the contemplation of the parties when the policy issued, and extrinsic evidence is admissible to show what interests it was in fact intended to cover.

Fire Ins. Ass'n v. Merchants' & Miners' Transportation Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Cincinnati Ins. Co. v. Rieman*, 1 Disn. 396, 12 Ohio Dec. 692; *Steele v. Franklin Ins. Co.*, 17 Pa. 290.

Such a policy, taken out for the benefit of carriers, will not cover the interest of the owners of the goods (*Steele v. Franklin Ins. Co.*, 17 Pa. 290).

It has also been held that under an insurance for A., "or as agent," A. could claim the whole amount of the loss in his own name, for the use of himself and of B., a joint owner, provided the insurer also so understood the insurance (*Davis v. Boardman*, 12 Mass. 80). And where a policy was effected by plaintiff in his own name, and indorsed on it was a transfer to his landlords, reciting that he had effected it for their use and as their agent, it was held that the interests of the landlords were covered, though the policy further provided that property held in trust or on commission must be insured as such in order to be covered (*Keely v. Ins. Co.*, 1 Phila. [Pa.] 175). Under the same principle, a known agent with whom a complete contract of insurance has been made, without any declaration of interest, has been held authorized to declare the interest to which the policy is to attach, and to have such declaration inserted in the policy (*Oliver v. Mutual Commercial Marine Ins. Co.*, 18 Fed. Cas. 664).

An insurance of a trustee as such has been held to open the door to evidence showing what interests were in fact in contemplation of the person named as insured (*Franklin Marine & Fire Ins. Co. of Philadelphia v. Drake*, 2 B. Mon. [Ky.] 51). Likewise, a policy issued to B., "executrix," was held in the light of extrinsic evidence to have been equivalent to a policy for the benefit of those entitled to the estate, and, so construed, the policy was not void, though strictly as executrix the insured had no insurable interest (*Globe Ins. Co. v. Boyle*, 21 Ohio St. 119).

An insurance of the "estate" of a deceased person is not necessarily limited either to the interest of the administrator or executor, or the interest of the heirs. The expression is indeterminate, and will be held to cover those interests in the property left by the

deceased which the evidence shows were within the contemplation of the parties.

Clinton v. Hope Ins. Co., 45 N. Y. 454, affirming 51 Barb. 647; *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394, 31 N. E. 231, affirming 61 Hun, 110, 15 N. Y. Supp. 429, and distinguishing *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229, *Weed v. Fire Ass'n*, 62 Hun, 621, 17 N. Y. Supp. 206, affirmed without opinion 137 N. Y. 567, 33 N. E. 339. See, also, *Herkimer v. Rice*, 27 N. Y. 163.

In all the *Weed Cases*, the policy purported to insure "the estate of R.," with the loss payable to the mortgagee. In the *London & Lancashire Company Case*, the referee found that, though it was the intention to insure such interests in the premises as might be represented under the words used, yet in fact "the estate of R." was not the sole and unconditional owner of the property; there having been a trust deed executed subsequent to the mortgage. This being true, the court held that under the conditions of the policy there could be no recovery. In the *Hamburg-Bremen and Fire Ass'n Cases*, however, it was found as a fact that it was the intention to include, by the phrase "estate of R.," not only the interests of the administrator and heirs, but also the interest vested in the trustee by the trust deed. Therefore it could not be said that the "interest of the insured" was not truly stated, in that no specific mention was made of the trust deed. The Supreme Court in the *Hamburg-Bremen Case* went further, and held that the interest of the mortgagee, to whom the loss was made payable, was covered; but the Court of Appeals did not mention this phase of the question, and it does not seem necessary to the decision, since the naming of the appointee "as a mortgagee" would be sufficient indication, if any were needed, that the interests represented by the "estate of R.," including the administrator and trustee, were incumbered by a mortgage.

(h) Loss payable to appointee—Mortgagee or lessee.

A policy naming a certain person as insured, and making the loss, if any, payable to another person, covers the interest of the person named as insured, rather than that of the person to whom the loss is made payable. The most frequent illustration of this is the case of a policy insuring a mortgagor, with the loss payable to a mortgagee; but the rule is not confined to such relationship.

Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 29 Conn. 374; *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34

Am. Rep. 122; *Sun Ins. Co. v. Greenville Bldg. & Loan Ass'n* No. 2, 58 N. J. Law, 367, 33 Atl. 962; *Milliken v. Woodward*, 64 N. J. Law, 444, 45 Atl. 796; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, affirming 12 N. Y. Super. Ct. 522; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Ulster County Sav. Inst. v. Decker*, 11 Hun (N. Y.) 515; *Donaldson v. Sun Mut. Ins. Co.*, 95 Tenn. 280, 32 S. W. 251; *Snow v. National Cotton Oil Co.* (Tex. Civ. App.) 34 S. W. 177; *Edwards v. Agricultural Ins. Co.*, 88 Wis. 450, 60 N. W. 782.

This rule has been held effective where, with the consent of the debtor named as insured, the policy was taken out, and the premium paid by the creditor appointed to receive the loss (*Donaldson v. Sun Mut. Ins. Co.*, 95 Tenn. 280, 32 S. W. 251). Likewise, it has been applied where the policy was procured by a mortgagee, as authorized by a clause in the mortgage (*Ulster County Sav. Inst. v. Decker*, 11 Hun [N. Y.] 515). And in *Sun Ins. Co. v. Greenville Bldg. & Loan Ass'n* No. 2, 58 N. J. Law, 367; 33 Atl. 962, a similar result was reached, though it does not appear from the report that the mortgage authorized such action by the mortgagee. It has even been held that where there is such an agreement, and the mortgagee procures a policy in terms insuring the mortgagor with loss payable to the mortgagee, it will be presumed that he acted under the mortgage; and this presumption will be conclusive, at least where the mortgagor was not notified to the contrary (*Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736). So, also, in *Snow v. National Cotton Oil Co.* (Tex. Civ. App.) 34 S. W. 177, an intention on the part of the person procuring the policy to insure the appointee's interest was held not sufficient to change the legal effect of the policy.

This doctrine, however, as is shown by *Smith v. Exchange Fire Ins. Co.*, 40 N. Y. Super. Ct. 492, does not mean that only the value of the property above the incumbrance is insured. In that case there was an insurance of a mortgagor of chattels in possession, with loss, if any, payable to the mortgagee. It was contended by the company that, because the mortgagee's title had at the time the policy issued become absolute by a default in payment of interest, therefore the policy covered only the value of any right of redemption the mortgagor may have had. The court, however, held that, the company having insured the property and made the loss payable to plaintiff as mortgagee, there could be no doubt that the whole value was covered.

The insertion in the policy of what is commonly known as the "union mortgage clause," providing that the insurance as to the

interest of the mortgagee shall not be invalidated by acts of the mortgagor, and that in case payment is made to the mortgagee under such clause, when without it no claim would have existed, the company shall be subrogated to the mortgage, creates a separate and distinct insurance of the interest of the mortgagee. Under such a clause he is more than an appointee. He is one of the insured.

Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141, affirming 12 Hun, 416; *Smith v. Union Ins. Co.*, 25 R. I. 260, 55 Atl. 715.

The distinction between a union mortgage clause and an ordinary provision making the loss payable to a mortgagee is plain; the *Hastings* and *Smith* Cases being in no way at variance with the general rule stated. But there are cases which seem to announce other rules somewhat at variance with the general rules, if not directly contradictory thereto. Thus, in *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335, a policy insuring "A. against loss by fire, * * * in case of loss, if any, one-half payable to B., as his interest may appear," issued with full knowledge that A. and B. were joint owners, was held to effect an insurance on the joint property. The relations of the parties were not such that B. would have been entitled to one-half the proceeds resulting from the destruction of A.'s share. Therefore, in order to give the clause making the loss payable to B. any practical effect, it was necessary to construe the policy as covering the interests of both. So, also, where the appointee, after the issuance of the policy, exchanged his mortgage interest for an undivided half of the property, it was held that no assignment of the policy was necessary (*Burbank v. McCluer*, 54 N. H. 339). And an indorsement on the policy whereby, with the company's consent, the insured transferred to the appointee, to whom the loss was payable "as his interest might appear," all the insured's interest "as owner of the property," was held in *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.* (C. C.) 108 Fed. 451, not to amount to an assignment of the policy, but to a mere declaration by all the parties to the contract that thereafter the appointee should be insured as owner, whose insured interest had before been indefinite. Similarly, in *Burke v. Niagara Fire Ins. Co.*, 12 N. Y. Supp. 254, 58 Hun, 605, affirmed without opinion under title *Fisher v. Niagara Fire Ins. Co.*, 128 N. Y. 668, 29 N. E. 148, it was directly held that the policy naming a deceased person as insured, with loss payable to a mortgagee, constituted an insurance of the

mortgagee's interest. The decision, however, while decisive in obviating the objections to recovery raised by defendant, was not necessary thereto; a waiver of the misdescription in the ownership of the property being predicated by the court on the issuance of the policy with knowledge of the circumstances; and of the subsequent insurance taken by the widow, on the failure of the company to give notice, as it promised, of any cancellation.

In Louisiana, also, it has been held that a policy taken out by a mortgagee in the name of the mortgagor, but without the mortgagor's knowledge or consent, does not effect an insurance on any interest except that of the mortgagee (*Cannon v. Home Ins. Co.*, 49 La. Ann. 1367, 22 South. 387). It further appeared in that case that there was a clause in the mortgage authorizing the mortgagee to take out such insurance and charge it to the mortgagor. Subsequent to the execution of the mortgage, however, and prior to the issuance of the policy, the equity of redemption had been sold under execution, and the court held that under these circumstances the clause in the mortgage did not authorize an insurance by the mortgagee of the interest of the purchaser. This case was distinguished in the subsequent case of *Monroe Bldg. & Loan Ass'n v. Liverpool & L. & G. Ins. Co.*, 50 La. Ann. 1243, 24 South. 238, where it appeared that the insurance was taken out with the knowledge and consent of the mortgagor named as insured. It is, however, difficult to tell in the latter case whether the court meant to hold that the policy covered the interest of the mortgagor, so that subsequent insurance on such interest would be double insurance, or only that, though the prior insurance covered only the interest of the mortgagee, nevertheless the mortgagor was such a party to the contract that subsequent insurance procured by him on his interest would forfeit the policy. The question raised in the *Building & Loan Ass'n Case* as to whether insurance for the benefit of the mortgagor alone constitutes double insurance, so as to forfeit or avoid a policy issued in the name of a mortgagor with the loss payable to a mortgagee, while to a certain extent dependent on the interests covered and whether they are the same or separate, yet involves so many other principles applicable only to forfeiture that reference is made to the briefs dealing with such questions for a fuller discussion, both of it and of related questions involving the forfeiture of the policy.²

² See post, vol. 2, pp. 1438, 1831.

A policy issued to a mortgagee as such covers, not the debt, but the property as security for the debt. The interest of the insured in the property is to have the whole of it as protection against any possible loss. Therefore, subject to the insurer's right of subrogation, he is entitled to payment for the destruction of any part of the property, though sufficient still remains to satisfy the obligation.

Ætna Ins. Co. v. Baker, 71 Ind. 102; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *De Wolf v. Capital City Ins. Co.*, 16 Hun (N. Y.) 116. See, also, *Foster v. Equitable Mut. Ins. Co.*, 2 Gray (Mass.) 216. But see the dictum in *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546, where, however, the case turned upon another point.

The argument of the court in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044, is not in reality opposed to this view; for while it is said that such an insurance is an insurance of the debt, it is evidently only meant that recovery for the mortgagee cannot be had beyond the debt, and that the debt measures the insurable interest. That the court did not mean that no recovery could be had, unless the property was so far destroyed that its value was less than the amount of the debt, is evident from the further unqualified statement that, if the premises are destroyed, the underwriters must pay the amount of the debt up to the sum insured.

The doctrine that, where a mortgagor has paid or is responsible for the premiums on a policy in terms insuring the mortgagee, the mortgagor is entitled to have any payments made credited on the mortgage debt (*Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428), but that, where such a policy is taken out entirely on the initiative and at the expense of the mortgagee (*Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409), no such right exists, and the insurer is entitled to subrogation, is believed to be but an illustration of the rule just stated, and not a departure from the ordinary rule that an insurance of a specific interest will not be extended to cover other unmentioned interests. The interest covered is in each case the property as a security for the debt, but the payment of the premium in former case is in the nature of an appointment of the mortgagor as a recipient of the benefits of the policy, thus giving him a right superior to the insurer's purely equitable right of subrogation, which in the other case is unimpeded in its operation. The question suggested, however, is academic, rather than practical, and reference may be made to the briefs treating of subrogation for a fur-

ther treatment of the practical effect of such circumstances. Indeed, most of the questions arising under an insurance of a mortgagee's interest are so related and dependent upon other principles that reference must be made to subsequent briefs dealing with the extent of loss and liability, persons entitled to proceeds, forfeiture and avoidance, etc., for further treatment. Special attention should, perhaps, be called to *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618. In that case the payment of premiums by a mortgagor on a policy insuring the mortgagee was held to justify a recovery, though at the time of the loss the mortgagee's interest had been terminated by the payment of the debt. It is difficult to say how such a result can be reconciled with any other theory than that the policy in fact covered the interest, not only of the mortgagee, but of the mortgagor, a theory which seems never to have been openly defended, and which is entirely at variance with the general principle that only the interests named, or by intendment of law indicated, will be covered.

An insurance of the interest of a lessee covers an interest entirely separate from that of the lessor (*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257). And a policy issued to a builder who had foreclosed his lien on a leasehold estate, but to whom no sale had been made, has been held not to cover the interest of the lessor, though the lease provided that the building should be kept insured for his benefit (*Merchants' Ins. Co. v. Mazange*, 22 Ala. 168). But where the lessee had an equity of redemption in addition to his leasehold interest, and this was known to the company at the time the policy was issued to him as lessee, it was held that the policy covered the equity, as well as the leasehold interest (*Creighton v. Homestead Fire Ins. Co.*, 17 Hun [N. Y.] 78).

(3) Use and occupancy—Profits.

An insurance of "use and occupancy" of a building insures the business use of which the property is capable, and not the loss of earnings and profits of the business carried on therein.

Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810, affirming 71 N. Y. Supp. 918, 64 App. Div. 182; *Tanenbaum v. Freundlich*, 81 N. Y. Supp. 292, 39 Misc. Rep. 819; *Same v. Simon*, 81 N. Y. Supp. 655, 40 Misc. Rep. 174, affirmed without opinion 82 N. Y. Supp. 1116, 84 App. Div. 642.

A novel form of fire insurance consists in a policy covering the profits of insured in a contract with another, such contract being of

such a nature that the destruction of the property of the second party thereto will decrease or destroy the profits of insured, which are protected by the insurance. Such an insurance is in its nature exceptional, and reference to the cases on the subject of insurance is deemed sufficient.

Insurance of royalties, National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473, affirming 34 Hun. 556; Insurance of profits arising from a contract to share in the profits of a fire insurance company, Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754. It might be noted that the court in this case insists that the tangible property insured by the company in whose profits insured was to share constituted the subject of insurance. The question at issue was the sufficiency of the description.

9. SUBJECTS OF INSURANCE IN INDEMNITY AND GUARANTY POLICIES.

(a) General principles.

In discussing the principles which determine what may properly be a subject of insurance, it was pointed out that the real subject of insurance is not the concrete thing or person, but the interest which the one to be indemnified possesses in such concrete thing or person. The rule deduced was that whenever the destruction or injury of any thing or person, or the impairment or breach of any right, duty, or obligation, would result in a diminution of estate, an interest in such thing, person, right, duty, or obligation is a proper subject of insurance. It was also pointed out that, as this incorporeal interest must be attached to some concrete object, it is the concrete object that is ordinarily spoken of as the subject of the insurance, and that for practical purposes this is sufficiently accurate, so long as the true subject is not lost sight of.

Attention has been called to these principles, as they form the foundation of the rules for the construction of a policy, for the purpose of determining what is the particular subject covered thereby. Thus, in determining what is covered by a fire policy or a marine policy, the construction always has reference to the concrete thing, the property in which the interest exists. **So, in determining what is covered by a policy of guaranty or indemnity insurance, the contract must be construed with reference to the concrete thing, in which exists the interest that is the real subject of the insurance.** There do not appear to be any cases in which it has been found necessary to construe the policy with reference to the subject cov-

ered thereby. It is, however, worth the while to outline the general principles on which such a construction of the contract must be based, should the necessity therefor arise.

Mr. Frost, in his work on Guaranty Insurance,¹ after defining guaranty insurance as an agreement whereby one party for a valuable consideration agrees to indemnify another in a stipulated amount against loss or damage arising through dishonesty, fraud, unfaithful performance of duty, or breach of contract on the part of a third person sustaining a contractual relationship to the party thus indemnified, takes the position that this third person is in a personal sense himself the subject-matter of the insurance contracted for. That Mr. Frost's view of the question is not justified by either fact or theory may be deduced from several considerations. From his definition of guaranty insurance it is obvious that, as in the case of fire or marine insurance, there must be a loss or damage to some concrete thing, and it is this concrete thing which is the subject of fire or marine insurance. In these it is loss or damage to some property or property right. In guaranty insurance, similarly, it is loss or damage to some property or property right. The agreement of the insurer is to indemnify against pecuniary loss or damage arising through the dishonesty, fraud, or breach of contract on the part of a third person.

Furthermore, it is apparent from Mr. Frost's reasoning that it is not this third person who is the subject of the insurance. This person Mr. Frost designates as the risk. He takes the position that, though in most forms of insurance "risk" is synonymous with the perils insured against, this is not the fact in guaranty insurance. He says: "Owing to the fact that in the last-named branch of insurance the perils insured against are invariably impersonated, not in the actions of the lawless and uncontrollable forces of nature, but in the action of one as a responsible human agent, the term 'risk' ordinarily has reference to a human personality, whose conduct along certain designated lines constitutes the perils insured against. Thus, it appears that the term as herein used relates solely to a personality entering into contract obligations and possessing contractual rights which the courts will recognize and enforce. * * * The risk must of necessity be under some contract obligations to the insured, the violation of which would cause pecuniary damage to the latter."² In accordance with this reasoning he re-

¹ Frost, *Law of Guaranty Insurance*, p. 35.

² Frost, *op. cit.* p. 36.

gards the subject of the insurance, which he designates as the risk, to be represented in fidelity insurance by the person whose faithful performance of duty, occupying a fiduciary relation to the insured, is guarantied; in contract insurance, by the party whose performance of the contract obligation is secured by the bond or policy; in credit insurance, as the debtor to whom credit has been extended; in title insurance, by the grantor from whom the insured has purchased real property; and in judicial insurance, by the appointee of the court, or other person, to secure whose faithful conduct the bond or policy is given. It is obvious, however, that in all of these forms of insurance it is still the loss or damage to some right of property for which the indemnity is given, and it is this right of property which must be regarded as the subject of the insurance. In designating the person against whose dishonesty, fraud, or breach of contract the indemnity is promised, the policy merely limits the risk. Such designations must be regarded as strictly analogous to the limitations as to place contained in many fire and marine policies.

As illustrating the correctness of the principle that it is the right of property that is the subject of guaranty insurance, as well as other forms of insurance, is the case of *Fidelity & Deposit Co. v. Singer*, 94 Md. 124, 50 Atl. 518. In this case, a vendee of goods having made an assignment in trust for creditors, the seller took the goods, giving a replevin bond, in which the assignee in his individual capacity was made obligee. It was held that, as the obligee in his individual capacity had no actual interest in the subject-matter, he could not recover on the bond in an action in his own name for the use of the assignee in his representative capacity. The theory was that the obligee as an individual had no such interest in the goods that a deprivation thereof, or of the possession of them, could do him any substantial injury. It is clearly deducible from this case that the right of property was the subject of the insurance, and not the principal in the replevin bond. Likewise in *Monongahela Coal Co. v. Fidelity & Deposit Co.*, 94 Fed. 732, 36 C. C. A. 444, the agreement was to indemnify the employer for the loss "of moneys, securities, or other personal property," caused by the dishonesty of the employé. So, too, in *Wheeler v. Equitable Trust Co.*, 206 Pa. 428, 55 Atl. 1065, the court says that "the subject insured was a mortgage covering ground rents"; that is to say the subject insured was the interest which the mortgagee had in the property. That these views as to what may be considered the subject of the insur-

ance in guaranty policies are consistent with general principles is obvious, if guaranty insurance is compared with burglary insurance, to which it is strictly analogous. In burglary insurance, the subject of the insurance is obviously the property, while the risk or peril insured against is robbery by any person whatsoever. In guaranty insurance, the risk is simply limited to a particular person named.

Similarly, under any definition of insurable interest, and also under the principles determining what may be a subject of insurance, it is obvious that in indemnity or employers' liability insurance the subject of the insurance is not the employé or other person, for an injury to whom the insured would become liable, so as to be entitled to indemnity from the insurer. In this, as in other classes of insurance, the insurer agrees to indemnify the insured against loss or damage arising through his liability to the employé or other person for accidental injuries. In other words, he has promised indemnity against loss or damage to his estate. It is a property right that is exposed to the peril. The description of the persons for injury to whom the insurer will pay indemnity is merely a limitation of the risk to the class of persons described.

10. PARTIES TO INSURANCE CONTRACTS.

- (a) Parties to marine and fire insurance contracts in general.
- (b) Change in firm or firm name.
- (c) Insurance for benefit of "whom it may concern."
- (d) Effect of "loss payable" and mortgage clauses.
- (e) Insurance procured in representative capacity.
- (f) Parties to life and accident contracts.
- (g) Who is "the insured" or "the assured."
- (h) Parties to guaranty and indemnity policies.
- (i) Parties to reinsurance contracts.

(a) Parties to marine and fire insurance contracts in general.

The determination of the parties to a contract of insurance is usually a simple matter, especially when the policy purports to cover only individual property or interest. It is generally the person named in the policy as the one whose property or interest is insured, who, besides the insurer, is the party, and the only party, to the contract, irrespective of who may have made the application. (*Johnson v. Scottish Union & N. Ins. Co.*, 93 Wis. 223, 67 N. W. 416.) So the fact that the husband signs an application for insurance with his wife on her separate property does not make him a party to the

contract, if the wife alone is named as the insured (*Union Ins. Co. v. McCullough*, 2 Neb. [Unof.] 203, 96 N. W. 79). It is only necessary that the party should be designated with sufficient accuracy to render the identity certain. So, if a policy runs to "L. Simon," and in the body of the instrument the word "his" frequently occurs, it is not uncertain because the insured is in fact a woman (*Simon v. Home Ins. Co.*, 58 Mich. 278, 25 N. W. 190). And the fact that the party is designated as "M. E. Pollard," whereas his real name is Frank H. Pollard, will not affect the validity of the policy, if the change of name was in good faith and not merely a fictitious change (*Pollard v. Fidelity Fire Ins. Co.*, 1 S. D. 570, 47 N. W. 1060). Similarly, it was held in *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241, that the fact that the plaintiff called herself "Connor," instead of "O'Connor," was immaterial. She was proved to be known by both names, and in this case contracted in the name of "O'Connor." The identity was clearly made out. A policy made out in the name of the Toledo Linseed Oil Works is good as a policy covering the property of the Toledo Linseed Oil Company, where they are shown to be one and the same corporation (*Toledo Linseed Oil Co. v. Universal Fire Ins. Co.*, 41 Leg. Int. [Pa.] 253). The estate of a decedent may be a party to the contract (*Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370), if the designation can be rendered certain by parol evidence or by circumstances (*Clinton v. Hope Ins. Co.*, 51 Barb. 647, affirmed in 45 N. Y. 454). An insurer cannot, however, take advantage of a mistake in the identity of the party insured, when the mistake is that of its own agent; the mistake not being mutual, and there being no concealment or misrepresentation by the applicant.

Travis v. Peabody Ins. Co., 28 W. Va. 583; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

Generally, where two or more are insured, in the absence of anything to show the extent of the individual interests, they will be regarded as jointly insured (*Haynes v. Rowe*, 40 Me. 181). But a policy indemnifying the mortgagor and mortgagee as interest may appear indicates a separation of interests, and creates a several liability to the parties according to their respective interests (*Kent v. Aetna Ins. Co.*, 84 App. Div. 428, 82 N. Y. Supp. 817).

One who pays the premiums on a policy of fire insurance is not necessarily a party thereto, unless it is so expressed in the policy (*Wright v. Continental Ins. Co.*, 117 Ga. 499, 43 S. E. 700); nor

can a policy issued to one be regarded as a policy covering a partnership, of which the person designated as the insured is a member (Graves v. Boston Marine Ins. Co., 2 Cranch, 419, 2 L. Ed. 324).

The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless the words "for whom it may concern," or their equivalent, indicate that it is intended that the interest of some other person be covered.

The Sydney (C. C.) 27 Fed. 119; Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 29 Conn. 374; Continental Ins. Co. v. Maxwell, 9 Kan. App. 268, 60 Pac. 539; Donnell v. Donnell, 86 Me. 518, 30 Atl. 67; Russell v. New England Marine Ins. Co., 4 Mass. 82; Finney v. Bedford Commercial Ins. Co., 8 Metc. (Mass.) 348, 41 Am. Dec. 515; Wise v. St. Louis Marine Ins. Co., 23 Mo. 80; Turner v. Burrows, 8 Wend. (N. Y.) 144, affirming 5 Wend. 541; Farmers' Mut. Ins. Co. v. New Holland Turnpike Co., 122 Pa. 37, 15 Atl. 563.¹

But where a contractor desires insurance on a building which he is erecting, and goes with the owner to an agent to make application therefor, and at the agent's suggestion a policy for three years is written in the name of the owner, containing the clause, "with a contractor's insurance for 30 days," such policy may be enforced in an action by the contractor, where the loss occurs within 30 days after its issue (German Fire Ins. Co. v. Thompson, 43 Kan. 567, 23 Pac. 608).

It is undoubtedly the general rule that, when the policy as issued by mistake designates the wrong person, the one who was intended to be insured is not a party to the contract, so as to maintain an action thereon (Zimmerman v. Farmers' Ins. Co., 76 Iowa, 352, 41 N. W. 39). In such cases reformation may be had as to the party.

Slas v. Roger Williams Ins. Co. (C. C.) 8 Fed. 183; Fink v. Queen Ins. Co. (C. C.) 24 Fed. 318; German Ins. Co. v. Gueck, 31 Ill. App. 151, affirmed 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; Montgomery v. Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934. But see Manhattan Ins. Co. v. Webster, 59 Pa. 227, 98 Am. Dec. 332, where it was held that if, by mistake of the agent, the policy was issued in the name of one of two persons desiring the insurance, on a total loss the whole interest could be recovered by the party to whom the policy was issued.

However, the mistake of naming one who has no interest as the insured in the policy may be cured by the company by an indorse-

¹ See Civ. Code Mont. § 8454.

ment stipulating that the loss, if any, is to be payable to a person named.

Fireman's Fund Ins. Co. of San Francisco, Cal., v. Dunn, 22 Ind. App. 332, 53 N. E. 251; *Solms v. Rutgers Fire Ins. Co.*, 4 Abb. Dec. (N. Y.) 279.

If, however, the company, after issuing its policy, erases the names of insured and substitutes others, the insured may treat the alteration as a conversion of the policy, and recover damages therefor, though, had he been in possession of the paper, he might also, under proper circumstances, have recovered upon the contract as it was before the alteration (*Martin v. Tradesmen's Ins. Co.*, 49 N. Y. Super. Ct. 416, affirmed 101 N. Y. 498, 5 N. E. 338).

If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, extrinsic evidence may be resorted to to ascertain the meaning of the contract; and when the meaning is thus ascertained the contract will be held to apply to the interests intended to be covered by it, and those persons will be deemed to be comprehended within it who were in the minds of the parties when the contract was made.

Catlett v. Pacific Ins. Co., 5 Fed. Cas. 291; *German Fire Ins. Co. v. Thompson*, 43 Kan. 567, 23 Pac. 608; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238; *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, affirming 51 Barb. 647; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

If the designation is certain, extrinsic evidence cannot be resorted to, to show that some other person is the one insured (*Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 29 Conn. 374). But, though there is no ambiguity, the rule that extrinsic evidence is inadmissible will not apply, in the case of an open policy issued to the agents of the insurer, where the question is whether one covered by certificate under such policy could maintain the action in his own name and show by parol that the insurance was taken out for his benefit (*Daniels v. Citizens' Ins. Co.* [C. C.] 5 Fed. 425). A plea admitting the issuance of an insurance policy, but denying that plaintiff was the person insured, is not required to be verified (*McCarty v. Hartford Fire Ins. Co.* [Tex. Civ. App.] 75 S. W. 934).

(b) Change in firm or firm name.

An interesting question has been presented in Maryland as to the effect of the change in the composition of a firm, which was the party insured under the contract. In *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47, a policy under seal was issued to M. & Son for one year, with a covenant that it should continue so long as the insured paid the premium. Subsequent to the issue of the policy one of the members of the firm retired, but the business was conducted in the same name. At the expiration of the policy the premium for a second year was paid, and the renewal receipt indorsed on the policy, which was "continued in force" another year. It was held that, as the renewal receipt was simply an extension for another year of the original sealed contract, there was a difference in the parties, which would render the present firm unable to maintain an action on the policy. A somewhat similar state of facts arose in *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398, except that in the last case a new partner joined the firm. There were two policies involved, one of which contained a covenant for continuance or extension, while the other did not. It was held that the new firm was not covered by the first policy, but that as to the second the renewal receipts would be regarded as distinct parol contracts to which the new firm was a party, and could therefore recover thereon. A mere change in the name under which business is transacted will not affect the policy (*Roby v. American Central Ins. Co.*, 11 N. Y. St. Rep. 93).

(c) Insurance for benefit of "whom it may concern."

A policy issued on account of whom it may concern ordinarily inures to the benefit of all owners (*Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427, affirming 26 N. Y. Super. Ct. 202). Consequently a policy, though issued in the name of a certain person, if expressed as for the benefit "of whom it may concern," will constitute any person having an interest and intended to be insured a party to the policy.

Seamans v. Loring, 21 Fed. Cas. 920; *The Sydney (C. C.)* 27 Fed. 119; *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596; *Sleeper v. Union Ins. Co.*, 65 Me. 385, 20 Am. Rep. 706; *Newson's Adm'r v. Douglass*, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192; *Turner v. Burrows*, 8 Wend. (N. Y.) 144, affirming 5 Wend. 541; *Burrows v. Turner*, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622; *Forgay v. Atlantic Mut. Ins. Co.*, 25 N. Y. Super. Ct. 79; *Sturm v. Atlantic Mut. Ins.*

Co., 63 N. Y. 77, affirming 38 N. Y. Super. Ct. 281; Protection Ins. Co. v. Wilson, 6 Ohio St. 553; Strohn v. Insurance Co., 33 Wis. 648.²

So an insurance for whom it may concern, apparently made for an individual, may be shown to be for a firm (*Lawrence v. Sebor*, 2 Caines [N. Y.] 203). The theory is that, where property is insured "on account of whom it may concern," there is a privity between the company and the actual owner of the property from the time of the insurance, and the contract is with him as the assured. (*Pacific Mail S. S. Co. v. Great Western Ins. Co.*, 65 Barb. [N. Y.] 334). But insurance on account of whom it may concern is limited, not only to those who have an insurable interest (*Crosby v. New York Mut. Ins. Co.*, 18 N. Y. Super. Ct. 369), but also to those for whom it was intended under the authority given the person taking out the policy (*Frierson v. Brenham*, 5 La. Ann. 540, 52 Am. Dec. 603). And it has been held that the intention must exist at the time the policy was taken (*Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348). But, according to *Hagan v. Scottish Union & National Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, the words, "for account of whom it may concern," inserted in writing immediately following the name of the insured in a policy of marine insurance, protect a subsequent vendee of an interest in the vessel, notwithstanding the retention in the policy, which is written on a blank intended for insurance of property on land, of the printed clause that such policy shall be entirely void, unless otherwise provided by agreement, if any change in interest, title, or possession shall be made.

(d) Effect of "loss payable" and mortgage clauses.

Where the policy is taken out by the owner of property, a recital that the loss shall be payable to another as his interest shall appear does not constitute such other a party to the contract.

Hatch v. Metropole Ins. Co., 11 Fed. Cas. 808; *Sias v. Roger Williams Ins. Co.* (C. C.) 8 Fed. 187; *Thatch v. Metropole Ins. Co.* (C. C.) 11 Fed. 29; *Graham & Buckingham v. Insurance Co.*, 2 Disn. (Ohio) 255; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

But, if the insurance is effected by the one to whom the loss is payable, he is, of course, the party to the contract.

Mannheim Ins. Co. v. Hollander (D. C.) 112 Fed. 549; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; *Harvey v. Cherry*, 12 Hun, 354, affirmed 76 N. Y. 496.

² See Civ. Code Mont. §§ 3455, 3456.

Where the policy contains the standard mortgage clause, it is generally regarded as creating an independent contract between the insurer and the mortgagee.

Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; *Phoenix Ins. Co. v. Floyd*, 19 Hun (N. Y.) 287; *Smith v. Union Ins. Co.* (R. I.) 55 Atl. 715.

In Florida, however, the clause has been regarded (*Glens Falls Ins. Co. v. Porter*, 44 Fla. 568, 33 South. 473), not as creating an independent contract, but merely as giving the mortgage a separate contractual status. Though the recital makes the policy payable to the mortgagee individually, the insurer cannot object that the money which the mortgage secures was loaned by the mortgagee in his capacity as president of a bank, which was the real mortgagee (*Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394, 31 N. E. 231, affirming 15 N. Y. Supp. 429, 61 Hun, 110).

(e) Insurance procured in representative capacity.

Where the insurance is effected by an agent on account of his principal, and recites that payment is to be made to the agent, he must be regarded as contracting in his representative capacity, not in his own right (*Braden v. Louisiana State Ins. Co.*, 1 La. 220, 20 Am. Dec. 277). Such agent may be regarded as taking the insurance in the capacity of a trustee of an express trust (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6). The issuance of a policy to one as agent is a sufficient indication that others are interested in the property insured (*Platho v. Merchants' & Manufacturers' Ins. Co.*, 38 Mo. 248).

It was held in *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, that a policy payable to "K., receiver," and intended to run to him and his successors, might be reformed in accordance with such intention; but, as it appeared that the policy was issued to K., receiver for H. v. H., "on their one-half interest in the four-story frame building," this was subsequently held to show the intent to insure the receiver as the representative of such interest, and that no reformation of the policy is required to enable his successor in the receivership to sue thereon (*Steel v. Phenix Ins. Co.*, 51 Fed. 715, 2 C. C. A. 463, 7 U. S. App. 325). A policy upon property, the title to which is vested in a testamentary trustee in trust for the heirs of the decedent, which policy insures the heirs and representatives against loss, is a valid policy in favor of the trustee, who, although not named therein, is entitled to

the benefit of it for the beneficiaries under the will (*Savage v. Howard Ins. Co.*, 52 N. Y. 502, 11 Am. Rep. 741). If the policy runs to one as executrix, extrinsic evidence is admissible to aid in construing the policy to show who were the parties actually insured (*Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.)

(f) Parties to life and accident contracts.

A policy on the life of a husband for the sole use of the wife, though it contains no express promise to pay her, if made upon a consideration recited to have been paid by her, is in effect a promise to pay the wife; the policy reciting that it is accepted by the wife upon certain conditions therein expressed. The only conclusion is that the promise is made to the one who applies for it, who is acknowledged by the promisor to be the person who pays for it, and who receives and accepts it. Therefore the wife, and not the husband, must be regarded as the party to the contract. (*Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294.)

The same principle is asserted in *North America Life Ins. Co. v. Wilson*, 111 Mass. 542, and *Thompson v. American Tontine Life & Sav. Ins. Co.*, 46 N. Y. 674.

Generally it may be said that the question whether a beneficiary can be regarded as a party to the contract depends on whether the promise to pay is made to such beneficiary or to the person whose life is insured. If the policy is issued to the person whose life is insured, such person is the party to the contract, though it may be expressed that the insurance is for another's benefit.

This seems to be the rule in Vermont (*Fairchild v. Northeastern Mut. Life Ass'n*, 51 Vt. 613; *Tripp v. Vermont Life Ins. Co.*, 55 Vt. 100) and in Massachusetts (*Nims v. Ford*, 159 Mass. 575, 35 N. E. 100). But, under statutory provisions in Massachusetts, the beneficiary may maintain action on the policy. *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303; *Emerson v. Metropolitan Life Ins. Co.*, 185 Mass. 318, 70 N. E. 200.

So it has been held that the beneficiary in an accident policy has at most only an inchoate and contingent interest until the death of the assured, and the insurer cannot regard her as a party to the contract having a present interest (*Hoffman v. Manufacturers' Acc. Indemnity Co.*, 56 Mo. App. 301).

On the other hand, if the policy expressly promises to pay to the beneficiary (*York County Mut. Aid Ass'n v. Myers*, 11 Wkly. Notes

Cas. [Pa.] 541), or the policy is effected by the beneficiary to whom the promise is made (*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800), such beneficiary must be regarded as a party to the contract.

Reference may also be made to *Brockway v. Connecticut Mut. Life Ins. Co.* (C. C.) 29 Fed. 766; *Mutual Life Ins. Co. v. Stibbe*, 46 Md. 302.

(g) Who is "the insured" or "the assured."

Some difficulty in construction and some resulting confusion has arisen from the use of the terms "insured" and "assured." Courts and writers have generally used these terms interchangeably as synonymous. Much of the confusion is due to the fact that the companies themselves, in preparing policy forms, have used the words interchangeably. Generally speaking, the person intended by the term "the insured" or "the assured" in a fire insurance policy is the person who owns the property, applies for the insurance, and pays the premium, and not another person to whom the money is payable in case of loss (*Sanford v. Mechanics' Mut. Fire Ins. Co.*, 12 Cush. [Mass.] 541). The use of the term is not, however, necessarily confined to one who is the owner of the property, but may include one whose interest is intended to be covered.

The Sidney (D. C.) 23 Fed. 88; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; *Liverpool & London & Globe Ins. Co. v. Davis*, 56 Neb. 684, 77 N. W. 66; *Armstrong v. Agricultural Ins. Co.*, 56 Hun, 399, 9 N. Y. Supp. 873; *De Witt v. Agricultural Ins. Co.*, 89 Hun, 229, 36 N. Y. Supp. 570; *Smith v. Union Ins. Co.* (R. I.) 55 Atl. 715.

But, if the policy contains the union mortgage clause, providing that the insurance shall not be invalidated by any act of the owner, the term "assured," as used in conditions, applies only to the owner, and not to the mortgagee (*Hastings v. Westchester Fire Ins. Co.*, 12 Hun [N. Y.] 416). On the other hand, it was held in *Hurlbert v. Pacific Ins. Co.*, 12 Fed. Cas. 1009, that, in a policy providing that all sums due from "the insured" when the loss becomes due shall be deducted, the words "the insured" mean, not the party who procures the insurance, but the party for whose benefit the insurance is made, as he is the one to have the benefit if loss occurs, and ultimately to pay the premium. Where a fire policy provides that in case of loss the assured shall give immediate notice, etc., the word does not mean merely the person to whom the policy was issued, but includes a mortgagee to whom the policy was made payable in case

of loss (*Watertown Fire Ins. Co. v. Grover & Baker Sewing Machine Co.*, 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146). So, a provision that the policy shall be void in case of fraud or false swearing by the "insured" includes the legal representatives of the person procuring the insurance (*Metzger v. Manchester Fire Assur. Co.*, 102 Mich. 334, 63 N. W. 650).³

In life insurance a distinction may be, and generally is, drawn between the terms "insured" and "assured." Though in a leading case (*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800) it was said that the terms "assured" and "insured" are applicable either to the party for whose benefit the insurance is effected or the party whose life is subject to the policy, the construction of the terms depending upon their collocation and context in the policy, the general rule seems to be that the term "assured," in a life policy obtained by one for the benefit of another, must be construed as designating the person for whose benefit the policy is obtained, and not the person whose life is insured.

This distinction is observed in *Brockway v. Connecticut Mut. Life Ins. Co.* (C. C.) 29 Fed. 766; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Hogle v. Guardian Life Ins. Co.*, 29 N. Y. Super. Ct. 567, 4 Abb. Prac. (N. S.) 346; *Cyrenius v. Mutual Life Ins. Co.*, 145 N. Y. 576, 40 N. E. 225, affirming 73 Hun, 365, 26 N. Y. Supp. 248; *Rowe v. Brooklyn Life Ins. Co.*, 38 N. Y. Supp. 621, 16 Misc. Rep. 323; *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421. But in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, "assured" was used to designate the life insured.

So, too, it was said, in *Ferdon v. Canfield*, 104 N. Y. 143, 10 N. E. 146, that the "insured" in a life policy is the one whose life is the subject of the insurance.⁴

(h) Parties to guaranty and indemnity policies.

Where a policy of fidelity insurance contains a specific contract between the employé and the guaranty company, the employé must be regarded as a party to the contract, to such extent that he must execute it (*United States Fidelity & Guaranty Co. v. Ridgley* [Neb.] 97 N. W. 836); but, where the employé joins in the bond merely to enter into certain obligations to the insurance company, their liability is not joint (*Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 26 C. C. A. 146, 80 Fed. 766).

³ See Civ. Code Mont. § 3390; Rev. Codes N. D. 1899, § 4445; Civ. Code S. D. 1903, § 1797.

⁴ See, also, Rev. St. Tex. 1895, art. 3096a.

Where a policy of credit insurance, issued to W. & Co., provided that it should cover only losses on sales of merchandise owned "by the indemnified," such provision did not require that the business of the indemnified should have been conducted, throughout the term of the policy, under exactly the same firm name, if the firm had been in existence, composed of the same members as when the policy was issued (*American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264, 38 U. S. App. 583).

Under a policy of employers' liability insurance, the employ   is not a party to the contract. It is solely a contract between the employer and the company.

Kinnan v. Fidelity & Casualty Co., 107 Ill. App. 406; *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411; *Embler v. Hartford Steam Boiler Inspection & Insurance Co.*, 8 App. Div. 186, 40 N. Y. Supp. 450. But see *Beacon Lamp Co. v. Travelers' Ins. Co.*, 61 N. J. Eq. 59, 47 Atl. 579.

(1) Parties to reinsurance contracts.

Ordinarily the contract of reinsurance is strictly between the original insurer and the reinsurer. The original insured cannot be regarded as a party to the contract, as he has no interest therein, and there is no privity between him and the reinsurer.

Strong v. Phoenix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant, Cas. (Pa.) 71.

If, however, the policy of reinsurance contains a separate agreement that the reinsurer will be responsible for losses on policies issued by the reinsured, the original insured is in privity with the contract of reinsurance, and in effect becomes a party to such contract.

Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769; *Fisher v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161, affirming 40 N. Y. Super. Ct. 291; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249.

11. BENEFICIARIES.

- (a) Who may be beneficiaries in general.
- (b) Statutory provisions restricting right to designate beneficiary.
- (c) Provisions of by-laws.
- (d) Same—Effect of subsequent by-laws.
- (e) Construction and effect of limitations.
- (f) Particular limitations or classes of beneficiaries.
- (g) Same—Children.
- (h) Same—Heirs, representatives, or next of kin.
- (i) Same—Family.
- (j) Same—Relations.
- (k) Same—Dependents.
- (l) Objections to eligibility and waiver thereof.
- (m) Mode and sufficiency of designation.
- (n) Same—Construction.
- (o) Same—Revocation by marriage.

(a) Who may be beneficiaries in general.

As ordinarily used, the term "beneficiary" has reference only to persons who, though not parties to the contract, are named therein as the recipients of the proceeds of the policy. In its broader significance it will include, also, those who, on a proper basis of insurable interest, have secured insurance on the lives of others. So far as this class of persons is concerned, their right to be beneficiaries is governed wholly by considerations of insurable interest, a subject which has been adequately discussed elsewhere. In the case of ordinary life policies, taken out by the person whose life is insured and designating some other person as beneficiary, the insurable interest which such person has in his own life is the basis of the policy, and it is not necessary that the beneficiary should have an insurable interest. As a general rule, therefore, any person may be made the beneficiary of an ordinary life policy taken out by the person whose life is insured, and any person may be made the beneficiary of a policy taken out by himself on the life of another, if he possesses the requisite insurable interest in such life.¹

Other things being equal, the rule that one may take out a policy on his own life for the benefit of any person he may choose to designate applies with equal force where the contract is with a mutual benefit association; but it is usual in such associations to impose certain restrictions as to the persons who may be beneficiaries.

¹ See ante, p. 245.

These restrictions may be by statute or by the constitution and by-laws of the association. It is, however, elementary that, in accordance with general principles, the member of a mutual benefit association, in the absence of any restriction, may designate as beneficiary any person he may choose.

Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 142 Cal. 489, 76 Pac. 238; **Berkeley v. Harper**, 3 App. D. C. 308; **Hoffmeyer v. Muench**, 59 Mo. App. 20; **Massey v. Mutual Relief Soc.**, 102 N. Y. 523, 7 N. E. 619; **Eckert v. Mutual Relief Soc. (Sup.)** 2 N. Y. Supp. 612; **Wolpert v. Grand Lodge Knights of Birmingham**, 2 Pa. Super. Ct. 564, 39 Wkly. Notes Cas. 264.

And where the association was incorporated in another state, in the absence of evidence to that effect, it will not be presumed that any restriction exists by virtue of the laws of such state (**Hoffmeyer v. Muench**, 59 Mo. App. 20).

A mere declaration that the object of the association is to provide relief for the "widows and orphans," or for the "family," of the deceased member, is not a restriction on the member's right to designate a beneficiary.

Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 76 Pac. 238, 142 Cal. 489; **Sulz v. Mutual Reserve Fund Life Ass'n**, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, reversing 83 Hun, 139, 7 Misc. Rep. 593, 28 N. Y. Supp. 263; **Penn Mut. Relief Ass'n v. Folmer**, 87 Pa. 133; **Maneely v. Knights of Birmingham**, 115 Pa. 305, 9 Atl. 41; **Menovsky v. Menovsky**, 19 Pa. Super. Ct. 427. But see **Groth v. Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania**, 95 Wis. 140, 70 N. W. 80, where it was held that an association organized under a statute authorizing the formation of corporations for the mutual benefit of members, their families, and kindred, cannot issue a certificate for the benefit of one not of the family or kindred of the member. See, also, **State v. Central Ohio Mut. Relief Ass'n**, 29 Ohio St. 403. In **Eastman v. Provident Mut. Relief Ass'n**, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29, it was, however, held that a description of the administrator as beneficiary is not inconsistent with the declared object of the association "to secure to dependent and loved ones assistance and relief at the death of a member."

Obviously, a provision that the benefit shall be paid to the member's family, "or as he may direct," does not limit his right to go outside of his family for a beneficiary.

Berkeley v. Harper, 3 App. D. C. 308; **Harper v. Berkeley**, Id.; **Mitchell v. Grand Lodge Iowa Knights of Honor**, 70 Iowa. 360, 30 N. W. 865; **Klotz v. Klotz**, 22 S. W. 551, 15 Ky. Law Rep. 183; **Inde-**

pendent Order of Sons and Daughters of Jacob of America v. Allen, 76 Miss. 328, 24 South. 702, 71 Am. St. Rep. 532; Brown v. Brown, 6 Misc. Rep. 433, 27 N. Y. Supp. 129; Supreme Lodge Knights of Honor v. Martin, 16 Phila. (Pa.) 97, 13 Wkly. Notes Cas. 160; Renner v. Supreme Lodge Bohemian Slavonian Ben. Soc., 89 Wis. 401, 62 N. W. 80.

So, where, under the charter and by-laws of a mutual benefit association, it was intended to benefit, among others, the heirs and devisees of the insured, any person may be named in the certificate as beneficiary whom the member might have designated in a will as a legatee or devisee (*Delaney v. Delaney*, 51 N. E. 961, 175 Ill. 187). In this connection reference may also be made to *Bloomington Mut. Life Ben. Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518, where it was held that as, under a recital that the purpose of the association was to furnish pecuniary benefits to the devisees or legatees of members, a member might devise the benefits of his policy to a stranger, he might, in the first instance, take out the policy payable to such stranger.

(b) Statutory provisions restricting right to designate beneficiary. •

In many, if not most, of the states, statutes have been passed regulating the organization and operation of co-operative or mutual benefit associations. In these statutes there are often special provisions designating what classes of persons may receive the benefits payable under the contracts issued by such associations. Such statutes are generally held to be prospective, and not retrospective, in their operation, and cannot affect certificates issued prior to their passage, so as to impose on the member restrictions not existing at the time he became a member.

Volgt v. Kersten, 45 N. E. 543, 164 Ill. 314; *Schoales v. Order of Sparta*, 55 Atl. 768, 206 Pa. 11; *Wolpert v. Grand Lodge Knights of Birmingham*, 2 Pa. Super. St. 564, 39 Wkly. Notes Cas. 264; *Thomeuf v. Knights of Birmingham of Pennsylvania*, 12 Pa. Super. Ct. 195.

So, where a benefit certificate, issued before the passage of the statute, designating as beneficiary one not included among the persons named in the statute, was forfeited for nonpayment of assessments, a reinstatement after the act took effect did not bring the certificate within its provisions (*Lindsey v. Western Mut. Aid Soc.*, 84 Iowa, 734, 50 N. W. 29).

Even if the statute extends the class of persons who may be made beneficiaries, it will not render valid a prior designation, in

the absence of provisions making it retrospective and specially applicable.

Supreme Council Am. Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; *Skilling v. Massachusetts Ben. Ass'n*, 146 Mass. 217, 15 N. E. 566; *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17. But see *Marsh v. Supreme Council Am. Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382, which was apparently decided on the theory that only the association could raise the objection.

It has, indeed, been held in Illinois that, even if the association reorganized under the new statute, it would not affect certificates issued under the prior organization (*Moore v. Chicago Guaranty Fund Life Soc.*, 52 N. E. 882, 178 Ill. 202). A Missouri statute, extending the classes from which beneficiaries might be taken, also provided that associations then doing business might continue such business, provided they complied with the provisions of the act relating to annual reports, and also that any such association might avail itself of the benefits of the new statute by amending its constitution or articles of association, or reincorporating thereunder. This statute was construed in Illinois (*Grimme v. Grimme*, 64 N. E. 1088, 198 Ill. 265), and it was held that, if no amendment to the constitution was made, as provided in the new statute, a person not included in the original act, though included in the latter, could not be made beneficiary, and it was not sufficient that the association had complied with the provisions relating to the making of annual reports.

The eligibility of the person designated to be beneficiary will be determined generally by the law of the state in which the association is incorporated.

Grimme v. Grimme, 101 Ill. App. 389, judgment affirmed 64 N. E. 1088, 198 Ill. 265; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Supreme Commandery U. O. G. C. v. Merrick*, 165 Mass. 421, 43 N. E. 127; *Gibson v. Imperial Council of Order of United Friends*, 168 Mass. 391, 47 N. E. 101; *Hoffmeyer v. Muench*, 59 Mo. App. 20.

Designations not in accordance with the statute of the state where the association was organized will not be enforced in another state (*Knights of Honor v. Nairn*, 60 Mich. 44, 26 N. W. 826).

An interesting phase of this question is presented in *Supreme Lodge of Knights of Honor v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893, where the association was originally incorporated under the laws of Kentucky; such laws permitting the member to designate

his beneficiary without reference to the dependence of such person on the member. Subsequently, but prior to the member's death, the association threw up its Kentucky charter and incorporated under the laws of Missouri, the statutes of which require that the beneficiary should be dependent on the member. Because of certain facts in the case which indicated that the contract, so far as the beneficiary was concerned, was a wagering contract, he was not allowed to recover; but Judge Lotz, in a dissenting opinion, held that the beneficiary had acquired vested rights while the association was incorporated under the Kentucky law, and such rights could not be divested by the subsequent acts of the association in reincorporating under the Missouri law.

(c) Provisions of by-laws.

If the statute contains provisions limiting to certain classes the persons who may be beneficiaries, the by-laws of the association must conform thereto (*Kirkpatrick v. Modern Woodmen*, 103 Ill. App. 468). It cannot restrict the rights within narrower limits (*Wallace v. Madden*, 168 Ill. 356, 48 N. E. 181, affirming 67 Ill. App. 524). So, it was held, in *Nelson v. Gibson*, 92 Ill. App. 595, that, where the act under which an association is incorporated provides that the member may designate a beneficiary having no insurable interest in his life, a by-law providing that he cannot do so is unconstitutional, as impairing the obligation of the contract between the member and the association. But in these cases the statute expressly named the persons designated as eligible to be beneficiaries. Therefore there is no conflict between them and *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41, where it was said to be no objection to a charter provision restricting the right to be a beneficiary that the statute was broad enough to include the persons thus excluded by the charter. Similarly, where the statute restricts the right to designate beneficiaries to certain classes of persons, the right cannot by a by-law be extended to include other classes of persons (*Di Messiah v. Gern*, 30 N. Y. Supp. 824, 10 Misc. Rep. 30); and this is true, though a subsequent statute broadens the powers of the association, so as to include the class named in the by-law (*Supreme Council A. L. H. v. Perry*, 140 Mass. 580, 5 N. E. 634).

In *Tepper v. Supreme Council Royal Arcanum*, 45 Atl. 111, 59 N. J. Eq. 321, the court, while recognizing the rule that an association cannot by its by-laws extend the right to be a beneficiary to per-

sons other than those permitted to be beneficiaries by the statute, held that it might restrict the right within narrower limits than those imposed by the statute. The case was subsequently reversed (61 N. J. Eq. 638, 47 Atl. 460, 80 Am. St. Rep. 449), but apparently only on the ground of a misapplication of the rule.

(d) Same—Effect of subsequent by-laws.

It has been held in some jurisdictions that if the member agreed, in his application or otherwise, to be bound by the by-laws or amendments subsequently adopted, he will be bound by a subsequent by-law limiting the class of persons who may be beneficiaries (*Baldwin v. Begley*, 56 N. E. 1065, 185 Ill. 180). The same rule is laid down in *Masonic Mut. Benefit Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192, on the ground that a member has no vested right to have the fund disposed of in accordance with the manner provided by the by-laws existing at the time of his admission. In *Sargent v. Supreme Lodge Knights of Honor*, 158 Mass. 557, 33 N. E. 650, the certificate was issued payable to one designated as a dependent of the member; the laws of the association providing that certificates might be paid as the member may direct. The certificate provided that the member would be bound by subsequent by-laws. The by-laws were amended, so that payment of the benefit fund was limited to the member's family and persons dependent on him. The member, being notified of the change in the by-laws, made affidavit that the beneficiary before designated was a dependent, and such designation was not changed. As a matter of fact the beneficiary was not a dependent, and the court held that she could not recover on the certificate, on the ground that though, under the original designation, she might have maintained a claim simply as the person designated, without reference to the question whether she was a dependent, as the member had expressly put her upon the footing of a dependent, the subsequent by-law became effective.

A similar doctrine governed in *Bollman v. Supreme Lodge Knights of Honor* (Tex. Civ. App.) 53 S. W. 722. The association was first incorporated in Kentucky, but later abandoned its charter and obtained a charter in Missouri, and for many years, with the knowledge and recognition of the subordinate lodges and of the members, continued to act under the later charter. It was held, therefore, that the new charter and the constitution and by-laws enacted thereunder controlled in determining the rights of beneficiaries under the certificate, though the member had taken out the

certificate before the new charter was obtained. Possibly the court inferred that the member had assented to the change. It is difficult to reconcile with this case the subsequent decision of the same court in *Grand Lodge A. O. U. W. v. Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840. The member agreed to comply with all laws then in force or thereafter adopted by the association as the express condition of his right to share in the benefit fund. There was no law of the association restricting the right of a member to designate a beneficiary at the time the certificate was taken out. By a subsequent by-law, however, persons who could be beneficiaries were limited to certain relatives of the member. The court held that this could not be construed so as to affect the certificate in suit, in the absence of express words requiring such a construction. The court based its decision on *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 281, 29 Pac. 610, 29 Am. St. Rep. 603, and makes no mention of the *Bollman Case* in its opinion.

The same state of facts as that involved in the *Bollman Case* also existed in *Hysinger v. Supreme Lodge Knights and Ladies of Honor*, 42 Mo. App. 627; but the court held that, as the order had made a valid contract with the member, it could not repudiate it, and, by incorporating under the Missouri statutes and changing its by-laws, invalidate the contract.

The leading case holding that such subsequent enactments cannot affect the rights of members under certificates issued prior to their adoption is *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. It was conceded in this case that a member has no right to presume that the laws of the order will remain unchanged, and that when that right to make such change is exercised for the good of the association in a proper way the member is bound thereby. But the court said that there is no power in the society to amend or enact laws which shall work any repudiation of its obligations. The power resides in the society merely for the purpose of carrying out the objects for which it was formed, and, if the power is expressly reserved in the charter, it is not to be construed as intended to reserve the power to avoid its contracts or work the destruction of vested rights. The contract may be modified or varied by a subsequent law, and the member bound thereby, either through the reserved power in the society to amend or enact such law, or by a stipulation with reference to future enactments, if there is no repudiation of the contract or complete deprivation of the member's rights. **But an amendment to the ef-**

fect that the member shall designate as his beneficiary one who shall in every instance be a member of his family, a blood relation, or a person dependent on him, cannot be construed retroactively, so as to apply to a member who has no family, or blood relation, or person dependent on him, and thus render invalid his previous designation of a beneficiary.

The New York courts have also adopted the rule that, in the absence of a clause making such enactments retroactive, they cannot affect the rights of beneficiaries already named.

Spencer v. Grand Lodge of Ancient Order of United Workmen of State of New York, 48 N. Y. Supp. 590, 22 Misc. Rep. 147, affirmed in 53 App. Div. 627, 85 N. Y. Supp. 1146; *Roberts v. Grand Lodge A. O. U. W. of New York*, 70 N. Y. Supp. 57, 60 App. Div. 259, reversing 83 Misc. Rep. 536, 68 N. Y. Supp. 949. See, also, *Sanger v. Rothschild*, 123 N. Y. 577, 26 N. E. 3, affirming 50 Hun, 157, 2 N. Y. Supp. 794.

Where an applicant for insurance in a life association declared his wish that it should be for the benefit of his estate, but the association issued, and he accepted, a certificate which promised that the association would pay the family, it was immaterial that, after the certificate was issued, the association's by-laws were so changed as to empower the association to pay to any designated beneficiary, whereas, before such change, they could pay only to the family, as there was no evidence that the applicant ever designated any beneficiary other than his family (*Hutson v. Jensen*, 85 N. W. 689, 110 Wis. 26).

(e) Construction and effect of limitations.

A member of a mutual benefit association may designate as his beneficiary any one permitted by the law and rules of the association (*McGrew v. McGrew*, 93 Ill. App. 76, affirmed in 60 N. E. 861, 190 Ill. 604), and a person cannot be eligible to be so designated who does not bear to the member some one of the relations provided for in the constitution or by-laws of the association (*Kirkpatrick v. Modern Woodmen of America*, 103 Ill. App. 468). The beneficiary must be within the classes permitted by the statute and the charter or by-laws of the association, and the designation as beneficiary of a person not within those classes is nugatory.

Reference may be made to *Danielson v. Wilson*, 73 Ill. App. 287; *Presbyterian Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Gillam v. Dale* (Kan.) 76 Pac. 861; *Gibson v. Kentucky Grangers' Mut. Ben.*

Soc., 8 Ky. Law Rep. 520; Kentucky Grangers' Mut. Ben. Soc. v. Howe's Adm'r, 9 Ky. Law Rep. 198; Gaines v. Kentucky Grangers' Mut. Ben. Soc., 11 Ky. Law Rep. 580; Gibbs v. Anderson, 16 Ky. Law Rep. 397; Supreme Council A. L. H. v. Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527; Supreme Council American Legion of Honor v. Perry, 140 Mass. 589, 5 N. E. 634; Supreme Council American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Britton v. Supreme Council, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376; Di Messiah v. Gern, 30 N. Y. Supp. 824, 10 Misc. Rep. 30; Odd Fellows' Beneficial Ass'n of Columbus v. Diebert, 2 Ohio Cir. Ct. R. 462; State v. People's Mut. Ben. Ass'n, 42 Ohio St. 579; National Mut. Aid Ass'n v. Gonser, 43 Ohio St. 1, 1 N. E. 11; Grand Lodge Order of Sons of Herman v. Iselt (Tex. Civ. App.) 37 S. W. 377; Koerts v. Grand Lodge of Wisconsin of Order of Hermann's Sons, 119 Wis. 520, 97 N. W. 163. See, also, Murphy v. Metropolitan St. Ry. Ass'n, 25 Misc. Rep. 751, 55 N. Y. Supp. 620, where it was held that the constitution of a beneficial association, authorizing it to withhold its consent to the member's designation of one not a relative as a substituted beneficiary until the member gives good reasons for the substitution, is not unreasonable as enabling the association to make an arbitrary denial of a member's rights.

Stipulations or agreements, the purpose and effect of which is to evade the restrictions of the statute, are inoperative. Thus an agreement between the member and one lawfully authorized to receive the benefit that the latter will act as trustee for a creditor, who could not be beneficiary, is not enforceable (*Gillam v. Dale* [Kan.] 76 Pac. 861). Though the designation as beneficiary of one not within the classes permitted by the statute or by-law is void, if the certificate is made payable part to a legal beneficiary and part to one not within the limitation, the contract is not entirely void, but the fund will be paid to the one legally entitled to be designated as beneficiary (*Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057). So it was held, in *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17, where an illegal designation was made, that the fund should be paid to the executrix of the member's estate, in trust for the benefit of those who, at the time the contract was made, were entitled to be named as beneficiaries.

Though the charter or constitution of the association designates in a certain order the persons who may be beneficiaries, it will not be construed to require the member to designate his beneficiary according to that order. As was said in *Donithen v. Independent Order of Foresters*, 58 Atl. 142, 209 Pa. 170, following *Maneely v. Knights of Birmingham*, 115 Pa. 305, 9 Atl. 4, the general purpose

of the limitation is not violated by the designation of one not in the order named in the constitution of the association. Consequently, where the constitution recited that the object of the order was to provide a benefit fund for the wife, affianced wife, children, blood relations, or persons dependent on the member, the designation of a brother was not invalid, because the member had a wife living at the time.

The same principle was asserted in *Menovsky v. Menovsky*, 19 Pa. Super. Ct. 427, and apparently is approved in *Williams v. Williams*, 10 Ky. Law Rep. 37.

(f) Particular limitations or classes of beneficiaries.

The language used to describe the various classes of beneficiaries has been construed in numerous cases. In some instances this construction has been of the limiting statutes or by-laws, and in others of the recitals designating the beneficiaries. As the result is the same, irrespective of the manner in which the question is raised, and the decisions are authority on either phase of the question, no attempt will be made in the present discussion to differentiate them as to the particular issue raised. The only question involved at present is as to what persons are included in a particular class, whether the words of description are used in a limitation clause or in a clause of designation.

Under a statute limiting beneficiaries to the relatives of the members, a designation of his "estate" by a member is ineffective (*Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166). But it was held, in *Dale v. Brumbly*, 96 Md. 674, 54 Atl. 655, where the certificate was payable to the "estate" of the assured, and the rules of the order provided that, if the designation failed, the benefits should be distributed as in case of intestacy, that the fund would be distributed to the wife and children of the assured, whether the designation of the "estate" as beneficiary was illegal or not.

It was held, in *Bacon v. Brotherhood of Railroad Brakemen*, 46 Minn. 303, 48 N. W. 1127, that a subordinate lodge of the association may be designated as beneficiary. In *Finch v. Grand Grove U. A. O. D.*, 60 Minn. 308, 62 N. W. 384, the by-laws expressly provided that the subordinate lodge might be designated as beneficiary, and it was therefore held that such designation was valid, though the lodge was not incorporated. On the other hand, in *Hart v. Hamburger*, 1 N. Y. St. Rep. 293, it was held that an unincorporated subordinate lodge could not be designated beneficiary as trustee for the children of the member.

Where the laws provide for the payment of benefits to the widow of a member, he may designate as his beneficiary one living with him as his wife, though not bearing such relation, if she is innocent of intentional wrong and believes herself to be lawfully married.

Schnook v. Independent Order of Sons of Benjamin, 53 N. Y. Super. Ct. 181; *Supreme Tent Knights of Maccabees v. McAllister*, 132 Mich. 69, 92 N. W. 770; *Story v. Williamsburg Masonic Mut. Ben. Ass'n*, 95 N. Y. 474. In some instances, the decision seems to have laid special stress, however, on the fact that the alleged wife was dependent on the member. *Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; *Senge v. Senge*, 106 Ill. App. 140; *James v. Supreme Council Royal Arcanum (C. C.)* 130 Fed. 1014.

But see *Kult v. Nelson*, 24 Misc. Rep. 20, 53 N. Y. Supp. 95, where it was held that a man living with a woman as her husband, though not in fact married to her, could not be designated as beneficiary under a by-law providing that the member's husband, son, etc., might be beneficiary. The alleged husband was not an innocent party, however. So it has been held that, if the illicit relation is known to be such, the one designated as wife cannot recover. *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543; *Grand Lodge A. O. U. W. v. Hanses*, 81 Mo. App. 545.

Where the laws provide that benefits may be made payable to an affianced husband or wife, the association cannot refuse to issue a certificate containing such a designation (*Wallace v. Madden*, 48 N. E. 181, 168 Ill. 356). A provision in a by-law that no benefit certificate shall be made payable to one not related by consanguinity or affinity does not prohibit a special contract designating the fiancée of a member as beneficiary (*Jacobs v. Most Excellent Assembly Artisans' Order of Mut. Protection*, 9 Pa. Dist. R. 54). In most instances, however, the question whether a fiancée may be beneficiary is determined on the basis of her dependency on the member for support. This phase of the question is discussed in subdivision (k).

(g) Same—Children.

On the theory that the term "children" includes only the immediate offspring (*Continental Life Ins. Co. v. Webb*, 54 Ala. 688), it has been held in some jurisdictions that the term does not include grandchildren, unless an intent to so include them is clearly indicated.

Russell v. Russell, 64 Ala. 500; *United States Trust Co. v. Mutual Ben. Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Winsor v. Odd Fellows' Ben. Ass'n*, 13 R. I. 149.

The courts in other states have, however, regarded the term "children" as including "children" and "grandchildren."

Duvall v. Goodson, 79 Ky. 224; *Nuckols v. Kentucky Mut. Ben. Soc.*, 16 Ky. Law Rep. 270; *Martin v. Ætna Life Ins. Co.*, 73 Me. 25; *Connecticut Mut. Life Ins. Co. v. Fish*, 59 N. H. 128.

Though this rule is laid down by the *Martin Case* in Maine, yet it has also been held that, if the policy is payable to the widow and the "then surviving children," the word "children" cannot be construed so as to include grandchildren (*Small v. Jose*, 86 Me. 120, 29 Atl. 976).

If the intent is clearly shown, the term "child" may include a stepchild (*Tepper v. Supreme Council Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449), or an adopted child, especially if such is the only child of the insured (*Martin v. Ætna Life Ins. Co.*, 73 Me. 25). Such a child may be regarded as child by law, if not by birth (*Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520). So it was held, in *Hanley v. Supreme Tent Knights of Maccabees*, 38 Misc. Rep. 161, 77 N. Y. Supp. 246, that, if designated as an adopted child, an illegitimate child could be made beneficiary, though ordinarily an illegitimate child is not a child, within the statute stating who may be beneficiaries (*Lavigne v. Ligue des Patriotes*, 178 Mass. 25, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. Rep. 460).

Where the policy is made payable to "my wife, M., and children," a child of the insured by a former wife is included (*McDermott v. Centennial Mut. Life Ass'n*, 24 Mo. App. 73). So, too, where it is made payable to "his children," it will include children of a wife other than one named (*Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289). In *Stigler's Ex'x v. Stigler*, 77 Va. 163, it was held that a recital that the policy should be payable to the wife and "their children" included a child by a former wife. This is not the usual rule. It is generally held that a designation of the wife by name and "their children" will not include children by another marriage.

Ætna Mut. Life Ins. Co. v. Clough, 44 Atl. 520, 68 N. H. 298; *Lockwood v. Bishop*, 51 How. Prac. (N. Y.) 221; *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312.

The different rule stated in the *Stigler Case* must be regarded as based on the particular facts; the child in that case being mentally and physically defective, and an object of special care on the

part of both the father and the stepmother. Adult children will not be included in the term "orphan children" (*Hammerstein v. Parsons*, 29 Mo. App. 509).

(h) Same—Heirs, representatives, or next of kin.

If heirs are designated as beneficiaries, the word "heirs," if not otherwise limited, will be construed to mean those who are entitled to receive the estate under the statutes of distribution.

Lamont v. Grand Lodge Iowa Legion of Honor (C. C.) 31 Fed. 177; *Mullen v. Reed*, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174; *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Hanna v. Hanna*, 10 Tex. Civ. App. 97, 30 S. W. 820.

As said in *Hanson v. Minnesota Scandinavian Relief Ass'n*, 59 Minn. 123, 60 N. W. 1091, the word "heir" is not to be construed according to its technical common-law meaning, but rather as referring to those entitled to a share in the estate under the statutes of distribution. So, in *Alexander v. Northwestern Masonic Aid Ass'n*, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161, the word was construed, in view of the statute, as referring to the widow, and not to the next of kin.

That the word will include widow and children is also asserted in *Wilburn v. Wilburn*, 83 Ind. 55; *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; *Pleimann v. Hartung*, 84 Mo. App. 283; *Leavitt v. Dunn*, 56 N. J. Law, 309, 28 Atl. 590, 44 Am. St. Rep. 402; *Walsh v. Walsh*, 66 Hun, 297, 20 N. Y. Supp. 933; *Janda v. Bohemian Roman Catholic First Cent. Union*, 75 N. Y. Supp. 654, 71 App. Div. 150, affirmed in 173 N. Y. 617, 66 N. E. 1110; *Hannigan v. Ingraham*, 55 Hun, 257, 8 N. Y. Supp. 232.

If, however, by the statute the widow is not entitled under the statutes of distribution, she will not be included in the term "heirs" (*Johnson v. Supreme Lodge Knights of Honor*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732). So, if a clear distinction is made in the policy between the "widow" and the "heirs," she will not be included in the latter word (*Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898). Applying the foregoing rules, it has been held that, if the member has a wife, the mother cannot be the heir, especially if she was not living with the insured as a member of his family and dependent upon him (*Elsev v. Odd Fellows' Mut. Life Ass'n*, 142 Mass. 224, 7 N. E. 844). A child taken into the insured's family, but never adopted, is not his heir, within the meaning of the term

(*Merchant v. White*, 79 N. Y. Supp. 1, 77 App. Div. 539). A bequest does not constitute the legatee an heir of the member (*National Mut. Aid Ass'n v. Gonser*, 43 Ohio St. 1, 1 N. E. 11).

The word "heirs" does not, however, simply include members of the family of the insured or persons having an insurable interest (*Silvers v. Michigan Mut. Ben. Ass'n*, 94 Mich. 39, 53 N. W. 935). If there is no widow or children, the term "legal heirs" may be construed to mean next of kin.

Hubbard v. Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376; *In re Andress' Estate*, 6 Ohio Dec. 174; *Appeal of Hodge*, 8 Wkly. Notes Cas. (Pa.) 209.

Where a by-law provides that the death benefit may be paid to the widow, uncle, and certain other named relatives, "including the next of kin," the phrase "next of kin" does not limit the classes enumerated before, but adds to them another class, and, consequently, does not prevent the designation as beneficiary of an uncle who is not next of kin (*Maxwell v. Family Protective Union*, 41 S. E. 552, 115 Ga. 475).

When the "representatives" of the insured are designated as beneficiaries, it will be construed as referring to the heirs or next of kin, rather than to the executor or administrator.

Murray v. Strang, 28 Ill. App. 608; *Schultz v. Citizens' Mut. Life Ins. Co.*, 59 Minn. 308, 61 N. W. 331; *Griswold v. Sawyer*, 125 N. Y. 411, 26 N. E. 464, reversing 56 Hun, 12, 8 N. Y. Supp. 517; *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *People v. Phelps*, 78 Ill. 147; *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379.

Where the articles of association stated the general object of the association to be the insuring of the lives of members on the plan of paying benefits to the "representatives" of deceased members, it was held that the word "representatives" must be construed as including any person whom the member may designate, or, if he fail to designate, any person whom the by-laws may designate as the one to whom the money shall be paid (*Walter v. Hensel*, 42 Minn. 204, 44 N. W. 57).

(1) Same—Family.

In some statutes or by-laws specifying who are eligible to be beneficiaries, there is included the "members of the family" of the insured. The term "family," as here used, is not necessarily restricted to the widow and children of the insured. (*Manley v. Man-*

ley, 64 S. W. 8, 107 Tenn. 191.) By the use of the word is meant to include such persons as habitually reside under one roof and form one domestic circle, or such as are dependent upon each other for support, or among whom there is a legal and equitable obligation to provide support (*Hofman v. Grand Lodge B. L. F.*, 73 Mo. App. 47). The word may be of narrow or broad meaning, as the intention of the parties using it, or as the intention of the law in using it, may be made to appear. Thus, it was held that where a son and his wife lived with his father, being dependent upon him for their support during the son's illness, the father was a member of the family, so as to be eligible as beneficiary of the son (*Ferbrache v. Grand Lodge A. O. U. W.*, 81 Mo. App. 268). It was, however, said, in *Young Men's Mut. Life Ass'n v. Harrison*, 10 Ohio Dec. 786, 23 Wkly. Law Bul. 360, that the word "family" need not be restricted, so as to include only members of the same household. It may include such kindred as mother, father, sister, or brother.

No little confusion is to be observed, however, in the decisions, as to the specific degree or kind of relationship which will bring the designated beneficiary within the term "member of the family" of the insured. Stepchildren of the insured, who have been brought up in his household, have been regarded as within the term (*Tepper v. Supreme Council of Royal Arcanum*, 47 Atl. 460, 61 N. J. Eq. 638, 88 Am. St. Rep. 449). But a mother, not living with her son, who is married, is not a member of his family (*Lister v. Lister*, 73 Mo. App. 99). A son, who has come to maturity and left the father's family permanently, becomes an independent entity, and no longer a member of the father's family, so as to allow the father to be beneficiary in a certificate taken by the son.

Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451; *Brower v. Supreme Lodge Nat. Reserve Ass'n*, 87 Mo. App. 614.

On the other hand, it was held, in *Klotz v. Klotz*, 15 Ky. Law Rep. 183, 22 S. W. 551, that an adult son, though not living with his father and not dependent upon him, was, nevertheless, a member of the father's family, within the meaning of the phrase "member of the family." So, a married daughter of the insured, though not living with her father, is included under the designation "immediate family" (*Danielson v. Wilson*, 73 Ill. App. 287). A sister, who does not live with her brother, and is not dependent on him for support (*Smith v. Boston & Maine Railroad Relief Ass'n*, 46 N. E. 626, 168 Mass. 213), and a brother of the insured, who is not dependent on

him (*Supreme Council A. L. H. v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770), are not members of the family. The fact that the brother lives in the household of the insured does not constitute him a member of the immediate family (*Norwegian Old People's Home Society v. Wilson*, 176 Ill. 94, 52 N. E. 41). A niece of the member's deceased wife does not belong to his family (*Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065). But, in *Pennsylvania Mutual Relief Ass'n v. Folmer*, 87 Pa. 133, it was held that, where the member lived with his brother-in-law, a niece of his deceased wife, being a member of the family in which insured lived, was so far a member of his family as to be eligible as a beneficiary.

The confusion in the construction of this phrase is well shown by a series of decisions in Michigan. In *Carmichael v. Northwestern Mut. Ben. Ass'n*, 51 Mich. 494, 16 N. W. 871, it was held that the term "family" will cover a case where the insured and the beneficiary were respectively an old man and a young woman, who were not related, but had lived for many years in the same household, and had treated each other as father and daughter. But, in *Knights of Honor v. Nairn*, 60 Mich. 44, 26 N. W. 826, it was said that an old friend of the insured, who has lived with him for years and is physically disabled, is, nevertheless, not a member of his family, so as to be eligible as beneficiary in a certificate issued to the insured. In a still later case (*Hosmer v. Welch* [Mich.] 67 N. W. 504, 107 Mich. 470) the insured, who had separated from his wife without a divorce, lived until his death with his sister, paying no board, but was nursed and cared for by her as a member of the family, and it was held that a policy on the brother's life, issued in favor of the sister by a company organized under an act authorizing the insured to name as beneficiary one of the "family," was valid, though the wife of the insured survived him.

(j) Same—Relations.

Where the statute provides for the payment of benefits to such persons as the member may direct, the family relation is not requisite to qualify a person to become beneficiary (*Sabin v. Grand Lodge A. O. U. W.*, 43 Hun [N. Y.] 634); nor will a provision declaring the object of the association to be to afford financial aid and benefit to the "widows, orphans, heirs, or devisees" of deceased members necessarily restrict the holder of a certificate to the selection of a beneficiary from among the members of his own family (*Lamont v. Grand Lodge Iowa Legion of Honor* [C. C.] 31 Fed.

177). It has, indeed, been held that a provision in a by-law that no benefit certificate shall be made payable to one not related by consanguinity or affinity does not prohibit a special contract designating a member's fiancée as beneficiary (*Jacobs v. Order of Mut. Protection*, 9 Pa. Dist. R. 54). On the other hand, it was held, in *Koerts v. Grand Lodge of Wisconsin of Order of Hermann's Sons*, 119 Wis. 520, 97 N. W. 163, that, where the laws of the association provide for the payment of a fund to the "survivors" of a deceased member, such term does not include a person who is not a relative or a member of the household of, or connected by marriage with, the insured.

Where the provision is that the beneficiary must be a relative of or related to the insured, it has been held in a few cases that these terms include relatives by marriage, as well as relatives by blood.

Simcoke v. Grand Lodge A. O. U. W., 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114; *Tepper v. Supreme Council Royal Arcanum*, 47 Atl. 460, 61 N. J. Eq. 638, 88 Am. St. Rep. 449.

So, a stepmother of the insured, being related by affinity in the same degree as a natural mother is by consanguinity, may be named as a beneficiary (*Faxon v. Grand Lodge Brotherhood of Locomotive Firemen*, 87 Ill. App. 262).

On the other hand, in well-considered cases, it has been held that the relationship must be that of blood (*Supreme Council Royal Arcanum v. Britton*, 47 N. J. Eq. 325, 21 Atl. 754). Therefore, it was held in *Supreme Council Order of Chosen Friends v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 785, that a wife of the insured's nephew could not be made beneficiary. Conceding that blood relationship is necessary, it has been held that the member may designate as beneficiary his mother (*Catholic Order of Foresters v. Callahan*, 146 Mass. 391, 16 N. E. 14), a brother (*Menovsky v. Menovsky*, 19 Pa. Super. Ct. 427), a sister (*Anthony v. Massachusetts Ben. Ass'n*, 158 Mass. 322, 33 N. E. 577), or the grandchildren of a sister (*Grand Lodge A. O. U. W. v. Fisk*, 85 N. W. 875, 126 Mich. 356).

(k) Same—Dependents.

In the absence of statutory restrictions, or limitations in the charter or by-laws of the association, a member of such association may name as beneficiary any person, regardless of the question of dependency (*Hoffmeyer v. Muench*, 59 Mo. App. 20). Thus, where the provision is that the fund shall be made payable to such person as the member may direct, dependency is not necessary (*Marsh*

v. Supreme Council A. L. H., 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382). If, however, the charter provides for the payment of the fund to the member's family or dependents, a valid certificate cannot be issued, naming as beneficiary one neither a member of the family nor dependent on the insured (Supreme Council Catholic Benev. Legion v. McGinness, 59 Ohio St. 531, 53 N. E. 54). Where the by-law provides that the certificate shall be made payable to the "wife, husband, children, dependent, mother, father," etc., the word "dependent" designates a class by itself, and does not limit the other descriptions (Earley v. Earley, 23 Ohio Cir. Ct. R. 618). **So, where the by-laws provide that relatives or persons dependent on the insured may be made beneficiaries, the term "relatives" is not confined to dependent relatives** (Lane v. Lane, 99 Tenn. 639, 42 S. W. 1058). Under a similar clause it has been held that a member may designate as beneficiary a sister, though she is not actually dependent on him for support (Supreme Assembly Royal Soc. of Good Fellows v. Adams [C. C.] 107 Fed. 335). **A limitation of eligible beneficiaries to those who are related to or dependent on the insured requires that, if the beneficiary is not related to the insured, he must be dependent on him** (Caudell v. Woodward, 96 Ky. 646, 29 S. W. 614).

Where dependents are among those designated as eligible to become beneficiaries, it is often necessary to determine who will fall within that description. **The words, "persons dependent upon the member," as used in relation to beneficiaries under benefit certificates, do not mean dependence for favor, companionship, or affection, nor do they refer to occasional gifts nor to complete dependence for support; but a person who is partially and regularly dependent on such member for support comes within the statute** (Martin v. Modern Woodmen of America, 111 Ill. App. 99). A father of the insured, who is financially independent of his son, is not within the class (Brower v. Supreme Lodge Nat. Reserve Ass'n, 87 Mo. App. 614). But where an intimacy existed between insured and the beneficiaries for several years, during which time he lived with such beneficiaries, who nursed him when sick, and it also appeared that he gave them provisions, clothing, etc., more than sufficient to pay his board, and several large sums of money, this was sufficient to support a finding that the beneficiaries were dependent on the insured (Grand Lodge A. O. U. W. of Texas v. Bollman, 53 S. W. 829, 22 Tex. Civ. App. 106). But where the insured promised to clothe, educate, and support a child, but in fact merely paid

for some music lessons and made a few occasional presents, the child still living with her parents, such child is not a dependent, within the meaning of the term (*Ownby v. Supreme Lodge Knights of Honor*, 101 Tenn. 16, 46 S. W. 758). A household servant, working for agreed weekly wages, is not a dependent (*Grand Lodge A. O. U. W. v. Gandy*, 53 Atl. 142, 63 N. J. Eq. 692); nor is a woman with whom the insured boarded (*Faxon v. Grand Lodge Brotherhood of Locomotive Firemen*, 87 Ill. App. 262). Creditors are not dependents, so as to be beneficiaries in the certificate of a mutual benefit association.

Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Fodell v. Royal Arcanum*, 44 Wkly. Notes Cas. (Pa.) 498.

A woman who has lived with the insured as his wife, in the belief that she was legally married, and who is dependent on him for support, is eligible to become a beneficiary as a dependent.

Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; *Senge v. Senge*, 106 Ill. App. 140; *James v. Supreme Council Royal Arcanum (C. C.)* 130 Fed. 1014.

But, if the illicit relation is maintained with knowledge of its unlawful character, the woman is not a dependent, so as to be eligible as a beneficiary.

Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543; *Grand Lodge A. O. U. W. of Missouri v. Hanses*, 81 Mo. App. 545; *West v. Grand Lodge Ancient Order of United Workmen of Texas*, 14 Tex. Civ. App. 471, 37 S. W. 968.

While an illegitimate child is not necessarily a dependent (*Lavigne v. Ligue des Patriotes*, 59 N. E. 674, 178 Mass. 25, 54 L. R. A. 814, 86 Am. St. Rep. 460), yet, if the insured had supported the child for several years at the home of its mother, it may be regarded as a dependent, so as to be eligible (*Hanley v. Supreme Tent Knights of Maccabees*, 77 N. Y. Supp. 246, 38 Misc. Rep. 161).

A woman to whom the member is engaged to be married is not by virtue of that fact dependent on him.

Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; *Parke v. Welch*, 33 Ill. App. 188; *Supreme Council A. L. H. v. Perry*, 140 Mass. 580, 5 N. E. 634.

Nor is she a dependent, because she has received from him occasional presents of clothing and money, if in reality she supports herself (*Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187). But, if the fiancée is supported partly by the insured, she is

a dependent, though he is not legally bound to furnish such support (*McCarthy v. Supreme Lodge New England Order of Protection*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637).

(1) Objections to eligibility and waiver thereof.

In the absence of proof to the contrary, the presumption is that a named beneficiary is a legal one (*Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252, 58 Pac. 595). So it has been held, in Massachusetts (*Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166), that there is no presumption that the statutes of another state are like the statutes of Massachusetts as respects limitations as to the persons who may be made beneficiaries. **The burden is on one asserting ineligibility to prove it.**

Knights of Honor v. Davis, 26 Colo. 252, 58 Pac. 595; *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 36 N. E. 429.

It was held in *Lister v. Lister*, 73 Mo. App. 99, that in determining the eligibility of the beneficiary reference must be had to the status of the person at the time of the insured's death. The same was asserted in *De Grote v. De Grote*, 175 Pa. 50, 34 Atl. 312; but in *Brown v. Ancient Order of United Workmen*, 208 Pa. 101, 57 Atl. 176, it was said that, in the absence of a provision to that effect, it was not the date of the death of the insured, but the date of the designation in the certificate, that determined the eligibility of the beneficiary.

The objection that the association was not authorized to issue the certificate designating the person named as beneficiary, because of his ineligibility, can be raised only by the association.

Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Tepper v. Supreme Council Royal Arcanum*, 47 Atl. 460, 61 N. J. Eq. 638, 88 Am. St. Rep. 449; *Maguire v. Maguire*, 69 N. Y. Supp. 61, 59 App. Div. 143; *Markey v. Supreme Council Catholic Benevolent Legion*, 74 N. Y. Supp. 1069, 70 App. Div. 4; *Schoales v. Order of Sparta*, 55 Atl. 766, 206 Pa. 11.

Where the restrictions as to who may be beneficiary are statutory, they cannot be waived (*Gillam v. Dale* [Kan.] 76 Pac. 861); but, if such restriction is contained merely in the by-laws of the association, the limitation may be waived (*Coulson v. Flynn*, 83 N. Y. Supp. 944, 41 Misc. Rep. 186). **The acceptance of assessments**

or dues, with knowledge that the beneficiary designated was not eligible, is a waiver thereof.

Bloomington Mut. Life Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558, affirming 24 Ill. App. 518; *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa, 734, 50 N. W. 29; *Tramblay v. Supreme Council Catholic Benev. Legion*, 85 N. Y. Supp. 613, 90 App. Div. 39; *Coulson v. Flynn*, 86 N. Y. Supp. 1133, 90 App. Div. 613, affirming 83 N. Y. Supp. 944, 41 Misc. Rep. 186.

It has, indeed, been held that the issue of a certificate with knowledge of the ineligibility of the beneficiary designated is a waiver (*Ledebuhr v. Wisconsin Trust Co.*, 112 Wis. 657, 88 N. W. 607). If the certificate provides that only certain officers can waive conditions to the contract, the fact that other agents of the association knew that the person named as beneficiary did not belong to the class from which the member was authorized to make the selection does not estop the association from calling in question such person's right to the fund (*Union Fraternal League v. Walton*, 112 Ga. 315, 37 S. E. 389). So the knowledge of the instituting officer of a subordinate lodge, on whom rested no duty to pass on the qualifications of the beneficiary, is not a waiver of ineligibility (*Supreme Council of American Legion of Honor v. Green*, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527). An admission of liability on the part of the association and payment of the fund into court is a waiver of any objection to the beneficiary.

Taylor v. Hair (C. C.) 112 Fed. 913; *Sangunitto v. Goldey*, 84 N. Y. Supp. 989, 88 App. Div. 78; *Tepper v. Supreme Council Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449.

(m) Mode and sufficiency of designation.

In an ordinary life policy, it is not absolutely necessary that the beneficiary should be named therein, in order to vest in him an interest therein, unless it is so required by the policy (*Sauerbier v. Union Cent. Life Ins. Co.*, 39 Ill. App. 620); and the policy is admissible in evidence, though it does not name the beneficiary, when it is followed by evidence showing who was the beneficiary (*Norristown Title, Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co.*, 132 Pa. 385, 19 Atl. 270). So, where the policy was made payable to the insured's executor, and subsequently an agreement was entered into between the insured and his wife and the company that, if the wife would pay the premiums, the insured would assign the policy to her, and the company would pay the amount to

her on his death, the agreement was simply regarded as the designation of the beneficiary (*Thomas v. Prudential Ins. Co. of America*, 158 Ind. 461, 63 N. E. 795). A written designation of a person to whom the amount of the policy is to be paid, and a request for such payment, addressed to the insurance company on the blank furnished by it, and in the form and manner therein provided, is a sufficient designation (*Arnott v. Prudential Ins. Co.*, 63 Hun, 628, 17 N. Y. Supp. 710). The company is estopped to claim that there was an insufficient designation of beneficiaries, where the agent taking the application has informed the applicant that the designation was sufficient for the purpose intended (*Sauerbier v. Union Central Life Ins. Co.*, 39 Ill. App. 620).

Since the designation of a beneficiary by a member of a relief association is an act testamentary in character, where such member is a minor, any designation by him of a beneficiary is invalid. *Burst v. Weisenborn*, 1 Pa. Super. Ct. 276.

Under the laws of mutual benefit associations, it is generally necessary that a beneficiary shall be designated in the mode prescribed in such laws (*Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n*, 76 Pac. 238, 142 Cal. 489). Though, where the by-laws of an association require the member to sign his designation of beneficiaries, his writing their names in a prepared blank, without signing, is not a sufficient designation (*Elliott v. Whedbee*, 94 N. C. 115), a failure properly to designate does not render the certificate void (*Ledebuhr v. Wisconsin Trust Co.*, 112 Wis. 657, 88 N. W. 607). But in such case the benefit will be paid to the family; actual designation being necessary only when the fund is to be paid to some person other than the family, heirs, or representatives (*Bishop v. Grand Lodge of Empire Order of Mutual Aid*, 112 N. Y. 627, 20 N. E. 562, reversing 43 Hun, 472).

Where no designation was made in the certificate proper, the space therefor being left blank, but by a subsequent indorsement the certificate was made payable to the parents of the insured, such indorsement amounts to an original designation (*Shryock v. Shryock*, 50 Neb. 886, 70 N. W. 515); and if, under the laws, the designation should have been submitted to the supreme secretary, the submission will be presumed, where the insured subsequently paid assessments for the benefit of the beneficiaries for a period of ten years or more. If the designation in the certificate did not correspond with the designation in the application, the retention of the certificate without objection was not such an assent to the erro-

neous designation as will amount to a waiver by the member (*Eckler v. Terry*, 95 Mich. 123, 54 N. W. 704).

It was held, in *West v. A. O. U. W.*, 14 Tex. Civ. App. 471, 37 S. W. 966, that where the applicant agreed to be bound by the by-laws as they then existed, or as they might be amended, the member is bound by a subsequent by-law relating to the method of designating beneficiaries. But an alteration of the by-laws changing the manner of designating beneficiaries, and, contrary to the former rule, requiring the designation to be made in a certain manner, cannot affect the rights of a member who was incapacitated by insanity from a compliance therewith and so remained until his death (*Grossmayer v. District No. 1. I. O. of B'Nai Berith*, 70 App. Div. 90, 74 N. Y. Supp. 1057, affirmed without opinion 174 N. Y. 550, 67 N. E. 1083). So, too, where certificates already in existence are expressly excepted from the operation of the by-law, it is not necessary that the member should make a new designation (*Pfeifer v. Supreme Lodge Bohemian Slavonian Benev. Soc.*, 173 N. Y. 418, 66 N. E. 108).

It is sometimes provided that a designation of the beneficiary shall be entered in a book kept for that purpose by the subordinate lodge. So, where a certificate was issued without a designation of any beneficiary, but subsequently the member verbally designated his children as such, and the secretary entered the same in the book of the association, it constituted an original designation, and was sufficient under the rules of the association (*Hanson v. Minnesota Scandinavian Relief Ass'n*, 59 Minn. 123, 60 N. W. 1091); and especially will the approval of the officers of the lodge of such method of designation be presumed, where it stood in one of the books of the association for a period of six or seven years. Under a by-law providing that every lodge shall keep a book in which a member shall declare in writing to whom the amount of the benefit shall be paid, and requiring the names of such beneficiaries to be written in full, a designation, "Payable to such parties as provided for in my will," is sufficient. The designation being in writing, a specification of the names of the persons intended in the will will relate back and complete the designation. (*Grand Lodge of U. S. v. Ohnstein*, 85 Ill. App. 355.) Where the laws provided that the members should designate their beneficiaries in a book kept in the lodge room, or by a writing duly acknowledged, the fact that there was no book in the lodge room in which to designate beneficiaries does not excuse the member for his failure to designate a beneficiary in the other method prescribed (*Loewenthal v. District Grand Lodge*,

No. 2, I. O. B. B., 19 Ind. App. 377, 49 N. E. 610). Moreover, on failure to properly designate a beneficiary, parol evidence is not admissible to show that the member intended to make the benefit payable to his administrator for the benefit of his estate (*Eastman v. Provident Mut. Relief Ass'n*, 62 N. H. 555).

Where the laws of an association so provide, the designation of a beneficiary may be by will.

Smith v. Covenant Mut. Ben. Ass'n (C. C.) 24 Fed. 685; *Nelson v. Gibson*, 92 Ill. App. 595; *Hoffmeyer v. Muench*, 59 Mo. App. 20.

But, if designation by will is allowed, a paper addressed to the officers of the lodge, reciting, "It is my will that the benefit shall be paid to" a person named, neither attested nor probated as a will, is not a proper designation (*Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 869). Though it was held, in *Weil v. Trafford*, 3 Tenn. Ch. 108, that the naming of a person as residuary legatee is a sufficient designation, **the weight of authority is that a general bequest by residuary clause is not sufficient.**

Maryland Mut. Benev. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; *Greeno v. Greeno*, 23 Hun (N. Y.) 478.

But, if inoperative as a bequest, the will may constitute such a written order of designation as will be sufficient under the rules of the association (*Dennett v. Kirk*, 59 N. H. 10). So, where the member executed a paper, which he sent to the secretary of his lodge, reciting that he "bequeathed the benefit" to a certain person, the paper was regarded as a valid designation, notwithstanding it was not within the statute of wills (*Thomeuf v. Knights of Birmingham of Pennsylvania*, 12 Pa. Super. Ct. 195). Where a member's will was delivered to the officers of his lodge and retained by them, there was a waiver of any irregularity in the designation (*Kepler v. Supreme Lodge Knights of Honor*, 45 Hun [N. Y.] 274).

Where a benefit certificate was payable to the friend of the insured, whom he might designate in his will, the person so named stands as if his name was written in the certificate, and takes thereunder, instead of under the will, and cannot, therefore, resort to the probate court to recover the insurance money (*Ledebohr v. Wisconsin Trust Co.*, 112 Wis. 657, 88 N. W. 607).

Where neither the statute, constitution, nor by-laws of a benefit order, in force at the time insured became a member or at the time of his death, authorize a designation by will, such a designation is

insufficient (*In re Smith's Estate*, 87 N. Y. Supp. 725, 42 Misc. Rep. 639). So, if the laws provide that a designation must be made while the member is living, a designation by will is not valid.

Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; *Hellenberg v. District No. 1*, I. O. B. B., 94 N. Y. 580.

It is, of course, elementary that, if the law under which the association is organized expressly provides that benefits cannot be willed, a designation by will is ineffective (*Baldwin v. Begley*, 56 N. E. 1065, 185 Ill. 180).

(a) Same—Construction.

Where several policies have been issued by life insurance companies in place of policies surrendered by the insured, and in the event of his death it becomes necessary to determine who are the beneficiaries entitled to the insurance, reference may be had, not only to the last application, but to the different policies (*Towne v. Towne*, 93 Ill. App. 159). If there is a variance between the application and the certificate as to the beneficiary, the application will control (*Eckler v. Terry*, 95 Mich. 123, 54 N. W. 704); and the fact that there is a variance cannot avail the insurer to defeat the contract (*Phillips v. Union Cent. Life Ins. Co.* [C. C.] 101 Fed. 33).

The general rule, that the contract is to be construed most strongly against the insurer, will be applied where there is a doubt as to who is intended to be designated as beneficiary (*McNally v. Metropolitan Life Ins. Co.*, 16 Pa. Super. Ct. 111). In some respects the designation of a beneficiary is similar to that of devisees or legatees under a will, and the same rules of construction should be applied (*Duvall v. Goodson*, 79 Ky. 224). Words used in designating a beneficiary will not be construed in their technical signification, but rather in accordance with the sense in which they were used (*Walter v. Hensel*, 42 Minn. 204, 44 N. W. 57). Parol evidence as to what occurred when the application was made is admissible to explain a latent ambiguity in the designation of a beneficiary (*Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136, reversing 63 Ill. App. 385).

A recital that a policy shall be payable to "children of" is equivalent to a recital that it was payable to "the children of" (*Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538). Where a policy designates the beneficiary by name, stating that she is the daughter of

the insured, and it appears that insured had a daughter bearing that name, parol evidence is inadmissible to show that the wife of the insured, bearing the same name, was the beneficiary (*Standard Life & Acc. Ins. Co. v. Taylor*, 12 Tex. Civ. App. 386, 34 S. W. 781). A policy payable to A., "trustee, and the children" of the insured, will be construed to mean that it is payable to A. as trustee "for" the children of the insured (*Atkins v. Atkins*, 70 Vt. 565, 41 Atl. 503). Where the insured, in his application, in answer to the question, "To whom will you have your death loss paid?" answered, "My heirs," a further reply, in answer to the request to state the relationship of beneficiaries, "Wife and daughters," renders certain the designation (*Addison v. New England Commercial Travelers' Ass'n*, 144 Mass. 591, 12 N. E. 407). A policy payable to "H., wife of M., his executors, administrators, or assigns," will be construed so that the word "his" refers to H., the wife, and not to M. (*Haerther v. Mohr*, 114 Iowa, 636, 87 N. W. 692). Where the beneficiary is designated by name and as the wife of the person insured, such person having had but one wife, there is no uncertainty, though the beneficiary is called "Georgie," instead of "Georgiana," the wife's real name (*Russ v. Supreme Council Am. Leg. of Honor*, 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469). Where the beneficiary is described as "Mrs. Kate H., his wife," whereas the name of the insured's wife was in fact "Ellen H.," the designation is nevertheless certain, though insured had a sister whose maiden name was Kate H.; it appearing that she had been married for several years when the certificate was issued (*Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136, reversing 63 Ill. App. 385). So, where one who had abandoned his wife thereafter promises marriage to one whose Christian name was "Emma L.," and designated her as his beneficiary under the name of "Emma L. Thompson," his "wife," the designation was sufficiently certain to secure the benefit to his fiancée, though his lawful wife's name was "Eliza J." (*Bogart v. Thompson*, 53 N. Y. Supp. 622, 24 Misc. Rep. 581).

(c) Same—Revocation by marriage.

If one designated as beneficiary is otherwise within the privileged class, the subsequent marriage of the insured does not revoke the designation.

Massachusetts Catholic Order of Foresters v. Callahan, 146 Mass. 391, 16 N. E. 14; *Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n*, 142 Cal. 489, 76 Pac. 238.

Where a subsequent by-law provides that, if marriage is contracted after the issuance of the policy, it shall be paid to the widow, the marriage of the member does not revoke a prior designation (*Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939, reversing 45 Ill. App. 112). Where the right of a married member to designate a beneficiary is restricted to his family, marriage will revoke a prior designation (*Sanger v. Rothschild*, 50 Hun, 157, 2 N. Y. Supp. 794, affirmed in 123 N. Y. 577, 26 N. E. 3). So, where the persons who may be beneficiaries must be members of the immediate family of the insured, a subsequent marriage of the insured will revoke a designation of his father or his mother as beneficiary.

Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451; *Lister v. Lister*, 73 Mo. App. 99.

12. AMOUNT OF INSURANCE.

- (a) Determination of amount in general.
- (b) Life insurance.
- (c) Same—Limitation to amount of assessment.
- (d) Same—Reduction of amount.
- (e) Questions of practice.

(a) Determination of amount in general.

The determination of the amount of insurance covered by a policy rarely arises directly as an independent question of construction, but usually in the form of a question as to the extent of the liability incurred by the insurer, in view of all the facts and circumstances connected with the loss. This phase of the question will be discussed at length in its proper connection. It is the purpose at present to refer merely to a few cases illustrating some of the more general principles of construction.

While the premium may be resorted to as a guide to discover the amount intended to be insured (*Post v. Phoenix Ins. Co.*, 10 Johns. [N. Y.] 79), it does not follow that the premium will control. The question as to what extent it will control often arises in determining the divisibility of the contract, it being held in some instances that a gross premium renders the contract entire. Thus, in *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759, it was held that, though separate amounts were stated on the various items covered, the premium

being gross, the sum of those amounts was the amount of insurance; the separation being merely a distribution or apportionment of the risk. On the other hand, it is the settled doctrine in some states that where the amounts attached to the various items are stated separately, or, as it is generally expressed, the items are for the purpose of insurance separately valued, the separate valuations may be regarded as separate policies for separate amounts.

Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Continental Ins. Co. v. Gardner*, 23 Ky. Law Rep. 335, 62 S. W. 886; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523.

So, where a policy recited, "This policy, being for \$1,000, covers pro rata on each of the following amounts," followed by a list of the articles insured, aggregating \$3,510, it was held that the policy insured each article separately for $1000/3510$ of the sum attached to such article in the list (*Citizens' Ins. Co. v. Ayers*, 88 Tenn. 728, 13 S. W. 1090). A policy covering separate amounts on separate items, the total being \$1,350, was construed as a policy for that amount, though in the body of the policy, by apparent mistake, the amount was written "thirteen and 50-100" (*Insurance Co. of North America v. Hofing*, 29 Ill. App. 180). Conversely, an indorsement on a policy, stating in figures an amount different from that on the face of the policy, will be regarded as a mere clerical error (*Bushnell v. Farmers' Mut. Ins. Co.*, 91 Mo. App. 523).

An agreement to write insurance on property to the amount of \$12,000 in four different specified companies will be construed as an agreement to write policies for equal amounts in each company. *Fitton v. Phoenix Assur. Co. (C. C.)* 25 Fed. 880.

Though the amount of the insurance is stipulated in the policy, the amount cannot be said to be fixed, except in the case of valued policies. In open policies the amount is usually expressed as "to an amount not exceeding," etc. In such policies the insured can recover only for his actual loss, not to exceed the amount named. The policy may, therefore, be regarded as only for an amount to be determined at the time of loss, but in no event to exceed the amount specified.

Luce v. Springfield Fire & Marine Ins. Co., 15 Fed. Cas. 1071; *Williams v. Continental Ins. Co. (D. C.)* 24 Fed. 767; *Hemmenway v. Eaton*, 13 Mass. 108; *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273; *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128.

But, even where a policy so provides, if the loss amounts to the sum stated in the policy, that is to be regarded as the amount of the insurance, and an allegation to that effect is proper (*Powers v. New England Fire Ins. Co.*, 35 Atl. 331, 68 Vt. 390).

In case of a valued policy, however—that is, one in which the value of the property insured is fixed and agreed upon—it is not necessary in the case of total loss to make any proof as to the value of the property (*Williams v. Continental Ins. Co.* [D. C.] 24 Fed. 767). **Therefore a valued policy does not merely estimate the value of the property insured, but it values the loss, and is equivalent to an assessment of damages in the event of a loss** (*Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367).

It is a general principle that the amount of insurance must be commensurate with the interest. Therefore, where a cargo already insured for \$12,000 is insured in a second policy and is valued therein at \$27,500, there remains an insurable interest of \$15,500, which is regarded as the amount insured by the second policy (*Millaudon v. Western Marine & Fire Ins. Co.*, 9 La. 27, 29 Am. Dec. 433). On the other hand, in *Fox v. Capital Ins. Co. of Des Moines*, 93 Iowa, 7, 61 N. W. 211, it was held that if a consignee of goods to be paid for if sold, and if not, to be returned to the consignor, applies for insurance thereon in his own name, intending to insure for the full value of the property, and the policy is written with that end in view, and with knowledge of the nature of the consignee's title, a clause limiting the liability to an amount not exceeding the interest of the consignee does not restrict the liability in case of loss to his personal interest.

An insurance company cannot reduce the amount of a policy issued to assured by merely writing him a letter stating that it was obliged to reduce its risk from \$1,250 to \$500, and inclosing a slip to that effect, with a request that it be attached to the policy, without proof that after the receipt of such letter the insured acquiesced in such reduction (*McLean v. American Mut. Fire Ins. Co.*, 122 Iowa, 355, 98 N. W. 146). And even where the policy contains a clause providing that it may be terminated by giving notice and refunding the premium for the unexpired term, if it contains no provision authorizing the company to reduce the amount of insurance, any attempt on the part of the company to reduce the amount on repayment of a portion of the premium is inoperative (*Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379).

(b) Life insurance.

In life policies the amount expressed is the amount of the insurance, as such policies are usually regarded as valued policies; that is to say, the loss is absolutely valued.

Rockhold v. Canton Masonic Mut. Ben. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. 419; Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244.

Even where a benefit certificate provides for the payment of a sum not exceeding \$5,000, it will be regarded as a contract of insurance for the amount so stated (Himmelein v. Supreme Council American Legion of Honor [Cal.] 33 Pac. 1130). On the other hand, an agreement by an endowment association to pay the holder his share of the endowment fund, "not exceeding \$1,000, it being declared to be the design and purpose of this association to provide the full sum of \$1,000 for each insurance certificate," is not an absolute promise to pay \$1,000, but merely a promise to pay the holder his share of the endowment fund, not exceeding \$1,000 (Congower v. Equitable Life & Endowment Ass'n, 94 Iowa, 499, 63 N. W. 192). The constitution of a mutual benefit association provided that it would pay \$350 on the death of a member who had been such for 10 years, and \$550 on the death of a member who had been such for 15 years. This association was consolidated with a second association; the agreement providing that the members of such second association should be accepted "in the same standing" as they had in their own organization, and should be allowed the same benefits as in their own organization. It was held that on the death of a member of the consolidated association, who had become such through the consolidation more than 10 years before his death, his beneficiary was entitled only to the first named amount, though his membership in the second association and in the consolidated association extended over 15 years. (Pfingsten v. Perkins [City Ct. N. Y.] 82 N. Y. Supp. 399.)

The rule that the amount of insurance must be limited to the extent of the interest is applied to life insurance policies taken out by a creditor on the life of his debtor. The amount must be limited to such a sum as will cover the debt and the cost of the insurance, with interest on such sums for the expectancy of life.

Cooper v. Shaeffer (Pa.) 11 Atl. 548; Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; Shaffer v. Spangler, 144 Pa. 223, 22 Atl. 865.

(c) Same—Limitation to amount of assessment.

The contracts or by-laws of co-operative or mutual benefit associations often contain provisions intended to limit the amount of insurance to the amount realized on the assessment. If the provision is that on the death of the member the beneficiary shall be entitled to receive from the association the amount collected on the assessment, the amount of insurance must be regarded as limited to the amount so collected. (*In re La Solidarite Mut. Ben. Ass'n*, 68 Cal. 392, 9 Pac. 453.) So, where the contract provides that on the death of a member an assessment shall be made and the proceeds, not to exceed a specified sum, shall be paid to the beneficiary, this is not a contract for a specified amount of insurance, but merely for the amount of an assessment.

Rainsbarger v. Union Mut. Aid Ass'n, 72 Iowa, 191, 33 N. W. 626; *Newman v. Covenant Mut. Ben. Ass'n*, 72 Iowa, 242, 33 N. W. 662; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261, 33 N. W. 663.

When the amount is so limited, it must be computed on the membership at the time of loss (*Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 64 N. W. 778, 59 Am. St. Rep. 367). If, however, the company delays in making the assessment, so that the assessment, when made, will not produce the amount specified in the certificate, it must make up the deficiency (*Union Mut. Acc. Ass'n v. Frohard*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664). If the contract recites that, if the reserve fund is exhausted when the policy becomes a claim, the amount payable shall be collected by an assessment, and in fact the association is nowhere given authority to make an assessment, the amount of the insurance is the amount specified in the policy (*Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222, 81 N. W. 484).

If, on the other hand, the policy does not contract to make an assessment, or make the payment contingent on the assessment, the amount of the insurance must be regarded as the amount specified in the policy, subject, however, to the limitation that, if the assessment does not produce the full amount, the beneficiary is entitled only to the amount realized; but in such case it is for the insurer to show what amount would be realized.

United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; *Lueders' Ex'r v. Hartford Life & Annuity Ins. Co. (C. C.)* 12 Fed. 465; *Hart v. National Masonic Acc. Ass'n*, 105 Iowa, 717, 75 N. W. 508; *Wood v. Farmers' Life Ass'n*, 95 N. W. 226, 121

Iowa, 44; Supreme Commandery Knights of the Golden Rule v. Everding, 20 Ohio Cir. Ct. R. 689, 11 O. C. D. 419; Prudential Mutual Aid Soc. v. Cromleigh, 3 Walk. (Pa.) 332.

But it has been held, in *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919, that, even if the testimony introduced by the company shows that an assessment would have produced an amount much smaller than that specified in the policy, the beneficiary is not to be limited to that amount if the company has represented by its officers and by circulars that the association had a large membership and a reserve fund at or about the time the claim matured. But in any event under such provision the amount of the insurance is limited to the amount specified, and the beneficiary can recover no more, though the assessment should realize a larger sum (*Bailey v. Mutual Ben. Ass'n*, 71 Iowa, 689, 27 N. W. 770). If the provisions of the certificate and by-laws leave it in doubt whether the amount of insurance is the amount specified in the policy or the amount actually realized from one assessment, the contract will be construed as one for the full amount stated in the policy (*Laker v. Royal Fraternal Union*, 75 S. W. 705, 95 Mo. App. 353).

(d) Same—Reduction of amount.

A reduction of the amount payable on a benefit certificate, if assented to by the insured, will be valid (*Evans v. Southern Tier Masonic Relief Ass'n*, 76 App. Div. 151, 78 N. Y. Supp. 611); and if it was optional with the insured to maintain his insurance on the old plan, rather than the new, under which the reduction took place, and he failed to exercise such option, such failure will be regarded as an express assent on his part to the reduction of his certificate (*Duer v. Supreme Council Order of Chosen Friends*, 21 Tex. Civ. App. 493, 52 S. W. 109). Payment of assessments on the reduced basis of the amount to be paid by the benefit certificate, made under protest and with tender of the full amount that would have been due if the reduction had not been made, is not an acquiescence in the reduction (*Russ v. Supreme Council American Legion of Honor*, 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469). It is, of course, obvious that an agreement between an insurance company, the insured, and the beneficiary in a life policy that the amount thereof should be scaled down two-fifths is an extinguishment pro tanto of such amount (*Leonard v. Charter Oak Life Ins. Co.*, 65 Conn. 529, 33 Atl. 511).

As a general rule, the legislative acts of a mutual benefit association will be presumed to be intended to operate prospectively only; consequently an amendment to its constitution or by-laws, reducing the amount payable under its certificates, will not be given a retrospective operation, but will be regarded as inoperative to reduce the amounts of policies issued prior thereto.

Beach v. Supreme Tent Knights of Maccabees, 177 N. Y. 100, 69 N. E. 281; *Pokrefky v. Detroit Firemen's Fund Ass'n*, 121 Mich. 456, 80 N. W. 240; *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066; *Jarman v. Knights Templars' & Masons' Life Indemnity Co. of Illinois* (C. C.) 95 Fed. 70; *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 93; *Goodson v. National Masonic Acc. Ass'n*, 91 Mo. App. 339; *Wuerfler v. Grand Grove Wisconsin Order of Druids*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

The question has been extensively discussed in the following cases. where an attempt to reduce the amount of the certificate of the American Legion of Honor was involved: *Supreme Council American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153, affirming (C. C.) 109 Fed. 261; *Black v. Supreme Council American Legion of Honor* (C. C.) 120 Fed. 580; *Supreme Council A. L. H. v. Champe*, 127 Fed. 541, 63 C. C. A. 282; *Lippincott v. Supreme Council A. L. H.* (C. C.) 130 Fed. 483; *McAlarney v. Supreme Council A. L. H.* (C. C.) 131 Fed. 538; *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33; *Russ v. Supreme Council American Legion of Honor*, 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469; *Newhall v. Supreme Council American Legion of Honor*, 181 Mass. 111, 63 N. E. 1; *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N. E. 238; *Williams v. Supreme Council American Legion of Honor*, 80 App. Div. 402, 80 N. Y. Supp. 713; *Simon v. Supreme Council American Legion of Honor*, 91 App. Div. 390, 86 N. Y. Supp. 866; *Smith v. Supreme Council American Legion of Honor*, 94 App. Div. 357, 88 N. Y. Supp. 44; *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932; *Makely v. Supreme Council American Legion of Honor*, 183 N. C. 367, 45 S. E. 649; *Gaut v. Supreme Legion of Honor*, 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465; *Supreme Council American Legion of Honor v. Storey* (Tex. Civ. App.) 75 S. W. 901; *Supreme Council A. L. H. v. Batte* (Tex. Civ. App.) 79 S. W. 629.

The contrary doctrine is asserted in some cases, on the ground that the constitution or the contract with the member conferred authority on the association to alter or amend its by-laws.

Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Hutchinson v. Supreme Tent of Maccabees*, 22 N. Y. Supp. 801, 68 Hun, 355; *French v. Society of Select Guardians*,

51 N. Y. Supp. 675, 23 Misc. Rep. 86; *Evans v. Southern Tier Masonic Relief Ass'n*, 88 N. Y. Supp. 162, 94 App. Div. 541; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362.

It is obvious, too, that where the certificate provides for payment "in an amount to be computed according to the laws of the society," and the laws provide that their provisions as to payment may be changed at any time, a member is bound by changes in the laws after the procurement of his certificate (*Bowie v. Grand Lodge Legion of the West*, 99 Cal. 392, 34 Pac. 103). So, when the certificate recites that it is issued on the express condition that the beneficiaries' rights should be determined by the laws in force at the time the same became payable, a subsequent by-law affecting the amount to be paid is within the power of the association (*Richmond v. Supreme Lodge Order of Mutual Protection*, 100 Mo. App. 8, 71 S. W. 736).

(e) Questions of practice.

A complaint which fails to allege, directly or inferentially, the amount of the insurance, or that the plaintiff was insured in any amount, is defective (*Wittkowsky v. American Ins. Co.*, 79 Mo. App. 501). If the complaint alleges that the certificate is a promise to pay the full sum designated therein, while the certificate offered in evidence shows a promise to pay a sum not exceeding that designated, there is a material variance (*Supreme Council American Legion of Honor v. Anderson*, 61 Tex. 296). On the other hand, it was held, in *Powers v. New England Fire Ins. Co.*, 68 Vt. 390, 35 Atl. 331, that where a declaration alleges the amount of the insurance to be \$1,000, whereas the policy recites that it is for a sum not exceeding \$1,000, this will not be regarded as a material variance. Under a declaration counting on the policy for \$2,100, a policy for \$1,800, is not admissible (*Dove v. Royal Ins. Co.*, 98 Mich. 122, 57 N. W. 30). Where the complaint alleged that the amount of insurance was \$1,600, and the original policy contained marginal figures indicating that amount, the fact that a copy of the policy attached to the complaint, and referred to as part of it, though reciting the amount as \$1,600, contained marginal figures indicating \$1,000, does not constitute a material variance (*Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100).

13. COMMENCEMENT, DURATION, AND TERMINATION OF RISK.

- (a) Commencement of risk.
- (b) Same—Marine policies.
- (c) Duration of risk.
- (d) Same—Policy expiring "at noon."
- (e) Same—Vessel at sea.
- (f) Termination of insurance—Marine policies.
- (g) Life and accident insurance.
- (h) Same—Effect of war.
- (i) Casualty and guaranty insurance.

(a) Commencement of risk.

In the absence of any stipulation fixing the time of commencement of the risk, it will be regarded as beginning with the completion of the contract. Whenever that particular act is performed which under the circumstances is regarded as completing the contract, whether it is the approval of the application, the payment of the premium, or the delivery and acceptance of the policy, the risk commences.

This principle is elementary, and the citation of the numerous cases would serve no useful purpose. Reference may be made to the following: *Eames v. Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298; *Potter v. Phenix Ins. Co. (C. C.)* 63 Fed. 382; *Hartford Fire Ins. Co. v. King*, 17 South. 707, 106 Ala. 519; *Union Insurance Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169; *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; *Palm v. Medina County Mut. Fire Ins. Co.*, 20 Ohio, 529; *Bennett v. Connecticut Fire Ins. Co.*, 11 Ohio Dec. 429, 27 Wkly. Law Bul. 15; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Soc.*, 34 Or. 228, 55 Pac. 435; *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671, 7 N. W. 776.

The principle is asserted directly, or may be implied as supported by inference, in nearly all the cases dealing with the completion of the contract, the various phases of which have been discussed elsewhere. Reference may be made to the discussion of parol contracts, of the acceptance of the application, of the delivery of the policy, and of the payment of the first premium.

So, where one applied, December 18th, to the authorized agent of an insurance company for insurance on his property, and it was agreed that the agent should issue the policy and send it to the insured on that day, and, though the policy was in fact issued on that day, it was not delivered, nor the premium paid thereon, until De-

cember 22d, it was held that the policy should be considered as commencing December 18th, instead of December 22d (*Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125). If the final act to give effect is the delivery of the policy, the risk will commence from the time of mailing the policy at the home office of the company to the insured (*Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180). So, in an open policy, the risk commences when the indorsement is made, in the absence of any stipulation to other effect (*Wass v. Maine Mut. Marine Ins. Co.*, 61 Me. 537).

In view of the principle that the risk commences on the completion of the contract, if the application provides that no liability shall attach until the application has been approved by the home office, the risk will not cover property destroyed before such approval (*St. Paul Fire & Marine Ins. Co. v. Kelley*, 89 N. W. 997, 2 Neb. [Unof.] 720). Leaving a memorandum at the agent's office calling for insurance on certain property is not a commencement of the risk, though on the subsequent approval of the risk the agent dates the policy back to a time previous to the leaving of such memorandum, in order to make the insurance continuous (*Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322). The date of the policy will be the date of commencement of the risk, if the approval of the application was made on the same day as the policy was dated (*Day v. Hawkeye Ins. Co.*, 72 Iowa, 597, 34 N. W. 435). Where an aggregate amount of insurance was applied for, no companies being mentioned, the insurance to be apportioned and distributed by the agent among the several companies which he represented, the risk commences as to each company at the time when the policy in such company was issued.

Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Michigan Pipe Co. v. North British & Mercantile Ins. Co.*, 97 Mich. 493, 56 N. W. 849.

As a policy may, in pursuance of a prior agreement between the parties, be antedated (*City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276), a policy bearing date on the day the premium was paid will take effect by relation from that day, though not delivered until several days afterwards (*Lightbody v. North American Ins. Co.*, 23 Wend. [N. Y.] 18). So, if the agent assumes to accept a risk at the date of receiving the premium, the policy, subsequently issued as of that date, will cover a loss occurring prior to the delivery of the policy (*Collins v. Phoenix Ins. Co.*, 14 Hun [N. Y.] 534).

It may be stipulated in the application that the risk shall commence upon a day named therein, and in such case the policy will cover a loss occurring before its issuance, but after the day so named.

Insurance Co. of North America v. Thornton, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225, reversing 5 Wkly. Law Bul. 646; *Hardwick v. State Ins. Co.*, 20 Or. 547, 28 Pac. 840.

The burden, however, is on the insured to show that it was understood at the time of signing the application that the risk was to begin on that date (*Brink v. Merchants' & Farmers' United Mut. Ins. Ass'n* [S. D.] 95 N. W. 929). If the application recites that the policy is to bear date and take effect at noon of the day when the application is approved, it cannot be shown by parol that there was an agreement that the policy should take effect the day the application was dated (*Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64). It must, however, clearly appear that the agent had authority to bind the company (*O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. 298). A mere soliciting agent has no such power, and his agreement that the risk shall commence on a certain date cannot bind the company.

Stockton v. Firemen's Ins. Co., 33 La. Ann. 577, 30 Am. Rep. 277; *Allen v. St. Lawrence County Farmers' Ins. Co.*, 88 Hun, 461, 34 N. Y. Supp. 872.

If the agent is a local agent with the usual powers, it will be presumed that he had authority, so as to render the policy binding from the date stipulated (*Walker v. Lion Fire Ins. Co.*, 175 Pa. 345, 34 Atl. 736). A recital in the written application for insurance, subsequently approved, that it was for a term of years from the date named, sufficiently shows the agent's agreement that the insurance should take effect on that date to satisfy a condition of the application that the company will not be bound by any agreement of the agent not contained therein (*Alliance Co-operative Ins. Co. v. Corbett* [Kan.] 77 Pac. 108).

A policy may be retrospective, as where a policy dated June 19th recites that it is to continue for one year from the preceding June 10th (*Fuchs v. Germantown Farmers' Mut. Ins. Co.*, 60 Wis. 286, 18 N. W. 846). Such a contract is usually written where the thing insured is at a distant point and its status is unknown to either par-

ty (*Security Fire Ins. Co. of N. Y. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush [Ky.] 81, 3 Am. Rep. 301). A policy may be made retrospective by the phrase "lost or not lost" (*Paddock v. Franklin Ins. Co.*, 11 Pick. [Mass.] 227), or by merely antedating the policy.

Hallock v. Commercial Ins. Co., 26 N. J. Law, 268, affirmed in 27 N. J. Law, 645, 72 Am. Dec. 379; *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Prac. (N. Y.) 351; *Bennett v. Connecticut Fire Ins. Co.*, 11 Ohio Dec. 429, 27 Wkly. Law Bul. 15; *Connecticut Fire Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 S. & C. P. Dec. 60.

In accordance with the general rules as to powers of agents, whether a marine policy relates back, so as to cover a loss occurring before the policy issued, depends on whether the agent was authorized to bind the company by his agreement as to the date of the commencement of the risk (*Continental Ins. Co. v. Allen*, 26 Ill. App. 576). If a policy by its terms is to take effect at 12 o'clock noon on the day designated, no acceptance of the policy by the insured thereafter can operate to make such policy take effect, so as to cover a loss occurring before noon of that day (*German Ins. Co. v. Downman*, 115 Fed. 481, 53 C. C. A. 213). The risks in reinsurance contracts usually commence from the time the reinsurance is granted (*Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140); but, if an intent to cover the risk from the inception of the original insurance is shown by the recitals of the policy, the reinsurance will be regarded as commencing on that date (*Philadelphia Life Ins. Co. v. American Life & Health Ins. Co.*, 23 Pa. 65).

Though a policy is by its terms to take effect on a certain date, yet it may be shown that because of failure to comply with some condition precedent it did not take effect until a subsequent day (*Atlantic Ins. Co. v. Goodall*, 35 N. H. 328). The theory is that the risk cannot commence until such condition is performed (*Hyde v. Mississippi Ins. Co.*, 10 La. 543, 29 Am. Dec. 465); but, if the condition is performed at the time the policy is issued, the contract takes effect at once (*Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray [Mass.] 192). On a subsequent performance, the risk commences from the time the company is notified that the conditions have been performed (*Hamilton v. Lycoming Ins. Co.*, 5 Pa. 339).

Reference may also be made to *Scammell v. China Mut. Ins. Co.*, 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462, where it was held that, if a contract is made to insure cargo at a reasonable rate of premium until the facts necessary to determine the premium to be

charged can be ascertained by the applicant and sent to the insurer, a failure to supply such information without unreasonable delay will terminate the contract.

A complaint alleging that the contract was made on some day in September prior to the 21st, leaving the exact date blank, is not demurrable for failure to show the commencement of the risk, where the exact dates appear from papers in the possession of the company, thus excusing the omission (*Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 South. 707); and an allegation that the contract was to take effect on a certain date is supported by evidence showing that a prior policy was to expire on that day, and that some time before insured paid the premium for a new one, telling the agent he wished it written out at once (*Insurance Co. of North America v. Bird*, 51 N. E. 686, 175 Ill. 42).

(b) Same—Marine policies.

It is usually regarded as immaterial where a vessel may be at the inception of the risk under a time policy (*Melcher v. Ocean Ins. Co.*, 59 Me. 217). In a voyage policy, in the absence of a distinct statement as to the port from whence the voyage is to be made, the risk will commence from the port where the vessel lay when the policy was issued or where the property insured was taken on board (*Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414). If a policy is to commence by its terms wherever the vessel was in safety on a certain day, a recital of permission to navigate a certain portion of the river does not affect the time of commencement (*Schroeder v. Stock & Mut. Ins. Co.*, 46 Mo. 174).

In determining the commencement of the voyage, for the purpose of ascertaining the commencement of risk, the intent is the important factor (*Dennis v. Ludlow*, 2 Caines [N. Y.] 111). Consequently a vessel, having quit her moorings in complete readiness for sea, the master having an actual intention to proceed, has begun her voyage (*Bowen v. Hope Ins. Co.*, 20 Pick. [Mass.] 275, 32 Am. Dec. 213). If the vessel is insured for a certain voyage, with the exception of risks covered by prior policies, the risk commences, though the first two days of the voyage were covered by previous policy on time (*Kent v. Manufacturers' Ins. Co.*, 18 Pick. [Mass.] 19). If it is contended that the previous risk had not expired when the new contract was made, the burden of proof is on the insurer to show the mistake (*Dodd v. Gloucester Mut. Fishing Ins. Co.*, 127 Mass. 151).

It is a sufficient description of the commencement of the risk to recite that the vessel is insured "at and from" a certain port (*Cleveland v. Union Ins. Co.*, 8 Mass. 308). The construction of a policy at and from a certain port, as to the commencement of the risk, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there; if in a domestic port, then from the date of the policy. If the vessel has been long lying in port, without reference to any particular voyage, then it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until his ownership commences. (*Seamans v. Loring*, 21 Fed. Cas. 920.) If the vessel is represented to be at a foreign port on a certain day, the risk under a policy at and from that port commences on the day represented (*Kemble v. Bowne*, 1 Caines [N. Y.] 75). Under a policy on cargo at and from a port, the risk commences when the cargo is loaded, if not, indeed, when it begins loading.

Smith v. Steinbach, 2 Caines, Cas. (N. Y.) 158; *The Liscard* (D. C.) 56 Fed. 44; *Patrick v. Ludlow*, 8 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130.

The general rule is that, under a policy on cargo, the risk commences from the loading thereof (*Hicks v. Merchants' & Manufacturers' Ins. Co.*, 1 Ohio Dec. 374); and if the goods were loaded and shipped on the day the policy is dated, the insurer becomes liable from the time of subscribing the policy, the subject insured being then at hazard (*Lorent v. South Carolina Ins. Co.*, 1 Nott & McC. [S. C.] 505). In view of the foregoing rule, however, it is obvious that a policy will not cover cargo lying on the wharf in readiness for loading.

Cottam v. Mechanics' & Traders' Ins. Co., 40 La. Ann. 259, 4 South. 510; *Smith v. Mobile Nav. & Mut. Ins. Co.*, 30 Ala. 167.

To ship goods from a place does not necessarily imply that they will be loaded there (*Sorbe v. Merchants' Ins. Co.*, 6 La. 185). Hence a policy on cargo from one port to another will cover it when loaded, though it was not loaded at the port named, but at another sanctioned by the usage of trade.

McCargo v. Merchants' Ins. Co., 10 Rob. (La.) 334; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397.

If the insurance is on cargo on the return voyage of the vessel, beginning from and immediately following the loading thereof on

board, the risk will not attach, if on the vessel's arrival at her outward port she is not permitted to remain there, but is compelled to put to sea and proceed with her original cargo to another port (*Richards v. Marine Ins. Co.*, 3 Johns. [N. Y.] 307). But if the vessel is on a trading voyage, and is insured at and from a foreign port, the risk will attach to such portion of her cargo as may be on board at such port (*Vredenergh v. Gracie*, 4 Johns. [N. Y.] 444, note).

A policy on freight at and from a certain port attaches at the time the cargo is placed on the vessel in preparation for the voyage (*Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29). Generally, the right to freight does not commence until the cargo is on board; but, if the freight is insured in a valued policy, the risk attaches if any part of the cargo is shipped (*Hart v. Delaware Ins. Co.*, 11 Fed. Cas. 683). Obviously, if no cargo has been loaded, the risk under a policy on freight does not begin (*Gordon v. American Ins. Co.*, 4 Denio [N. Y.] 360). Where a vessel, instead of pursuing her voyage, deviated to another port and was there chartered for a voyage to Manila, an indorsement, "This policy now attaches at and thence via Philippine Islands to port of advice or discharge in Atlantic United States and 15 days on vessel in port after arrival," did not make the policy attach at once to the Manila freight, while the inward freight was unloading (*Lincoln v. Boston Marine Ins. Co.*, 159 Mass. 337, 34 N. E. 456).

Where the vessel is under charter, the inception of the voyage, even in ballast, from one port to another, to take the cargo pursuant to the charter, is an inception of the voyage on which freight is to be earned. Consequently the risk on freight commences on the inception of the voyage to obtain the cargo.

Robinson v. Manufacturers' Ins. Co., 1 Metc. (Mass.) 143; *Hodgson v. Mississippi Ins. Co.*, 2 La. 341; *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163; *Melcher v. Ocean Ins. Co.*, 60 Me. 77; *Hart v. Delaware Ins. Co.*, 11 Fed. Cas. 683.

(c) Duration of risk.

Though, ordinarily, the duration of the risk is regarded as an essential element of the contract, so that, if not agreed on, there can be no contract (*Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777), yet, if the insurer has made it a custom to issue policies open as to duration, the fact that no period was fixed for the duration of the risk will not be fatal (*Petrie v. Phenix Ins. Co.*,

132 N. Y. 137, 30 N. E. 380, affirming 11 N. Y. Supp. 188, 57 Hun, 591). So, too, it will be sufficient if means are provided for determining the period, though none is absolutely fixed in the policy (*Imboden v. Detroit Ins. Co.*, 31 Mo. App. 321). Generally, where the contract is otherwise complete, it will be presumed that the policy is to continue for a reasonable time (*Schroeder v. Trade Ins. Co.*, 109 Ill. 157). In *Kimball v. Lion Ins. Co.* (C. C.) 17 Fed. 625, the duration of the policy was presumed to be one year. So, in *Scott v. Home Ins. Co.*, 53 Wis. 238, 10 N. W. 387, where the original policy was for one year, and the first renewal was also for one year, with the same premium, it was presumed that a third renewal, the same premium having been paid and nothing appearing to the contrary, was also for one year. The same rule was applied in *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 363. Policies are sometimes written as "permanent" policies. Such contracts are contracts of insurance from year to year, and until terminated by an express notice by one of the parties thereto (*First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. Prac [N. Y.] 448).

A policy will not be declared void because it recites that it is to expire on the day of its date (*Phoenix Ins. Co. v. Boulden*, 96 Ala. 609, 11 South. 774). But it may be shown, by reference to indorsements, to the application and to the amount of premium, that it is to be an insurance for a specific period (*Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray [Mass.] 261). But it was held, in *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199, that, where a policy is by mistake made to expire at a time prior to its date, such mistake cannot be corrected in a court of law, but must be reformed in equity. A policy issued by mistake for a longer term than intended is not void (*Latimore v. Dwelling House Ins. Co.*, 153 Pa. 324, 25 Atl. 757). If the policy appears to have been altered as to the period of risk, it may be shown that it was in the same condition when received by the insured, that he made no alterations in it, but that he accepted it, and relied on it as a policy for the period stated (*Davidson v. Guardian Assur. Co.*, 176 Pa. 525, 35 Atl. 220). A policy issued by mistake for a longer term may, however, be reformed or canceled in equity (*North American Ins. Co. v. Whipple*, 18 Fed. Cas. 340); and if the clerk filling out such policy testifies that he made a mistake and, instead of making it for two months, according to the application, made it for fourteen months, and it

further appeared that only two months' premium was paid, this is sufficient to entitle the company to equitable relief.

In *Noel v. Pymatuning Mut. Fire Ins. Co.*, 130 Pa. 523, 18 Atl. 1054, a five-year policy which had been running about two years was surrendered for the purpose of taking a new one for an additional amount. After a loss, an examination of the policy showed that it was issued, not for five years, but was to expire at the time limited in the original policy. It was held that the facts that the second policy was entered on the books as a five-year policy, and the insured had paid assessments after the time limited for the expiration of the original policy, showed the intention to be that the second policy should run five years from its date.

A fire policy, expressed to cover "the risk on shore for 10 days prior to shipment," will be construed to mean the 10 days immediately following the issuance of the policy (*Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162). Where the duration of a policy is stated to be from August 15th to October 15th, and the policy recites that it is upon the insured's hop house "while drying hops," the period named in the policy is modified by the clause as to the use of the building, and the policy will continue only while the process of drying hops is continued (*Langworthy v. Oswego & O. Ins. Co.*, 85 N. Y. 632). Where a policy dated June 19th recited that it was to continue in force for one year from June 10th preceding, the date of the policy will not control the provision as to duration, but the policy will continue only until June 10th the succeeding year (*Fuchs v. Germantown Farmers' Mut. Ins. Co.*, 60 Wis. 286, 18 N. W. 846). Where a contract is accepted for a term of 30 days, "unless the applicant is sooner notified of its rejection," and it is further provided that the insurance will cease at the end of 30 days, unless a regular policy has been issued, the policy terminates at the expiration of the period named, though no notice of rejection was given, if no policy was issued (*Barr v. Insurance Co. of North America*, 61 Ind. 488). An indorsement on a time policy, before it had expired, that the vessel was covered for the return voyage, "under and subject to the conditions" of the existing policy, does not extend the period beyond the time specified in the original policy (*Pitt v. Phenix Ins. Co.*, 10 Daly [N. Y.] 281). If, however, a policy is limited to 30 days, the time consumed in making, with the written consent of the insurers, a transshipment of the insured goods, is not to be

. counted as part of the period (*Plant v. Eufaula Home Ins. Co.*, 41 Ga. 130).

In an action on the contract, the termination of the risk should ordinarily be alleged. *Shaver v. Mercantile Town Mut. Ins. Co.*, 79 Mo. App. 420; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435. But, in the case of an open policy, it is sufficient if it is alleged that the policy was in force at the time of the loss. *Fire Ass'n v. Miller*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 332. An allegation that the time of insurance was from January 6, 1870, to January 6, 1871, is not supported by a policy wherein the time is described as from January 6, 1870, "at noon," to January 6, 1871, "at noon." *Simmons v. Ins. Co.*, 8 W. Va. 474. Where the allegation was that the insurance was for a term of three years, and defendant by its answer alleged that the policy was for a term of only one year, a reply alleging that the policy by mistake read "one year," instead of "three years," did not state a new cause of action. *Orient Ins. Co. of Hartford, Conn. v. Clark*, 59 S. W. 863, 22 Ky. Law Rep. 1066.

(d) Same—Policy expiring "at noon."

In *Walker v. Protection Ins. Co.*, 29 Me. 317, involving a marine policy on time, it was held that in such a contract the time is to be reckoned according to the longitude of the place where the contract is made. Therefore a contract of insurance on a vessel for one year from December 17, 1845, at noon, must be regarded as referring to the meridian of the place where the contract was made, as, otherwise, the duration of the policy would be less than one year or more than one year, according as the vessel, on the day of expiration, was east or west of the place of contract. This line of reasoning does not apply, of course, in the case of a fire policy, where the property is fixed in location. Under such circumstances, the words expressing duration would undoubtedly be construed as referring to the meridian of the place of loss.

An interesting question was presented in *Jones v. German Ins. Co.*, 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860, where, under a policy expiring at 12 o'clock at noon of a certain day, the insurer contended that the time of noon must be determined by standard time; the loss having occurred after noon by standard time, though before noon according to solar time. The court said that, in the absence of statutory enactment, they could not concede this position. The meaning of the words "12 o'clock" seems to be definitely fixed by the words "at noon." "Noon" is defined in the dictionaries as the middle of the day, and time, when it concerns legal duty, should

be fixed with reference to certain unvarying and uniform standards. This standard, the court regarded as the meridian of the sun, and held that to sustain the contention that, in computing time, standard time should be used, it must be shown that there existed a custom at the place where the loss occurred to use such time, and that by such custom 12 o'clock at noon meant 12 o'clock standard time. Similarly, in *Meier v. Phoenix Ins. Co.*, 12 Ins. Law J. (N. S.) 192, the Supreme Court of Ohio affirmed by a divided court a decision of the lower court to the effect that "noon" in an insurance policy means noon by sun time.¹

(e) *Same—Vessel at sea.*

Marine policies on time usually provide that, if the vessel is at sea or on passage at the expiration of the period, the risk shall continue at the specified rate of premium until the vessel arrives at its port of destination. Under such a clause, the policy does not terminate at the expiration of the period, if the vessel is actually prosecuting a voyage at that time (*Eyre v. Marine Ins. Co.*, 5 Watts & S. [Pa.] 116). The policy renews itself as a policy on time if the vessel is at sea, pursuing her course to her destination (*Union Ins. Co. v. Tysen*, 3 Hill [N. Y.] 118).

A vessel is at sea, or on passage, within the clause, if she is in a river leading from a port, ready to sail, though actually 25 miles inland (*Union Ins. Co. v. Tysen*, 3 Hill [N. Y.] 118), while detained in a foreign port against the will of the master (*Wood v. New England Marine Ins. Co.*, 14 Mass. 31, 7 Am. Dec. 182), or if driven by stress of weather into a port of necessity, or captured and carried there by a superior force (*Hutton v. American Ins. Co.*, 7 Hill [N. Y.] 321). A vessel is not at sea, or on passage, if she has entered a port voluntarily to obtain supplies and crew for further voyage (*Washington Ins. Co. v. White*, 103 Mass. 238, 4 Am. Rep. 543), for orders (*Wales v. China Mut. Ins. Co.*, 8 Allen [Mass.] 380), to make repairs (*American Ins. Co. v. Hutton*, 24 Wend. [N. Y.] 330), or to take in cargo (*Hutton v. American Ins. Co.*, 7 Hill [N. Y.] 321); and this is true, though it is not a port by law, but an open roadstead, with no haven, harbor or custom house, and is not her final destination (*Cole v. Union Mut. Ins. Co.*, 12 Gray [Mass.] 501, 74 Am. Dec. 609; *Cole v. Commercial Mut. Marine Ins. Co.*, 12 Gray [Mass.] 519, note).

¹ As to the use of solar or standard time, see, also, *Proctor Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188; *Parker, Ex parte*, 35 Tex. Cr. R. 12, 29 S. W.

480; *Searles v. Averhoff*, 28 Neb. 668, 44 N. W. 872; *Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327.

(f) Termination of insurance—Marine policies.

The commencement of a voyage terminates a risk under a policy insuring a vessel as a port risk (*Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453, affirming 40 N. Y. Super. Ct. 417). Under a policy on the cargo of a canal boat, which recites that the risk shall terminate when the voyage is stopped, if, in consequence of ice or the closing of navigation, the boat was frozen in, and the commissioners declared the canal closed, but subsequently a channel was cut, this did not show that the risk had terminated (*Delahunt v. Ætna Ins. Co.*, 97 N. Y. 537, affirming 26 Hun, 668). Under such circumstances, the master of the canal boat had the right to continue the voyage to a proper place to discharge the cargo and lay the boat up for the winter, and if the provision was that the risk should terminate, three days being given to discharge the cargo, the actual stoppage is the time from which the three days for discharging are to be computed (*Sherwood v. Mercantile Mut. Ins. Co.*, 66 N. Y. 630).

In voyage policies, the termination of the voyage is the termination of the policy, and voyages usually terminate at the port of discharge.

To constitute a port of discharge, there must be an actual discharge of a substantial part of the cargo. *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *King v. Middletown Ins. Co.*, Id. 184; *Grant v. Lexington Fire, Life & Marine Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Upton v. Salem Commercial Ins. Co.*, 8 Metc. (Mass.) 605; *Bramhall v. Sun Mut. Ins. Co.*, 104 Mass. 510, 6 Am. Rep. 261. A discharge of a number of the hands at the port of arrival, an equal number being immediately shipped in their place, does not show a termination of the voyage at such port. *King v. Hartford Ins. Co.*, 1 Conn. 333. If the insurance is to a port in the West Indies "and a market," the vessel may in good faith go from island to island to discharge her cargo, and the risk is not determined until the whole is discharged. *Maxwell v. Robinson*, 1 Johns. (N. Y.) 333.

A policy on freight to a port of discharge in Australia terminates at the first port where the cargo is discharged (*Fay v. Alliance Ins. Co.*, 16 Gray [Mass.] 455). If the policy describes the voyage as "to a port of discharge in Cuba, and at and thence to a port of advice," the policy terminates at the port of advice (*Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 963). A policy to Salem or Boston terminates by arrival of the vessel at Salem, without a previous election of Boston as the port of final destination, though the vessel immediately receives orders to proceed to Boston (*Dodge v. Essex Ins. Co.*, 12 Gray [Mass.] 65); but where a vessel is insured until

her return to Boston, the insurance does not terminate by an arrival at Salem for repairs, under orders from the owner (*Ellery v. New England Ins. Co.*, 8 Pick. [Mass.] 14). Generally the insurer of a voyage is responsible until the vessel is moored in safety at the port of discharge (*Zacharie v. Orleans Ins. Co.*, 5 Mart. N. S. [La.] 637), and the policy sometimes provides that the risk shall not terminate until the vessel has been moored 24 hours in safety. To terminate the risk under such a clause, the voyage must have ended by the arrival of the vessel at the port of delivery, and anchoring her with a view to end the voyage at her proper station at that port for the delivery of cargo (*Meigs v. Sun Mut. Ins. Co.*, 16 Fed. Cas. 1323). Merely dropping anchor in the harbor, short of the usual anchorage grounds, for temporary purposes, and especially from necessity, or on account of the navigation of the harbor, is not such a mooring (*Simpson v. Pacific Mut. Ins. Co.*, 22 Fed. Cas. 174).

For illustration of these principles, reference may be made to *Zacharie v. Orleans Ins. Co.*, 5 Mart. N. S. (La.) 637; *Mariatigui v. Louisiana Ins. Co.*, 8 La. 65, 28 Am. Dec. 129; *Bill v. Mason*, 6 Mass. 313; *Meigs v. Mutual Marine Ins. Co.*, 2 Cush. (Mass.) 439; *Bramhall v. Sun Mut. Ins. Co.*, 104 Mass. 510, 6 Am. Rep. 261; *Dickey v. United Ins. Co.*, 11 Johns. (N. Y.) 358.

A policy for 12 months is a time policy, and therefore a provision as to mooring does not apply, though the policy contains it (*Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351).

Under cargo policies, the risk continues until the cargo reaches the usual place for the delivery of goods in that trade at the port of delivery (*Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711). So a landing of the goods at quarantine will terminate the policy, if, by the usage of trade, that is the first landing place at that port (*Gracie v. Marine Ins. Co.*, 8 Cranch, 75, 3 L. Ed. 492). A policy may provide that the risk shall continue until the goods are safely landed. In such case, the risk is at an end whenever the goods can be considered safely landed according to the usual course of business, though they may have never been delivered to the consignee (*Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77); and if, after a portion of the goods are landed, they are destroyed by fire, the insurers are not liable for such portion (*Mansur v. New England Mut. Marine Ins. Co.*, 12 Gray [Mass.] 520). Even where the policy recites that it covers all risks to the "final destination," such clause will not continue the risk until the goods are delivered at the warehouse or into the manual custody of the

consignee (*Beddall v. British & Foreign Marine Ins. Co.*, 143 N. Y. 94, 37 N. E. 613, affirming 67 Hun, 648, 21 N. Y. Supp. 709).

But see *Fletcher v. St. Louis Marine Ins. Co.*, 18 Mo. 193, where it was held that if, after a part of the goods had been landed, all of them were burned, those on the wharf as well as those on the vessel, the insurer will not be exonerated as to those which had been landed, unless they had been received and accepted by the consignee, or a reasonable time had elapsed for the discharge of the remainder.

A policy on goods to continue for 24 hours after they are landed means 24 hours after all the goods are landed (*Gardiner v. Smith*, 1 Johns. Cas. [N. Y.] 141). Where it becomes necessary to place the goods in launches to land them, they are at insurer's risk until landed (*Osacar v. Louisiana State Ins. Co.*, 5 Mart. N. S. [La.] 386).

A recent case (*Crew-Levick Co. v. British & Foreign Marine Ins. Co. of Liverpool*, 103 Fed. 48, 43 C. C. A. 107) presents an interesting phase of this question. The policy, covering goods for inland transportation, was in the form of a marine policy, and contained the usual clause that the risk should continue until the goods were safely landed. There was a rider attached, showing that the insurance covered "oil in tank cars in transit." It was held that the clause as to landing of the goods was applicable only to sea carriage, and was no part of the contract made by the policy in question, and that when a tank car of oil, covered by the policy, had been delivered by the railroad which transported it to the insured, by being placed upon the private siding alongside the warehouse belonging to the insured, it could no longer be considered in transit, and covered by the policy.²

(g) Life and accident insurance.

As in the case of insurance on property, the commencement of the risk in life or accident insurance will, in the absence of any stipulation to the contrary, be regarded as coincident with the completion of the contract; and, if this is the approval of the application, such approval will determine the commencement of the risk.

Rogers v. Equitable Mut. Life & Endowment Ass'n, 72 N. W. 538, 103 Iowa, 337; *Lee v. Union Cent. Life Ins. Co.*, 19 Ky. Law Rep. 608, 41 S. W. 319; *Allen v. Massachusetts Mut. Acc. Ass'n*, 44 N. E. 1053, 167 Mass. 18; *Coker v. Atlas Accident Ins. Co.* (Tex. Civ. App.) 31 S. W. 703.

² For other reports of this case, see (C. C.) 98 Fed. 71, affirming (C. C.) 77 Fed. 858.

It is, of course, the act that constitutes the completion of the contract that determines the commencement of the risk; and, if this is the delivery of the policy, the risk will not commence until then (*Summers v. Mutual Life Ins. Co.* [Wyo.] 75 Pac. 937, 66 L. R. A. 812). But, in the absence of any evidence of a contrary intent, the policy, purporting to insure for the future only, will be presumed to take effect upon its date.

Fowler v. Preferred Acc. Ins. Co., 28 S. E. 398, 100 Ga. 330; *Philadelphia Life Ins. Co. v. American Life & Health Ins. Co.*, 28 Pa. 65.

Though delivery is ordinarily necessary to give effect to the policy, an agreement that a life policy remaining in the custody of the insurer shall be in force from its date is valid and enforceable (*Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30).

It may, however, be agreed to commence the risk on the date of the application. In such case the policy must be regarded as dating back to the date of the application (*Grier v. Mutual Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28). If the policy is indorsed on the back as beginning at a certain time, and the same time is recited on its face, such indorsement and recital will prevail over a general provision of the policy that it is not to take effect until issued and delivered to the insured. And, after it has been issued and delivered, it takes effect from the date stated by its terms, and not from the date of delivery. (*Gordon v. United States Casualty Co.* [Tenn. Ch. App.] 54 S. W. 98.) The effect of agreements as to the time the risks shall commence depends, however, on the power of the agent to make such agreements; and an agent authorized only to solicit insurance has no implied authority to waive a provision in the application that the company shall not be liable prior to the acceptance of the application (*United States Mut. Acc. Ass'n v. Kittenring*, 22 Colo. Sup. 257, 44 Pac. 595). In *Mathers v. Union Mutual Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83, the Supreme Court of Wisconsin sustained an agreement that the insurance should commence from the date of the application, apparently on the theory that the agent, as agent of the company, had power to modify the contract in that regard. But this case was subsequently overruled in *Chamberlain v. Prudential Ins. Co. of America*, 85 N. W. 128, 109 Wis. 4, 83 Am. St. Rep. 851. An agreement between the applicant and the agent that the insurance shall begin on payment of the first premium, and that, if the policy is not issued, the sum paid should be refunded, may be maintained as an agreement

for temporary insurance, to continue until the application should be accepted or rejected (*Halle v. New York Life Ins. Co.*, 58 S. W. 822, 22 Ky. Law Rep. 740). And in such a case, if the company proposes a different form of insurance from that designated in the application, its liability on the temporary contract continues until the applicant has accepted or rejected the proposed change. While a provision in the constitution and by-laws of a mutual benefit association that the insurance shall not take effect until 30 days after the issuance of the certificate is valid (*Willison v. Jewelers' & Tradesmen's Co.*, 30 Misc. Rep. 197, 61 N. Y. Supp. 1125), a provision, in an accident policy which purports to insure for a period of 12 months from the date named, that the risk shall not commence until 15 days from the date of the policy, is inconsistent with the provision as to duration of risk, and is therefore void (*Bean v. Ætna Life Ins. Co.*, 78 S. W. 104, 111 Tenn. 186).

Parol evidence is admissible to show the time when the risk commences, if such time is doubtful by reason of some omission from or ambiguity in policy. *Modern Woodmen Accident Ass'n v. Kline*, 50 Neb. 345, 69 N. W. 943. But statements, made by a local agent taking the application, as to when the policy will be received or when the insurance will be in force, are inadmissible to contradict the provisions of the application itself. *Allen v. Massachusetts Mut. Acc. Ass'n*, 44 N. E. 1053, 167 Mass. 18.

A contract for temporary insurance, made to cover the period between the date thereof and the date on which the annual premium on a regular policy becomes due, was held to cover the whole of the last date, especially in view of the fact that the insured had the whole of such day in which to pay the regular premium to keep up the continued insurance (*Thomson v. Connecticut Mut. Life Ins. Co.*, 4 Pa. Dist. R. 382). An accident policy, reciting that it applies only to persons over 16 years of age and under 65, terminates when the insured has passed his sixty-fifth birthday (*Wheeler v. United States Casualty Co.* [N. J. Sup.] 57 Atl. 124). An accident policy, providing for the payment of installments of premium in four consecutive months, recited that the first payment made the policy good for two months, the second for four months, the third for seven months, and the fourth for twelve months. It was also declared that the premiums specified were for consecutive periods of two, three, and five months. It was held that this policy was not a contract for an entire period of a year, but for separate periods. (*Employers' Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W.

869.) But in an action on an accident policy, where the complaint alleges that the term of insurance was fifty-two weeks, a policy providing for such a term under independent contracts for two, two, three, and five months is not a material variance (*Standard Life & Accident Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133).

(h) Same—Effect of war.

It has been held in some states that the intervention of war absolutely terminates contracts of insurance.

Worthington v. Insurance Co., 41 Conn. 372, 19 Am. Rep. 495; *Dillard v. Insurance Co.*, 44 Ga. 119, 9 Am. Rep. 167; *Tait v. Insurance Co.*, 23 Fed. Cas. 620.

The weight of authority, however, is in support of the contrary doctrine, and in well-considered cases the courts of last resort in New York and Virginia have adopted the rule that the intervention of war does not terminate, but merely suspends, the contract.

Cohen v. Insurance Co., 50 N. Y. 610, 10 Am. Rep. 522; *Sands v. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. 614, 3 Am. Rep. 218; *Mutual Ben. Life Ins. Co. v. Atwood's Adm'x*, 24 Grat. 497, 18 Am. Rep. 652; *New York Life Ins. Co. v. Hendren*, 24 Grat. 536; *Clemmitt v. Insurance Co.*, 76 Va. 355; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290; *Statham v. Insurance Co.*, 45 Miss. 581, 7 Am. Rep. 737.

In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, the court held that so far as the contract was executory it was terminated, but so far as it is executed the insured has acquired rights in the reserve fund, constituting him a creditor. Consequently, under general rules as to this relation, the contract is merely suspended.

(i) Casualty and guaranty insurance.

A fidelity bond bearing date June 15, 1884, and reciting that it was issued for a period of 12 months, ending June 15, 1885, will be regarded as taking effect from its date, though it was not delivered to and accepted by the insured until July 29, 1884 (*Ætna Life Ins. Co. v. American Surety Co. [C. C.]* 34 Fed. 291). Fidelity bonds usually limit the risk to losses sustained during the continuance of the bond. This provision is interpreted to mean that the liability on the bond covers only such defalcations as may occur while the

employé is such under the bond (*Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146). Therefore the mere suspension of a national bank, taken possession of by the examiner, does not terminate the bond of a cashier, who continues to render service to the bank. He must be deemed to have remained in the service of the employer, at least until the appointment of a receiver for the bank (*American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977).

Where a policy insuring against the loss of money packages transported by mail provides that no risk shall be considered insured until a letter addressed to the insurer describing the package has been deposited in the post office at the place of mailing, the deposit of a letter in a mail box at the place from which the package was mailed, such box being under the sole custody of the local postmaster, constituted a sufficient deposit in the post office to determine the commencement of the risk (*Banco de Sonora v. Bankers' Mut. Casualty Co.* [Iowa] 95 N. W. 232.)

Where an insurance company insures a tenant against loss accruing by reason of having to pay rent while the insured building may be untenable by reason of fire, and after a fire has occurred, and made the building untenable for six months, the landlord re-enters to rebuild under an agreement with the tenant that the rent shall continue to be paid, the liability of the insurance company is terminated by such re-entry, since the right to collect rent ceased upon re-entry, and the agreement to the contrary did not bind the company (*Heller v. Royal Ins. Co.*, 133 Pa. 152, 19 Atl. 349, 7 L. R. A. 411).

14. RENEWAL OF THE CONTRACT.

- (a) Form and validity in general.
- (b) Nature and construction of renewal contracts.
- (c) Same—Conditions of insurance.
- (d) Renewal of guaranty policies.

(a) Form and validity in general.

It may be regarded as elementary that an insurance policy may be continued in force after its expiration by an agreement to that effect (*Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368). It is not essential that the new contract should be evidenced by another and distinct policy. The general custom is to renew by the mere issu-

ance of a renewal receipt or certificate.¹ (*Corporation of London Assurance v. Paterson*, 32 S. E. 650, 106 Ga. 538.) If in the form of a renewal receipt, such receipt must be regarded as more than a mere receipt for money. It is the evidence of a contract. (*Baum v. Parkhurst*, 26 Ill. App. 128.) But such a renewal must usually be based on a definite agreement (*Shank v. Glens Falls Ins. Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14). Generally the custom of insurance companies to renew without a special request is not so well established that an insured can take advantage of it (*Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. 191). This, however, is a local matter, and dependent generally on local conditions and customs. If the policy is under seal, it can be renewed by an ordinary renewal receipt only if it contains a covenant for renewal in that manner (*Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398).

The authority of an agent to renew a policy depends, of course, on his general powers, and it is a recognized principle that an agent with general authority to solicit insurance and issue policies may bind the company by a contract of renewal.

Bauble v. Aetna Ins. Co., 2 Fed. Cas. 1038; *Taylor v. Germania Ins. Co.*, 23 Fed. Cas. 772; *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608, 36 U. S. App. 277; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641; *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292, affirmed in 1 Abb. Dec. 316; *Squier v. Hanover Fire Ins. Co.*, 46 N. Y. Supp. 30, 18 App. Div. 575, affirmed in 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349; *Franklin Fire Ins. Co. v. Massey*, 33 Pa. 221; *McCullough v. Hartford Ins. Co.*, 2 Pa. Super. Ct. 233; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521, 44 N. W. 828.

An agent cannot, however, renew after loss any more than he can insure property already destroyed (*Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. 191). Yet, if the company agreed that the policy should be a permanent one—that is to say, renewed from year to year, without further application, until notice to the contrary—it will cover a loss occurring after the expiration of the original term and before a renewal certificate is actually issued (*Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 18 Barb. [N. Y.] 69).

¹ Validity of oral contracts of renewal, see *ante*, p. 398.

(b) Nature and construction of renewal contracts.

The courts have been rather indefinite in their characterization of the nature of the renewal contract. In some instances, in view of the fact that it is based on a new consideration, they have characterized the renewal as a new contract.

Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Brady v. Northwestern Ins. Co., 11 Mich. 425; Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289.

On the other hand, in other instances the courts have characterized the renewal, not as a new contract, but as a mere continuance or revival of the expiring contract.

Herron v. Peoria Marine & Fire Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; American Fire Ins. Co. v. Nugent, 7 Ky. Law Rep. 598.

But, whatever view may be taken of its nature, it is generally recognized that the renewal does not change the terms and conditions of the policy, but merely continues them in force. The rights of the parties are still determined by the provisions of the original policy, no matter how often it may have been renewed. Its terms are neither enlarged, restricted, nor changed.

Reference may be made to Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 South. 34; Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Aurora Fire & Marine Ins. Co. v. Kranich, 36 Mich. 289; Witherell v. Maine Ins. Co., 49 Me. 200. The original policy is admissible in evidence to show the conditions of the insurance. Sun Mut. Ins. Co. v. Crist (Ky.) 39 S. W. 837; Western Assur. Co. v. McAlpin, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423. And a complaint on renewal should set out the conditions of the original policy. Mallette v. British American Assur. Co., 46 Atl. 1005, 91 Md. 471.

The word "renew," whether used to express a new contract or a continuance of the old one, is construed to import that the contract is by the same company, on the same property, and on the same terms (Abel v. Phoenix Ins. Co., 62 N. Y. Supp. 218, 47 App. Div. 81). The parties are in general the same (New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221); and if by mistake a new policy is issued, designating another as the insured, the recovery

may nevertheless be had by the original insured according to the original contract (*Akin v. Liverpool & London & Globe Ins. Co.*, 1 Fed. Cas. 264). But the insurer may, in the renewal, agree to indemnify parties other than those named in the original, and such contracts will be regarded as continuing the insurance on the terms and conditions expressed in the policy, but to such other parties (*Lancey v. Phoenix Fire Ins. Co.*, 56 Me. 562).

The property covered will usually be the same, though it is not absolutely necessary that the same description of location shall be read into the renewal, especially if a new description is given by the insured on the application for the renewal (*Eddy St. Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426). The original policy will also be referred to for the description of the use of the property (*Garrison v. Farmers' Mut. Fire Ins. Co.*, 56 N. J. Law, 235, 28 Atl. 8). The amount of the insurance may be differently distributed among the various items of renewal (*Eddy St. Iron Foundry v. Farmers' Mut. Fire Ins. Co.*, 5 R. I. 426); and if a policy of \$1,800 on a grist mill and \$700 on machinery is renewed in general terms for \$2,500, it must be construed as the intent of the parties that the insurance should thereafter be without distribution of the risk and apply generally to both building and machinery (*Driggs v. Albany Ins. Co.*, 10 Barb. [N. Y.] 440).

Generally speaking, **the risk covered must be the same**; and if an expiring marine policy is renewed, but to cover another and more extensive voyage, the renewal constitutes a new and distinct contract, though no new policy is issued (*Leftwich v. Royal Ins. Co. of Liverpool*, 46 Atl. 1010, 91 Md. 596). Where a policy excepting fire and ice from the perils was renewed by an indorsement so as to except ice only, a second indorsement, renewing the policy generally, will restore its original terms of exception (*Honnick v. Phoenix Ins. Co.*, 22 Mo. 82). The renewal will also be construed as for the same term as the original policy, whether such term be one year (*Scott v. Home Ins. Co.*, 53 Wis. 238, 10 N. W. 387), or three (*Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 363).

Where an agreement is made for continuing insurance until notice of discontinuance by either party, a change in the conditions of the insurance, as, for instance, in the amount of premium to be paid, will terminate such a permanent or continuing agreement. *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153, affirming 23 How. Prac. 448.

(c) Same—Conditions of insurance.

In view of the general rule that the renewal is on the same terms as the original policy, it has been held that the insured is justified in presuming that the conditions of the renewal will be the same as those of the original, in the absence of notice to the contrary (*Mallette v. British American Assur. Co.*, 46 Atl. 1005, 91 Md. 471); and, if the conditions are not the same, a reformation of the contract may be had (*Cochran Cotton Seed Oil Co. v. Phoenix Ins. Co.*, 7 Misc. Rep. 695, 28 N. Y. Supp. 45). It has been said that, even where a new policy is issued on renewal, the insured may rely on the good faith of the company, and is not bound to read the policy for the purpose of discovering whether there has been any change in the conditions (*Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248). It is discretionary with the court whether to refuse relief on the ground of neglect to discover the change (*Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, affirming 13 Hun, 496). A different rule prevails in Georgia, and it has been held (*Thomson v. Southern Mut. Ins. Co.*, 90 Ga. 78, 15 S. E. 652) that, where a new policy issued on renewal was retained by the insured for four months before reading, he cannot object to a change in the conditions thereof relating to vacancy.

Since statutes and ordinances relating to insurance, or to matters connected with the property insured, enter into and become part of the contract, an ordinance (*Brady v. Northwestern Ins. Co.*, 11 Mich. 425) or a statute (*Ogden v. New York Mut. Ins. Co.*, 21 N. Y. Super. Ct. 248, affirmed 35 N. Y. 418) passed between the issuance of the original policy and the renewal, though not affecting the original policy, will enter into and become part of the renewal.

(d) Renewal of guaranty policies.

Policies of fidelity insurance usually limit the liability to losses which shall occur during the continuance of the contract and be discovered during such period or within a specified time thereafter, and provide that on renewal liability under the original bond shall cease; the intention being that only the last bond shall be in force at any time. Under this clause the renewal of a fidelity bond, though it recites that it continues in force the original bond, cannot be regarded as operating as a continuing contract. Each renewal must be regarded as a separate and distinct obligation.

Florida Central & P. R. Co. v. American Surety Co., 99 Fed. 674, 41 C. C. A. 45; *Proctor Coal Co. v. United States Fidelity & Guaranty*

Co. (C. C.) 124 Fed. 424; *Sherman v. Harbin* (Iowa) 100 N. W. 629; *De Jernette v. Fidelity & Casualty Co. of New York*, 98 Ky. 558, 33 S. W. 823. Nevertheless there is but one bond and one penalty. *First Nat. Bank v. United States Fidelity & Guaranty Co.*, 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765.

Policies of credit insurance sometimes provide that if the contract is renewed, on or before the date of its expiration, on terms in force at that time, losses occurring after the expiration, on goods shipped between the commencement and such expiration, shall be provable under the renewal. This provision distinguishes contracts of credit insurance from contracts of fidelity insurance, referred to in the preceding cases, and the renewal certificate operates as a continuing contract. (*Lauer v. Gray*, 55 N. J. Eq. 544, 37 Atl. 53.)

VII. REFORMATION AND MODIFICATION OF THE CONTRACT.

1. Reformation of insurance contracts.

- (a) Right to reformation in general.
- (b) Reformation of warranties.
- (c) Reformation where there is a remedy at law.
- (d) Mistake of complaining party.
- (e) Same—Customary provisions.
- (f) Necessity of mistake or fraud by defendant.
- (g) Mutual mistake—General rule.
- (h) Same—Mistake as to effect of language.
- (i) Same—Consideration for preliminary agreement.
- (j) Same—Intention to issue policy in accordance with contract.
- (k) Same—Circumstances indicating fraud.
- (l) Fraud—General rule.
- (m) Same—Active inducement to accept policy.
- (n) Fraud as shown by issuance of policy with variant clause.
- (o) Same—Doctrine as applied to future rights.
- (p) Same—Past and present matters.
- (q) Same—Contrary doctrine.
- (r) Contract itself misleading.
- (s) Circumstances affecting relative weight of fraud and laches.
- (t) Agency.
- (u) Necessity of reformation.

2. Pleading and practice with reference to the reformation of insurance contracts.

- (a) Nature and form of remedy—Res adjudicata and election.
- (b) Right to reformation in action at law.
- (c) Time of bringing action.
- (d) Jurisdiction.
- (e) Parties.
- (f) Pleading.
- (g) Evidence.
- (h) Trial.
- (i) Review.

3. Modification of insurance contracts.

- (a) General rule—Meeting of minds.
- (b) What constitutes a modification.
- (c) Consideration.
- (d) Form of modification.
- (e) Effect of custom or silence.
- (f) Construction.
- (g) Agency.
- (h) Pleading and practice.
- (i) Unauthorized alteration.

1. REFORMATION OF INSURANCE CONTRACTS.

- (a) Right to reformation in general.
- (b) Reformation of warranties.
- (c) Reformation where there is a remedy at law.
- (d) Mistake of complaining party.
- (e) Same—Customary provisions.
- (f) Necessity of mistake or fraud by defendant.
- (g) Mutual mistake—General rule.
- (h) Same—Mistake as to effect of language.
- (i) Same—Consideration for preliminary agreement.
- (j) Same—Intention to issue policy in accordance with contract.
- (k) Same—Circumstances indicating fraud.
- (l) Fraud—General rule.
- (m) Same—Active inducement to accept policy.
- (n) Fraud as shown by issuance of policy with variant clause.
- (o) Same—Doctrine as applied to future rights.
- (p) Same—Past and present matters.
- (q) Same—Contrary doctrine.
- (r) Contract itself misleading.
- (s) Circumstances affecting relative weight of fraud and laches.
- (t) Agency.
- (u) Necessity of reformation.

(a) Right to reformation in general.

This brief has for its scope the substantive law in relation to the reformation of insurance contracts.¹ The general principles underlying the subject are stated in *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 490, 22 L. Ed. 395:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. When the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected, so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred."

In accordance with these principles it may be stated as an established rule that policies of insurance, like other written instruments, will be reformed by equity, so as to conform to the intention of the

¹ As to right to reformation of contracts in general, see Cent. Dig. vol. 42, "Reformation of Instruments," cols. 1042-1044, § 2.

parties, in cases of mutual mistake, and also where there is a mistake on one side and fraud on the other.

The following cases may be referred to as asserting such rule: *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885; *Dean v. Equitable Fire Ins. Co.*, 7 Fed. Cas. 301; *Delaware Ins. Co. v. Hogan*, 7 Fed. Cas. 408; *Hearn v. Equitable Safety Ins. Co.*, 11 Fed. Cas. 965, affirmed in 20 Wall. 494, 22 L. Ed. 398; *Bowers v. New York Life Ins. Co. (C. C.)* 68 Fed. 785; *Western Assur. Co. v. Ward*, 75 Fed. 338, 21 C. C. A. 378; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311; *Hartford Ins. Co. v. Haas*, 8 Ky. Law Rep. 610; *Bell v. Western Marine Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Weinberger v. Merchants' Ins. Co.*, 41 La. Ann. 31, 5 South. 728; *Delaware State Fire & Marine Ins. Co. v. Gillett*, 54 Md. 219; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 98 Am. Dec. 293; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483; *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366; *Devereux v. Sun Fire Office*, 4 N. Y. Supp. 655, 51 Hun, 147; *Wilson v. National Life Ins. Co.*, 65 N. Y. Supp. 550, 31 Misc. Rep. 403; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240, 14 Am. Rep. 249; *Id.*, 46 How. Prac. 498; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544; *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622.

Equity will, however, reform an insurance policy only to enable a party to assert some right thereunder.² Therefore, where action on the reformed policy could not in any event be successfully maintained, no reformation will be granted.³

Thompson v. Phoenix Ins. Co., 136 U. S. 299, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Abraham v. North German Fire Ins. Co. (C. C.)* 37 Fed. 731, 3 L. R. A. 188; *Steel v. Phenix Ins. Co. (C. C.)* 47 Fed. 863.

It seems to have been almost universally conceded that, in the absence of negligence on the part of the complaining party, the policy is subject to reformation after loss, as well as before. The

² As to enforcement by equity of abstract rights, see Cent. Dig. vol. 19, "Equity," cols. 26, 27, § 8. As to reformation of invalid instruments in general, see Cent. Dig. vol. 42, "Reforma-

tion of Instruments," cols. 1052-1054, § 20.

³ As to operation of statute of frauds to prevent reformation in general, see Cent. Dig. vol. 23, "Frauds, Statute of," col. 2319, § 267.

question seems to have been raised, however, in *Van Tuyl v. Westchester Fire Ins. Co.*, 67 Barb. (N. Y.) 72. In that case the Supreme Court stated that it was said in *Solms v. Rutgers Fire Ins. Co.*, 21 N. Y. Super. Ct. 578, that a policy cannot be reformed after loss, but that such case was reversed in *42 N. Y. 416, 4 Abb. Dec. 279. The question was not distinctly raised in the *Solms* Case, however, no reformation having been asked. Be that as it may, the question is definitely settled in 55 N. Y. 657, where the *Van Tuyl* Case is affirmed. The case is not reported in full, but it is said that the fact that an action to reform a policy of fire insurance is not brought until after a loss is not ipso facto a bar, but only a circumstance to be taken into consideration in determining whether a mistake was made. That a policy may be reformed after loss is also stated in *McCoubrey v. St. Paul Fire & Marine Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112; the *Van Tuyl* Case being cited as authority. Whether the point was contested does not, however, appear.

(b) Reformation of warranties.

It is stated in *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622, that, "though it was at one time doubted whether a policy would be reformed to the extent of altering a warranty or a condition precedent to any assumption of liability by the insurers, the more recent authorities hold that mistakes in the warranty, where the agent of the insurance company, to whom the applicant correctly stated the facts, has made the blunder in reducing the application to writing, will be relieved against." In *Harris v. Columbiana Co. Mut. Ins. Co.*, 18 Ohio, 116, 51 Am. Dec. 448, the company contended that, since certain representations of the insured as to incumbrances amounted to warranties, avoiding the policy, if untrue, it made no difference that the company may have been informed as to the true state of the title. The court, while admitting that knowledge by the company, unaccompanied by any mistake of the insured or inducement by the company, would not justify a reformation, decided that the rule did not apply where, as in the case at bar, the facts known to both parties were misinterpreted by the company and the property erroneously described by it as unincumbered. The modification placed upon the company's contention in each of these cases would seem to place warranties in the same category with other portions of the policy, since reformation is always founded primarily upon the mistake of the complaining party.

The same conclusion was eventually reached by the courts of Pennsylvania, which seems to have been the only other state where the contention has been made that warranties, as affected by the doctrine of reformation, differ from other portions of the contract. In the consideration of the Pennsylvania cases, however, it should be borne in mind that in Pennsylvania equity is considered the law, and that parol evidence is admitted in law actions to establish the right to equitable relief, thus rendering it difficult to determine whether the decision of the court is based on the principle of reformation or estoppel.

The first case dealing with the question seems to have been *State Mutual Fire Ins. Co. v. Arthur*, 30 Pa. 315. The Supreme Court, while admitting that knowledge by the insured might be a reply to a false representation, decided that it would not avoid the effect of a false warranty. It said: "Knowledge by the underwriter, or by him and the assured, is no basis for reforming the policy, though it is conceded that equity will reform in the case of a mutual mistake of facts. * * * It is rather evidence of guilty collusion between the agents and the assured, from which the latter can derive no advantage." This reasoning was apparently based on *Smith v. Insurance Co.*, 24 Pa. 320, where parol evidence was offered to vary the effect of a warranty. It appeared, however, that not only the agent, but the insured, was aware of the falsity of the warranties, and the court held that, being particeps criminis with the agent, the insured could not profit by the agent's knowledge.

The intention of the court to distinguish between representations and warranties is even more plainly shown in the case of *Columbia Ins. Co. v. Cooper*, 50 Pa. 331, and *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544, both decided in 1865. In the former of these cases the statement in the application relied on to defeat recovery was held a representation only, and parol evidence was admitted. In the latter case, the statement having been held to be a warranty, the court refused to admit the parol evidence. The court says: "Undoubtedly policies of insurance may be reformed, like other instruments, when mistake or fraud is proved; but whether this can be done to the extent of altering a warranty or a condition precedent to any assumption of liability by the insurers may well be doubted, in view of the authorities." The court cites several cases in support of its statements, but every one of them, except *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348, in addition to other distinguishing features, deals with an attempt

to vary a written contract by parol in an action at law in a state recognizing the distinction between law and equity. In the *Perrine Case* the statement of the insured was not a strict warranty, and the decision was based solely on the ground that the agent, under the mutual company's rules, was the insured's agent as to drawing up the application. It is of interest, also, that in the *Cooper Case* itself it is eventually decided that the agent under the circumstances was acting as the agent of the insured, and that, therefore, his mistake was not imputable to the company. Furthermore, Justice Strong, who wrote the opinion in this case, subsequently decided (*Insurance Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593), when on the supreme bench of the United States, that parol evidence was admissible to show that the insured made true answers to questions in an application, differing from the answers as written therein by the agent. The *Cooper Case* is, however, cited with approval in *Seybert v. Ætna Life Ins. Co.* (Pa. Com. Pl.) 4 Luz. Leg. Reg. 218, where the answers given by the insured were incorrectly written in the application.

In *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464, the insured gave true answers to questions in the application, but these were incorrectly written down by the agent; the insured having no knowledge thereof. The court distinguishes the *Cooper Case*, in that it was decided on the ground of the agent's authority, and reaches the conclusion that, if there has been a mutual mistake, parol evidence will be admissible, and that the mistake or fraud of a knavish agent, within the scope of his authority, will not enable the company to avoid a policy with the insured, who became an innocent party to the contract. So far as the *Cooper Case* holds that a policy cannot be reformed to the extent of altering a warranty or a condition precedent, it would seem that it must be considered as overruled by this case; the only distinguishing feature in that regard being that in the *Cooper Case* the insured knew what was in the warranty, but relied on the agent's assurance that the judgments were not incumbrances, while in the *Eilenberger Case* the insured did not know that false answers were contained in the written application.

In the case of *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41, where there was a mutual mistake as to the facts, but the warranty expressed the intention of the insured, the court holds that no reformation was justified, following the *Arthur* and *Cooper Cases* so far as they refer to a mistake of the insured in making a

false statement, believing it to be true, without having been misled by the other party. Where, however, the agent, without the knowledge of insured, writes something else than the answers as given by the insured, the instrument may be reformed.

That a warranty may be reformed in such circumstances is also decided in *Meyers v. Lebanon Mut. Ins. Co. of Jonestown*, 156 Pa. 420, 27 Atl. 39, and *Dowling v. Merchants' Ins. Co. of Newark*, 168 Pa. 234, 31 Atl. 1087.

(c) Reformation where there is a remedy at law.

Though there are many cases in which reformation has been granted, where it would seem that the law would also have granted relief by way of estoppel in pais, yet the doctrine that equity will not grant relief where there is a plain and adequate remedy at law⁴ seems rarely to have been invoked as affecting the right of reformation of insurance policies.

In the early case of *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, 11 L. Ed. 931, though there was a prayer for a decree to compel the indorsement on a policy of a notice given the company as to other insurance, such notice having been prior to the last renewal of the policy, and though relief against the fraud was denied on the ground, among others, of a plain and adequate remedy at law, nevertheless such ground for denying relief does not seem to have been considered with reference to the specific prayer for reformation. That estoppel in an action at law is as plain, adequate, and complete a remedy as reformation in equity is not decided.

That estoppel on the ground of the knowledge of the agent as to an existing fact is not as plain, adequate, and efficacious a remedy as reformation is decided in *Western Assur. Co. v. Ward*, 75 Fed. 338, 21 C. C. A. 378. The same principle is relied on in *Miller v. Hillsborough Mut. Fire Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278; and in *Delaware State Fire & Marine Ins. Co. v. Gillett*, 54 Md. 219, the court refuses to give its assent to the contrary proposition. The latter case is, however, really decided on the ground that it is a matter peculiarly within the jurisdiction of equity to give relief in cases where, through mistake or fraud, the contract does not express the intent of the parties, and that, therefore, the fact that complainant might have enforced his rights in an action on the policy was no

⁴ As to the effect of a remedy at law see Cent. Dig. vol. 42, "Reformation of Instruments," cols. 1044-1047, § 3½.

answer to the exercise of jurisdiction by equity. Such, also, seems to have been the basis of the decision in *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

In *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199, where the company insisted that the mistake relied on was purely clerical and could be corrected by law from an indorsement of the policy, and that therefore equity had no jurisdiction, the court decided that law could only construe a contract, and not correct it; that the indorsement was only a memorandum, which could not be used in construction, and that, therefore, equity properly took jurisdiction.

In *Jacobs v. St. Paul Fire & Marine Ins. Co.*; 86 Iowa, 145, 53 N. W. 101, it was decided that, even though a question of mistake might be determined at law, it was not negligence for plaintiff, in his action on the policy, to file an amended petition seeking reformation and have the case transferred to the equity side of the docket, instead of determining the question of mistake in the law action.

(d) Mistake of complaining party.

It is a result from the conduct of the insurance business that the mistake which almost invariably forms the basis of reformation consists in the signing of an application, or the acceptance of a policy by the insured which, without his knowledge, fails to fulfill his intention. There is no mistake as to the insured, where he accepts the policy or signs the application with full knowledge as to its provisions and effect. Thus, in *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83), and *Dean v. Equitable Fire Ins. Co.*, 7 Fed. Cas. 301, reformation was denied on the ground that the policy probably expressed the true intent of insured.

Such, also, was the principle involved in *Baldwin v. State Ins. Co.*, 60 Iowa, 497, 15 N. W. 300, and *Bartholomew v. Mercantile Ins. Co.*, 34 Hun (N. Y.) 263, in each of which reformation was denied on the ground that it appeared that the policy was purposely made payable to another than the owner for the purpose of avoiding creditors.

In *McConnell v. Provident Sav. Life Assur. Soc.*, 92 Fed. 769, 34 C. C. A. 663, where no different agreement appeared as to how the policy should be dated, or when the premiums should be payable, than appeared by the terms of the policy, such terms were held not subject to reformation, though thereby the first premium purchased less than a year's insurance. And in *Grand Lodge A. O. U. W. v. Sater*, 44 Mo. App. 445, it was held that, though the certificate failed to express the original intent of the parties, yet, since

it was accepted and retained with a full knowledge of its contents, no reformation was justified.

In *McHugh v. Imperial Fire Ins. Co.*, 48 How. Prac. (N. Y.) 230, it was held that, where the insured asked for other alterations in the policy after its issuance without objecting to the feature in regard to which reformation was sought, he must be held to have adopted the instrument, and reformation was therefore refused. It is, however, decided, in *Hill v. Milville Mut. Marine & Fire Ins. Co.*, 39 N. J. Eq. 66, and *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450, that, aside from fraud practiced on insured to induce an acceptance of the contract, he is not bound by its terms merely because he had an opportunity to examine it; and *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431, is authority for the proposition that, if the insured is unacquainted with the insurance business, the rule is not varied, though he actually reads the policy.

The holding of a contract for a considerable length of time is a suspicious circumstance, requiring more proof of the mistake than would be required in case of prompt action.

Graves v. Boston Marine Ins. Co., 2 Cranch, 419, 2 L. Ed. 324; *Durham v. Fire & Marine Ins. Co.* (C. C.) 22 Fed. 468; *Avery v. Equitable Life Assur. Soc.*, 117 N. Y. 451, 23 N. E. 3, reversing 52 Hun, 392, 5 N. Y. Supp. 278; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167.

It has been held, too, that the retention of the policy for a considerable time constituted such negligence, and was such an affirmation of the policy, that equity could give no relief.

Goldsmith v. Union Mutual Life Ins. Co., 17 Abb. N. C. (N. Y.) 15; *Wagner v. Westchester Fire Ins. Co.* (Tex. Civ. App.) 38 S. W. 214; *Okes v. Fire Ins. Co.*, 2 Pa. Dist. R. 747, 12 Pa. Co. Ct. R. 341. The *Goldsmith Case* was, however, reversed, by the first department, without mention of the laches, in 18 Abb. N. C. (N. Y.) 325; and the doctrine in the *Wagner Case*, after reaffirmance by the same court on a subsequent appeal, reported in 48 S. W. 49, was ignored in 92 Tex. 549, 50 S. W. 569, where the case was reversed by the Supreme Court on the ground that relief could be had on the policy as written, the company being held estopped to set up the defense based on a variant clause.

The cases of *Okes v. Fire Ins. Co.*, 2 Pa. Dist. R. 747, 12 Pa. Co. Ct. R. 341, and *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167, appear to be decided on the theory that insured's conduct subsequent to the issuance of the policy must not have been inconsistent

with his claim of mistake. In the former, the acceptance of benefits only payable under the policy as written, and in the latter, Pardee, J., dissenting, the bringing of an action maintainable only in case the policy as written was correct, was held sufficient to prevent a reformation.

It is on the principle that there must be a mistake as to the complaining party that equity denies relief where a false warranty is inserted with insured's knowledge, though it is also known to the company to be false. The variance between the written contract and the facts is in such case rather an evidence of guilty collusion between the agent and the insured.

Reference may be made to *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622; *Harris v. Columbiana Co. Mut. Ins. Co.*, 18 Ohio, 116, 51 Am. Dec. 448; *State Mutual Fire Ins. Co. v. Arthur*, 30 Pa. 315; *Smith v. Insurance Co.*, 24 Pa. 320; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41.

(c) Same—Customary provisions.

The principle that where, from the nature of the contract, the insured was bound to expect certain provisions, he will be held to have contracted with reference to them, seems to have been given much weight in *Avery v. Equitable Life Ins. Soc.*, 117 N. Y. 451, 23 N. E. 3, where a reformation of a tontine policy, so as to make it call for a definite amount, was denied, partly on the ground that, from the nature of the contract and from the words "estimated results" in the memorandum given the insured, it appeared that the amount to be paid at the end of the period was an uncertain quantity. So, also, in *Clem v. German Ins. Co.*, 29 Mo. App. 666, it was held that the usual clauses must have been in the minds of both parties, and that, therefore, the usual provision in relation to dividing the loss with other concurrent insurance would not be stricken out.

Nevertheless, as said in *German Ins. Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 549, the mere fact that a tornado policy was requested did not authorize a reformation of such a policy, written on a fire blank, to accord with the terms of a tornado blank; it not appearing that either party had in mind, or even knew, the point of variance.

(f) Necessity of mistake or fraud by defendant.

Though the policy fails to express the intent of the complaining party as to the matter in regard to which reformation is sought, the

reformation will not be granted, unless there was the same intent by the other party. The mistake by which the variance is introduced must be either mutual or induced by the fraud of the other party.

This rule is applied in *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885; *Delaware Ins. Co. v. Hogan*, 7 Fed. Cas. 403; *Severance v. Continental Ins. Co.*, 21 Fed. Cas. 1103; *Spare v. Home Mut. Ins. Co.* (C. C.) 19 Fed. 14; *Durham v. Fire & Marine Ins. Co.* (C. C.) 22 Fed. 468; *Travelers' Ins. Co. of Hartford v. Henderson*, 69 Fed. 762, 16 C. C. A. 390, reversing *Henderson v. Insurance Co.* (C. C.) 65 Fed. 438; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, reversing *McMaster v. Insurance Co.* (C. C.) 78 Fed. 33; *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003; *Massey v. Cotton States Life Ins. Co.*, 70 Ga. 794; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *St. Paul Fire & Marine Ins. Co. v. Sharer*, 76 Iowa, 282, 41 N. W. 19; *National Mutual Benefit Ass'n v. Heckman*, 86 Ky. 254, 5 S. W. 565; *Davega v. Crescent Mut. Ins. Co.*, 7 La. Ann. 228; *Weinberger v. Merchants' Mutual Ins. Co.*, 41 La. Ann. 31, 5 South. 728; *National Fire Ins. Co. of Baltimore v. Crane*, 16 Md. 260, 77 Am. Dec. 239; *German American Ins. Co. v. Davis*, 131 Mass. 316; *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83); *Grand Lodge A. O. U. W. v. Sater*, 44 Mo. App. 445; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *McHoney v. German Ins. Co.*, 52 Mo. App. 94; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 93 Am. Dec. 293; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Slobodsky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483; *Doniol v. Commercial Fire Ins. Co.*, 34 N. J. Eq. 30; *Dougherty v. Greenwich Ins. Co. of N. Y.* (N. J. Ch.) 33 Atl. 295; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240, 14 Am. Rep. 249; *Id.*, 46 How. Prac. 498, affirming 35 N. Y. Super. Ct. 394; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Avery v. Equitable Life Assur. Soc.*, 117 N. Y. 451, 23 N. E. 3, reversing 52 Hun, 392, 5 N. Y. Supp. 278; *Mead v. Westchester Fire Ins. Co.*, 3 Hun (N. Y.) 608; *Miaghan v. Hartford Fire Ins. Co.*, 12 Hun (N. Y.) 321; *Devereux v. Sun Fire Office of London*, 51 Hun, 147, 4 N. Y. Supp. 655; *London Assur. Corp. v. Thompson*, 47 N. Y. Supp. 830, 22 App. Div. 64; *Carey Mfg. Co. v. Merchants' Ins. Co.*, 54 N. Y. Supp. 398, 25 Misc. Rep. 18, affirmed without opinion 59 N. Y. Supp. 7, 42 App. Div. 201; *Dougherty v. Lion Fire Ins. Co., Limited*, 84 N. Y. Supp. 10, 41 Misc. Rep. 285, affirmed 88 N. Y. Supp. 1096, 95 App. Div. 618; *Lyman v. United Ins. Co.*, 2 Johns. Ch. (N. Y.) 630; *Id.*, 17 Johns. (N. Y.) 373; *New York Ice Co. v. Northwestern Ins. Co.*, 20 How. Prac. (N. Y.) 424; *McHugh v. Imperial Fire Ins. Co.*, 48 How. Prac. (N. Y.) 230; *Elstner v. Cincinnati Equitable Ins. Co.*, 1 Disn. 412, 12 Ohio Dec. 703; *Seybert v. Aetna Life Ins. Co.*, 4 Luz. Leg. Reg. (Pa.) 219; *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544; *Weisenberger v. Harmony Fire & Marine Ins. Co.*, 56 Pa. 442; *Susquehanna Mut.*

Fire Ins. Co. v. Swank, 102 Pa. 17; *Diffenbaugh v. Union Fire Ins. Co.*, 150 Pa. 270, 24 Atl. 745, 30 Am. St. Rep. 805; *Shopp v. Patrons' Mut. Fire Ins. Co.*, 197 Pa. 219, 47 Atl. 201; *Boyce v. Hamburg-Bremen Fire Ins. Co.*, 24 Pa. Super. Ct. 589; *Schmid v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 37 S. W. 1013; *German Ins. Co. v. Daniels* (Tex. Civ. App.) 83 S. W. 549; *Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.) 38 S. W. 214; *Underwriter's Fire Ass'n v. Henry* (Tex. Civ. App.) 79 S. W. 1072; *Ledyard v. Hartford Fire Ins. Co.*, 24 Wis. 496; *Meiswinkel v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 147, 43 N. W. 669, 1 L. R. A. 200.

Where, however, as in *Balen v. Hanover Fire Ins. Co.*, 67 Mich. 179, 34 N. W. 654, the name of the insured was merely nominal, the insurance having been secured by a mortgagee while the title was in litigation, the fact that the parties agreed on the name of the litigant who eventually lost, will not preclude a reformation by the insertion of the name of the other litigant as owner and insured. The real intention in such a case would be to issue a policy in the name of the owner, whomsoever he might be. But a reformation was denied in *Schmid v. Virginia Fire & Marine Ins. Co.* (Tenn. Ch. App.) 37 S. W. 1013, on the ground that it was not the intention to insure the owner, whomsoever he might be, where, without mistake or fraud by the company, the husband was insured, instead of the wife, who was the real owner. In such a case the contract is a personal one with the insured, and to change it in such respect would be to make a new contract.

(g) Mutual mistake—General rule.

Where, however, the courts have considered the evidence sufficient to establish a mutual mistake, reformation has been uniformly granted.

Such was the holding in the following cases, where the mistake was as to the person or interest insured: *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 296, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Oliver v. Mutual Commercial Marine Ins. Co.*, 18 Fed. Cas. 664; *Sias v. Roger Williams Ins. Co.* (C. C.) 8 Fed. 183; *Bailey v. American Cent. Ins. Co.* (C. C.) 13 Fed. 250; *Spare v. Home Mut. Ins. Co.* (C. C.) 17 Fed. 568; *Fink v. Queen Ins. Co.* (C. C.) 24 Fed. 318; *Williams v. North German Ins. Co.*, Id. 625; *Abraham v. North German Ins. Co.* (C. C.) 40 Fed. 717; *Steel v. Phoenix Ins. Co.*, 51 Fed. 715, 2 C. C. A. 463; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Taylor v. Glens Falls Ins. Co.*, 32 South. 887, 44 Fla. 273; *Maryland Home Fire Ins. Co. v. Kimmell*, 89 Md. 437, 43 Atl. 764; *Balen v. Hanover Fire Ins. Co.*, 67 Mich. 179, 34 N. W. 654; *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634; *German Fire Ins. Co. v. Gueck*, 180 Ill. 345,

23 N. E. 112, 6 L. R. A. 835; *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371, 79 Am. Dec. 539; *Longhurst v. State Ins. Co.*, 19 Iowa, 304; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127, 82 N. W. 315; *Lansing v. Commercial Union Assur. Co. (Neb.)* 93 N. W. 756; *Hill v. Millville Mut. Marine & Fire Ins. Co.*, 39 N. J. Eq. 66; *Steinbach v. Prudential Ins. Co.*, 70 N. Y. Supp. 809, 62 App. Div. 133; *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 336; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Manhattan Ins. Co. v. Webster*, 50 Pa. 227, 98 Am. Dec. 332; *Epiphany Roman Catholic Church v. German Ins. Co.*, 91 N. W. 332, 16 S. D. 17; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

In the following cases the beneficiary in a life policy or certificate was changed: *Welch's Adm'r v. Welch*, 13 Ky. Law Rep. 639; *Scott v. Provident Mut. Relief Ass'n*, 63 N. H. 556, 4 Atl. 792; *Eastman v. Same*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29; *Goldsmith v. Union Mut. Life Ins. Co.*, 18 Abb. N. C. (N. Y.) 327, reversing 17 Abb. N. C. 15, 15 Abb. N. C. 409.

The mistake established was as to the property covered in the following: *Brugger v. State Inv. Ins. Co.*, 4 Fed. Cas. 472; *Western Assurance Co. of Toronto v. Ward*, 75 Fed. 338, 21 C. C. A. 378; *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *Clem v. German Ins. Co.*, 29 Mo. App. 666; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Spring Garden Ins. Co. v. Scott*, 1 Walk. (Pa.) 181, 27 Leg. Int. 76.

Phrases setting out the situation of the property have also often been reformed for mutual mistake. *Providence Washington Ins. Co. v. Brummelkamp (C. C.)* 58 Fed. 918; *Home Ins. & Banking Co. of Texas v. Myer*, 93 Ill. 271; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Martin v. Farmers' Ins. Co. of Cedar Rapids*, 84 Iowa, 516, 51 N. W. 29; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Pickett Spring Water Ice Co. v. Citizens' Ins. Co. of Pittsburg*, 24 Ky. Law Rep. 1461, 71 S. W. 514; *Strong v. North American Fire Ins. Co.*, 1 Alb. Law J. (N. Y.) 162; *Le Gendre v. Scottish Union & Nat. Ins. Co.*, 88 N. Y. Supp. 1012, 95 App. Div. 562; *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622.

The description of the insured property was reformed in *Home Fire Ins. & Banking Co. of Texas v. Myer*, 93 Ill. 271; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357, 12 Abb. Prac. 414; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, affirming 6 Hun, 353; *Mollere v. Pennsylvania Fire Ins. Co.*, 5 Rawle (Pa.) 342, 28 Am. Dec. 675. The description of the voyage, in *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398, affirming 11 Fed. Cas. 965, and *Traders' Bank v. Ocean Ins. Co.*, 62 Me. 519. The period or time of insurance, in *North American Ins. Co. v. Whipple*, 18 Fed. Cas. 340; *Trenton Potteries Co. v. Title Guaranty & Trust Co.*, 68 N. E.

B.B.Ins.—55

132, 176 N. Y. 65; *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671, 7 N. W. 776. The provision as to the risk covered, in *Pacific Mut. Life Ins. Co. v. Frank*, 44 Neb. 320, 62 N. W. 454. The provision as to amount, in *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833. The provision as to other insurance, in *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450, and *Independent School District of Doon v. Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956. The provision as to ownership, in *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212, and *Delaware State Fire & Marine Ins. Co. v. Same*, Id. 219. The provision as to incumbrance, in *Columbia Ins. Co. v. Cooper*, 50 Pa. 331. The provision as to vacancy, in *Bennett v. Agricultural Ins. Co. of Watertown*, 106 N. Y. 243, 12 N. E. 609. Provision inserted permitting concurrent insurance, in *Grand View Bldg. Ass'n v. Northern Assur. Co. (Neb.)* 102 N. W. 246. The provision as to running a mill at night, in *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452, and *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y. 657, affirming 67 Barb. 72. The provision requiring a watch clock, in *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465.

In *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311, the insurer, admitting the mistake and alleging that it would at any time have been corrected, urged that equity had no jurisdiction; but the court decided that, since complainant's demand for payment of the loss was denied and he was thus compelled to seek his rights in the courts, and since equity alone could grant the correction of the policy necessary for his recovery, therefore complainant had the right to come to equity for relief. This was the more especially true, since defendant did not allege an offer to correct the mistake before suit was commenced.

(h) Same—Mistake as to effect of language.

A mutual mistake as to the legal effect of the language of the policy or application, whereby the intention of the parties is defeated, will justify a reformation.

The principle is supported by *Oliver v. Mutual Commercial Marine Ins. Co.*, 18 Fed. Cas. 664; *Fink v. Queen Ins. Co. (C. C.)* 24 Fed. 318; *Abraham v. North German Ins. Co. (C. C.)* 40 Fed. 717; *Travelers' Ins. Co. of Hartford v. Henderson*, 69 Fed. 762, 16 C. C. A. 390; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Welch's Adm'r v. Welch*, 13 Ky. Law Rep. 639; *Lansing v. Commercial Union Assur. Co. (Neb.)* 93 N. W. 756; *Eastman v. Provident Mut. Relief Ass'n*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Spring Garden Ins. Co. v. Scott*, 1 Walk. (Pa.) 181, 27 Leg. Int. 76.

So, also, in *Columbia Ins. Co. v. Cooper*, 50 Pa. 331, parol evidence was admitted to show that a misrepresentation as to incumbrances arose from a mutual mistake in regarding the property insured as personalty.

In *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371, 79 Am. Dec. 539, the court decides that under a Code provision a mistake in designating one holding a mechanic's lien as "mortgagee" could be corrected; but in *Longhurst v. Star Ins. Co.*, 19 Iowa, 364, and *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443, similar mistakes were held subject to correction with no reference to any statutory provision, especially since the mistake in each case was induced by the agent of the company.

This element was also given prominence in reaching similar decisions in the following cases: *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Sias v. Roger Williams Ins. Co. (C. C.)* 8 Fed. 183; *Bailey v. American Cent. Ins. Co. (C. C.)* 13 Fed. 250; *Williams v. North German Ins. Co. (C. C.)* 24 Fed. 625; *Western Assurance Co. of Toronto v. Ward*, 75 Fed. 338, 21 C. C. A. 378; *Hartford Fire Ins. Co. v. McCarthy (Kan.)* 77 Pac. 90.

A reformation allowing the insured vessel to stop at two ports in Cuba was sought in *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395. Complainant maintained that there was a usage that vessels going to Cuba might visit two ports, which authorized the alleged deviation, and that, therefore, the policy should be reformed. The court, after holding the company chargeable with knowledge of the usage, if one existed, decided that parol evidence of usage was admissible only to explain an ambiguity. "If the words employed have an established legal meaning, parol evidence that the parties intended to use them in a different sense will be rejected," unless, as ordinarily interpreted, the words would be senseless. The court throughout seems to treat the offer to show the usage as though the action were one at law. So far as its remarks can be held to apply to an action for reformation, they would seem to be overruled by the later case of *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52.

In *Westchester Fire Ins. Co. v. Wagner (Tex. Civ. App.)* 38 S. W. 214, the court says that, if the property was insured as belonging to the insured under a belief that their interest as consignees would be thereby covered, it would be inclined to the opinion that the mistake was one of law which could not be corrected. The court decided the case, however, on the ground of lack of evidence and of laches.

(i) Same—Consideration for preliminary agreement.

The theory that the consideration for the formal contract will not be sufficient support for the preliminary agreement seems only to have been raised in *Elstner v. Cincinnati Equitable Ins. Co.*, 1 Disn. 412, 12 Ohio Dec. 703, and *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532.⁵ In the *Elstner* Case the court held that, until the premium was paid or secured to be paid, there was no valid binding contract; that there having been no sum agreed upon, and there being no particular sum determined by the nature of the risk, there was no valid contract which would form the basis of reformation.

In the *McMaster* Case, however, the court fairly decides that since no consideration passed for the agent's agreement as to the length of time the first premium was to carry the policy, and since either party could withdraw prior to the delivery of the policy, fixing a different period of duration, no reformation on the ground of mutual mistake could be based on such agreement. Though this doctrine does not appear to have been elsewhere expressly discussed, it would seem to be inferentially denied in every life insurance case in which reformation is granted, since the general rule is that a life insurance contract is not binding on either party until the policy itself has passed beyond the control of the company.

(j) Same—Intention to issue policy in accordance with contract.

The contention that, though the minds of the parties may have met on the terms of the contract, reformation will nevertheless not be granted on the ground of mutual mistake, unless there was also an intention on the part of the company to issue a policy containing such terms, does not seem to have been often raised. In the case of *Travelers' Ins. Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390, reversing (C. C.) 65 Fed. 438,⁶ the agent agreed to issue a policy covering death at the hands of another, and believed he had done so. The printed form used, however, excluded this risk, and he had no authority to issue any other, and had no intention of exceeding his authority, nor to issue any other policy than on the form supplied him. The court decided that reformation could not be granted, basing its decision apparently on the agent's lack of intention to issue any other policy than was issued, rather than on the question

⁵ Writ of certiorari denied 171 U. S. 687, 18 Sup. Ct. 944.

⁶ Writ of certiorari denied 163 U. S. 708, 16 Sup. Ct. 1207, 41 L. Ed. 312.

as to whether his act in excess of his authority would bind the company. So, also, in *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, the court, after deciding that the preliminary agreement with the agent was not binding for want of consideration, states, as a further reason for denying relief on the ground of mutual mistake, that the agent who made the agreement and whose intent was chargeable to the company requested the company to issue the policy at variance with such agreement.

Barnes v. Hekla Fire Ins. Co., 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450, decides, however, that the mere fact that it was not agreed between the agent and insured in terms that the policy, when issued, should contain a clause giving the latter the right to obtain additional insurance, did not preclude a reformation by the insertion of such provision.

(k) Same—Circumstances indicating fraud.

Somewhat similar to the *Henderson* and *McMaster* Cases are those cases which proceed on the theory that an intention to issue a policy with a certain clause will not be implied, though the company has knowledge that the insured expects such a clause. Thus, in *Miaghan v. Hartford Fire Ins. Co.*, 12 Hun (N. Y.) 321, it was held that knowledge by the agent as to the nature of insured's interest would not establish an agreement to issue a policy, taking such fact into account.⁷ So, also, in *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255, the court, without stating whether or not the knowledge of a soliciting agent would be imputed to the company, held that reformation could not be decreed in relation to other insurance on the basis of an agreement made with the agent, he having no authority to contract. It should be noted, however, that the agent sent in a report not in accordance with his alleged knowledge. A similar case is *Cox v. Ætna Ins. Co.*, 29 Ind. 586, where the court either ignores imputability of the agent's knowledge or the effect of such knowledge on the company's intention, holding that the mistake of the agent in writing the answers would not justify reformation, unless it further appeared that the company in fixing the rate did not act on such answer; the ground of the decision being that the court could not make a contract for the parties.

There are, however, cases in which such knowledge is given almost a conclusive effect. Thus, in *Taylor v. Glens Falls Ins. Co.*,

⁷ Recovery in this case was afterwards allowed on the policy as written, on the ground of estoppel. See *Miaghan v. Hartford Fire Ins. Co.*, 24 Hun, 58.

32 South. 887, 44 Fla. 273, the court holds that the issuance of a policy to one known to be dead must be either by mistake or fraudulent, and, since fraud is never to be presumed, grants reformation on the ground of mistake. The same doctrine is invoked in *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127, 82 N. W. 315, where the agent, acting on an unfounded assumption as to the owner of the property, issued it in the name of the wrong person; and the court says that its faith in the business morality of the company would not permit it to believe that it intended its validity to depend on an unfounded conjecture. So, in *Clem v. German Ins. Co.*, 29 Mo. App. 666, and *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431, in each of which the property to be insured was known to the company, but not properly inserted in the policy; the court holding that the presumption of the company's good faith impels it to the conclusion that a mistake was made.

In *Traders' Bank v. Ocean Ins. Co.*, 62 Me. 519, *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843, and *Independent School Dist. of Doon v. Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956, the same presumption is invoked to prove mistake as to the voyage of the vessel, concurrent insurance, and the description of the buildings, respectively.

The mere fact that the insured failed to read his policy will not avoid the effect of a mutual mistake arising from the issuance of a policy without a concurrent insurance clause and the insured's acceptance of it in that condition (*Grand View Bldg. Ass'n v. Northern Assur. Co.* [Neb.] 102 N. W. 246).

(1) Fraud—General rule.

Though the mistake is not mutual, and the policy is written as intended by one of the parties, reformation will be granted, where the complaining party by fraud of the other is induced to accept a contract not conforming to the real agreement.

The rule is supported by *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398, affirming 11 Fed. Cas. 965; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Taylor v. Glens Falls Ins. Co.*, 32 South. 887, 44 Fla. 273; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *Fitchner v. Fidelity Mut. Fire Ass'n*, 72 N. W. 530, 103 Iowa, 276; *Franklin Fire Ins. Co. of Philadelphia v. Hewitt*, 3 B. Mon. (Ky.) 231; *Lancashire Ins. Co. v. Lucas* (Ky.) 34 S. W. 809; *Bell v. Western Marine Ins. Co.*, 5 Rob. (La.) 423,

39 Am. Dec. 542; *Phoenix Ins. Co. v. Hoffhelmer*, 46 Miss. 645; *Miller v. Hillsborough Mut. Fire Assur. Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, affirming 13 Hun, 496; *McGuire v. Hartford Fire Ins. Co.*, 40 N. Y. Supp. 300, 7 App. Div. 575; *McCoubrey v. St. Paul Fire & Marine Ins. Co.*, 64 N. Y. Supp. 112, 50 App. Div. 416, affirmed in 62 N. E. 1097, 169 N. Y. 590; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Continental Life Ins. Co. v. Goodall*, 3 Am. Law Rec. 338, 5 Ohio Dec. 160; *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41; *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 39; *Dowling v. Merchants' Ins. Co. of Newark*, 168 Pa. 234, 31 Atl. 1087; *Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S. E. 911; *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83.

The mistake of insured, as before pointed out, almost invariably consists in the active or passive execution of the contract not conforming to his intention; but the defendant often insists that the very acceptance and retention of this contract constitutes such laches as will prevent complainant from securing the relief demanded. It is evident, however, that the fraud of the underwriter consists in inducing the very thing which is relied on as constituting laches; that is, accepting the contract containing a variant provision. It is thus almost impossible to consider the question of fraud, without at the same time considering the laches of complainant, and such laches will, therefore, so far as it has been relied on to overcome the fraud of defendant, be treated in connection with the fraud itself.

(m) Same—Active inducement to accept policy.

There seems to have been few cases in which the fraud of the underwriter consisted in active misrepresentation and deceit, inducing the insured to accept a policy different from the agreement of the parties. In the case of *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465, it appears that the agent, in full possession of the facts, told the applicant that one of his employes was a watchman, and a corresponding answer was given in the application. The court held that the decision, being within the agent's authority, was binding, that to hold otherwise would inflict on the insured a legal fraud, and that he was entitled to reformation. The same doctrine is involved in *Harris v. Columbiana County Mut. Ins. Co.*,

18 Ohio, 116, 51 Am. Dec. 448, where the agent, knowing the facts, decided that the property was not incumbered. In *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505, it is held that a policy may be enforced by striking out a warranty, where the underwriter, with knowledge of its falsity, said it did not apply.

In the case of *Travelers' Ins. Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390, reversing (C. C.) 65 Fed. 438, it was, however, squarely held that a mistake of the agent in failing to comprehend the class of risks covered by the policy, though accompanied by misleading statements in that regard, was not sufficient, in the absence of intentional fraud, to warrant a reformation of a plain clause in the policy. It is, of course, essential, as decided in *Harrison v. Hartford Fire Ins. Co.* (C. C.) 30 Fed. 862, that the assurance by the company be given before the execution of the policy.

(a) Fraud as shown by issuance of policy with variant clause.

The weight of authority favors the proposition that the issuance of the policy or the preparation of the application with a clause varying from the intention of the parties will itself entitle the insured to a reformation, though the mistake could have been discovered by a perusal of the contract itself. Thus, in *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398, affirming 11 Fed. Cas. 965, it was said that the insured had a right to assume that the policy would accurately conform to the preliminary agreement by letter, and to rest confidently to that belief. The theory, as shown by *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 240, 33 Am. Rep. 607, is that that party whose duty it is to prepare a written contract in accordance with a previous agreement, and who prepares one materially changing the agreement, and delivers it as in accordance therewith, commits a fraud against which equity will give relief.

(a) Same—Doctrine as applied to future rights.

The doctrine that the issuance of a policy containing a clause variant from the intention of the parties is a basis of reformation has been applied to clauses dealing with future matters, and which would not have rendered the policies void at the moment of delivery.

Reference may be made to *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398, affirming 11 Fed. Cas. 965; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833; *Lippincott*

v. Insurance Co., 3 La. 546, 23 Am. Dec. 467; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, affirming 13 Hun, 496; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246; *Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S. E. 911; *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83.

It might be further stated that in the case of *Miller v. Hillsborough Mut. Fire Assur. Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278, reversing 42 N. J. Eq. 459, 7 Atl. 895, and (N. J. Eq.) 10 Atl. 106, the reformation, granted under the very similar principle that the contract was itself misleading, was as to subsequent vacancy.

It should be noted that in all the cases cited above, except *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246, there was a distinct preliminary agreement. The *Brioso Case* seems an exception. In that case documents were merely left with the underwriter showing the amount of goods to be insured and the proposed route of the vessel. The court said that the general rule that equity will not only correct a mistake in case of a complete preliminary understanding by both parties does not prevail, either where the party against whom the relief is sought has acted in bad faith, or where, having assumed the preparation of the instrument, he has either willfully or negligently omitted what has been clearly stated to him as the intention of the other party, who, relying on its correctness, incautiously assents to it, under the supposition that it conforms to the verbal forms of the negotiations as previously agreed upon. Such case, however, standing alone, can scarcely be said to conclusively settle that the mere issuance of a policy, with knowledge by the underwriter that it contains a clause as to the future rights of the parties varying from the assured's expectation, will justify a reformation.

(p) Same—Past and present matters.

Where the clause relates to the status of the parties, and its breach will invalidate the policy *ab initio*, there is authority for the doctrine that mere knowledge by the company of the facts and of the presumable intention of the insured will justify the reformation. Thus, in *Fitchner v. Fidelity Mut. Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530, where the reformation asked was as to concurrent insurance, which the court treats as an existent fact, it was said that it was not material that the agent, who was only a soliciting agent, and the insured, entered into a contract. At any rate, the agent was

bound to set out the material facts as stated by insured, and through a mistake on his part he failed to do so. This mistake was carried forward into the policy. The company was charged with the agent's knowledge, and, having accepted and retained the premium and issued the policy, it would be presumed that it did so with reference to existing conditions known to it, and, while its failure to insert the provisions in the policy may have resulted from the mistake of the agent, it resulted in a fraud on the plaintiff. What contracts were made between the insured and the agent was immaterial. The question was, what material facts connected with the policy were made known to the agent and omitted from the policy? As to these the plaintiff was entitled to relief. The case should be considered in connection with the original opinion (68 N. W. 710), which seems to have been suppressed, since it is not officially reported, and in which the court endeavors to justify a reformation on the ground of mutual mistake, holding that, though in fact a contract with the soliciting agent was not binding, yet, the company being bound by his knowledge, the agreement between him and the insured was as though he had been an authorized agent.

Reference may also be made to the following cases: *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *Bell v. Western Marine Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Continental Life Ins. Co. v. Goodall*, 3 Am. Law Rec. 338, 5 Ohio Dec. 160; *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 39.

The case is, of course, if anything, stronger, even as to past or present matters, where there has been a preliminary agreement varying from the formal written contract. *Franklin Fire Ins. Co. of Philadelphia v. Hewitt*, 3 B. Mon. (Ky.) 231, is a good illustration. The court in such case was mainly concerned to determine whether the goods held by insured on commission were covered by the preliminary certificate. Having decided that they were, the court said that the only question left was as to the effect of acceptance and retention by insured of a policy which omitted such goods, and that since they had no reason to expect a variance between the original contract and the policy, and since the policy would certainly have been rejected had the variance been discovered, a delay in examining the policy would not prevent the reformation.

In the following cases, also, there was a definite preliminary agreement as to some past matter: *Lancashire Ins. Co. v. Lucas* (Ky.) 34 S.

W. 899; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *McCoubay v. St. Paul Fire & Marine Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112; *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386; *Graham v. Ins. Co.*, 2 Disn. 255, 13 Ohio Dec. 157.

In many of the foregoing cases, whether the variance was caused by mistake or fraud is not definitely stated, as the right to reformation follows equally from either.

Such seems to have been the holding in the following: *Franklin Fire Ins. Co. of Philadelphia v. Hewitt*, 3 B. Mon. (Ky.) 231; *Lancashire Fire Ins. Co. v. Lucas* (Ky.) 34 S. W. 899; *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *McCoubay v. St. Paul Fire & Marine Ins. Co.*, 64 N. Y. Supp. 112, 50 App. Div. 416; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278, 19 Am. Dec. 431; *Continental Life Ins. Co. v. Goodall*, 5 Ohio Dec. 160, 3 Am. Law Rec. 338; *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386; *Graham v. Ins. Co.*, 2 Disn. 255, 13 Ohio Dec. 157. In *Lippincott v. Insurance Co.*, 3 La. 546, 23 Am. Dec. 467, *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645, *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263, *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. 420, 27 Atl. 39, and *Dowling v. Merchants' Ins. Co. of Newark*, 168 Pa. 234, 31 Atl. 1087, reformation seems to have been granted without reference to the question whether the variance was induced by fraud or mistake. See, also, *Medley v. German Alliance Ins. Co.* (W. Va.) 47 S. E. 101.

(q) Same—Contrary doctrine.

The case of *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, 11 L. Ed. 931, is somewhat peculiar. In that case a decree was sought to compel the company to indorse on the policy notice as to further insurance given prior to renewal of the policy on which the action was based. The case is really decided on the lack of evidence. The court, however, after reciting the circumstances under which equity will admit parol evidence in relation to a written contract, without mentioning fraud, says that none of such cases seems to embrace the case at bar, where the proof is offered, not to show an omission in the original contract, but rather to show a breach of official duty happening some time after the contract. The court does, however, subsequently recognize the fraud involved in the issuance of the renewal, but considers it rather as a possible reason for a decree estopping the company from relying on the absence of a written notice than as a reason for reformation.

There are cases, however, in which it is held that the mere issuance of a policy known to contain a variant clause is not sufficient of itself to justify reformation, where the insured might have discovered the variance. Thus, in *Susquehanna Mut. Fire Ins. Co. v. Swank*, 102 Pa. 17, the testimony was uncontradicted that at the time of the application the insured was informed that he would not be liable for any assessments and that the application would be taken on another plan. The application, however, contained a distinct promise to pay assessments, and the policy recited such agreement. The policy was retained several months, during which a prior assessment had been levied and paid under protest. The court held that the application was plain, and, if the applicant signed it without reading, he was inexcusably negligent. Had he read either the application or the policy, he would have seen that he was insured on the assessment plan, and the mistake would have been corrected. In *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, reversing *McMaster v. Insurance Co. (C. C.)* 78 Fed. 33, in which it appeared that it was agreed that one payment should carry the risk for 13 months, while by the terms of the policy as issued it became forfeited for nonpayment several days before that time, the court held that there could be no reformation on the ground of fraud, since the representation of the agent, 13 or 14 days before the issuance of the policy, would not constitute such artifice or deceit as to excuse the insured from reading his policy.⁸ A similar doctrine governed *Massey v. Cotton States Life Ins. Co.*, 70 Ga. 794, and *McHoney v. German Ins. Co.*, 52 Mo. App. 94. It should, however, be noted that in the two latter cases emphasis was placed on the length of time between the acceptance of the policy and the bringing of the action.

In *Miaghan v. Hartford Fire Ins. Co.*, 12 Hun (N. Y.) 321, proof of the issuance of a policy containing a sole and unconditional ownership clause, with knowledge by the agent as to the equitable nature of insured's title, was held to constitute no evidence of fraud. So, in *McHugh v. Imperial Fire Ins. Co.*, 48 How. Prac. (N. Y.) 230, it is decided that, though a provision as to other insurance was purposely omitted from a renewal policy, no claim of fraud could be

⁸ In a subsequent action at law on the policy involved in this action, reported in 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, where it appeared that the insured, when the policy was delivered,

was informed that it insured him for 13 months, the Supreme Court held that the company was estopped from insisting on a forfeiture for nonpayment prior to that time.

made, where there was no attempted concealment, and the policy as delivered had a conspicuous blank space for the insertion of any agreement as to other insurance. In *Cox v. Ætna Ins. Co.*, 25 Ind. 586, the court apparently ignores the question of fraud, or else the imputability of the agent's knowledge to the company, deciding that a mistake of the agent in writing out the responses to the questions would not entitle the insured to reformation, unless it should further appear that it was not on the faith of an erroneous warranty that the company acted in accepting the risk. So, also, no mention is made of fraud in *Elstner v. Cincinnati Equitable Ins. Co.*, 1 Disn. 412, 12 Ohio Dec. 703, where the court decides that, because there was no contract in relation to the use of fire heat, there could be no reformation, though the company by its authorized agents knew of the real condition of the premises.

(r) Contract itself misleading.

The case of *Miller v. Hillsborough Mut. Fire Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278, reversing 42 N. J. Eq. 459, 7 Atl. 895, and (N. J. Eq.) 10 Atl. 106, seems to be authority for the proposition that reformation may be granted where the policy itself is misleading. The policy provided that it should be subject to the by-laws of the corporation, but there were 14 conditions annexed to the policy, each referring to a by-law, and the court held that the assignee of the policy had a right to assume that such conditions embraced all the by-laws, and that he was entitled to a reformation in that regard.

(s) Circumstances affecting relative weight of fraud and laches.

As before pointed out, a consideration of reformation on the ground of fraud must necessarily take into consideration complainant's alleged laches. Thus, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, the court, in determining the effect of representations by agent as to the provisions of a policy, notes the fact that the insured was illiterate. And the same element is given weight in *McGuire v. Hartford Fire Ins. Co.*, 40 N. Y. Supp. 300, 7 App. Div. 575. In *McHoney v. German Ins. Co.*, 52 Mo. App. 94, it was held that illiteracy did not prevent the acceptance and retention of the policy from operating as assent to the fraud.

In *Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S. E. 911, where a substituted policy did not correspond in duration with the original

policy, the court, in considering the fraud, dwells on the fact that insured expected and reasonably understood that the new policy would be the same as the substituted one.

The fact that the policy in suit was a renewal policy, which failed to correspond with the original, has been noted by the court in the following: *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, affirming 13 Hun, 496; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *McCoubrey v. St. Paul Fire & Marine Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112.

In *Mitchell v. Ætna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386, the court, in determining the question of the company's fraud and insured's negligence, notes the fact that the policy was delivered to an agent of the insured, who was only a depository, to receive the policy and pay the premium. In *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619, the court notices the fact that the objectionable provision was in fine print.

On the other hand, the length of time the policy was in the hands of insured has been considered an important reason for denying relief.

McHoney v. German Ins. Co., 52 Mo. App. 94; *Massey v. Cotton States Life Ins. Co.*, 70 Ga. 794; *Wilson v. National Life Ins. Co.*, 67 N. Y. Supp. 1150, 56 App. Div. 624, affirming 65 N. Y. Supp. 550, 31 Misc. Rep. 403.

The case of *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263, nevertheless lays down the rule that, while the fact that the policy has been in plaintiff's hands for a considerable time is a circumstance to be considered in determining whether it corresponds to the actual contract, yet there is no rule of law which fixes the period within which a man must discover that his policy does not express the contract, or which bars from relief for delay in ascertaining his rights, short of the period of statutory limitations.

That an assignee, at least, of a policy of a mutual company, is not bound, by his relation to the company, to have such knowledge of its by-laws as to prohibit a reformation in effect striking out one of them, is decided in *Miller v. Hillsborough Mut. Fire Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278, reversing 42 N. J. Eq. 459, 7 Atl. 895, and (N. J. Eq.) 10 Atl. 106.

(t) Agency.

Where an agent has no authority in the premises, or is not in fact acting for the company, and where the other party has not been misled into a belief that he has authority, no reformation can be granted on account of agreements or representations made by him.

This principle has been applied in *Spare v. Home Mut. Ins. Co.* (C. C.) 19 Fed. 14, *Harrison v. Hartford Fire Ins. Co.* (C. C.) 30 Fed. 862, and *Wilson v. National Life Ins. Co.*, 67 N. Y. Supp. 1150, 56 App. Div. 624, affirming 65 N. Y. Supp. 550, 31 Misc. Rep. 403.

The company is responsible for the fraud or mistake of its general agent in making out a policy, he being intrusted with power in that regard.

Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; *Spurr v. Commercial Union Ins. Co.*, 40 Minn. 428, 42 N. W. 207.

It is also held that the knowledge of such an agent is the knowledge of the company, and that his mistake in drawing up the application will render it responsible for the variance in the contract in regard to such matter.

Welsh v. London Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; *Hill v. Millville Mut. Marine & Fire Ins. Co.*, 39 N. J. Eq. 66.

In *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83), it is, however, decided that the agent's statement that he was a general agent did not prove him to be so, that a general agent does not necessarily have authority to bind the company, and that, even if he had authority to bind the company, it did not follow that his mistaken belief as to what the application contained was the belief of the company.

The company is also bound by the knowledge of a soliciting agent, and is responsible for mistakes made by him in filling up the application; such proceeding being within his line of duty.

Reference may be made to the following: *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 634; *Fitchner v. Fidelity Mut. Fire Ins. Ass'n*, 103 Iowa, 276, 72 N. W. 530; *Independent School District of Doon v. Fidelity Ins. Co.*, 113 Iowa, 63, 84 N. W. 956; *Bennett v. Agricultural Ins. Co. of Watertown*, 106 N. Y. 243, 12 N. E. 609; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464.

In *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465, the same principle is applied to a soliciting agent's interpretations of

the question in the application; and an intention of the soliciting agent as to the date of the policy is held, in *N. Y. Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, to be the intent of the company, so as to preclude reformation on account of a mutual mistake, the policy corresponding with such intent.

In *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544, nevertheless, it was held that an agent having authority to make surveys, receive applications, premium notes, and cash premiums for the company agreeably to its by-laws, was not its agent to declare what were or were not incumbrances, or to waive compliance with any precedent condition on which policies were issued. In the opinion of the court, to hold the company on account of a mistake by such an agent and insured as to whether certain judgments were incumbrances would be to make a new contract. *Sykora v. Forest City Mut. Ins. Co.*, 7 Ohio Dec. 372, 2 Wkly. Law Bul. 223, proceeds upon the theory that, where a binding contract is required before reformation will be granted, an agreement by a soliciting agent is not sufficient.

It is decided, in *Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S. E. 911, that though no commission has been issued to one transacting the company's business, and though he calls himself and is called by the company a "broker," yet where he is furnished with all needful blanks and papers, and where the company pays his office expenses and responds to his acts, it will be bound by his acts, so that it may be compelled to issue a policy in accordance with his agreement. And those who are in fact but brokers become the agents of the company, so that it is charged with their knowledge, when, as in *Continental Life Ins. Co. v. Goodall*, 3 Am. Law Rec. 338, 5 Ohio Dec. 160, for the purpose of securing to such brokers their premium, it forwards to them for delivery a policy which by its terms is to be valid only when signed by them.

The mistake of a clerk of the general agent in writing a policy will operate the same as the agent's mistake, and justify reformation (*Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206). And in *Continental Life Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, it is decided that the act of the clerk of the general agent, assuring an applicant as to the effect of the policy, was likewise the act of the agent, and justified a reformation. So, also, in *Continental Life Ins. Co. v. Goodall*, 3 Am. Law Rec. 338, 5 Ohio Dec. 160, the company was held bound by the knowledge of the

clerk of the authorized brokers, and by the false answers written by him in the application.

A provision in the policy to the effect that no agent shall have authority to waive or strike from the policy any of its printed conditions does not prevent reformation on the ground of a prior agreement. This rule is laid down in *Continental Ins. Co. v. Ruckman*, 127 Ill. 367, 20 N. E. 77, 11 Am. St. Rep. 121, where the variant clause related to vacancy of the premises. At the time the contract was agreed upon the applicant had no knowledge of such a clause, and it was doubtful whether the delivery of the policy to him, he being illiterate, was notice of its contents. Furthermore, the provisions, strictly construed, can only apply to a subsequent waiver, and not to the original draft of the policy. The same doctrine is enunciated in *Meyers v. Lebanon Mut. Ins. Co.*, 27 Atl. 39, 156 Pa. 420, where it is further questioned whether any notice, though given in advance, can relieve the company from the consequences of its agents' fraud or mistake, by which a policy was secured which would not otherwise have been made. This question seems definitely decided by *Columbia Ins. Co. v. Cooper*, 50 Pa. 331, where it was decided that no company has a right to select and send out agents to solicit a business for its benefit, and then saddle their blunders upon its customers. A slightly different view of the limiting clause was taken in *Grand View Bldg. Ass'n v. Northern Assur. Co. (Neb.)* 102 N. W. 246, where it was pointed out that an inadvertent omission by the agent of a clause permitting concurrent insurance was neither a waiver nor an attempted waiver of the clause forfeiting the policy on account of the absence of such provision, but a mere mistake in the performance of a duty as to which the agent had undoubted authority.

The doctrine of *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348, that one about to insure in a mutual company must be presumed to have made himself acquainted with its regulations, and must therefore be held bound by the provision that the surveyor should be his agent, seems entirely overthrown by the later cases, where it is decided that, as to agency, a mutual company occupies no better position than a stock company; the insured not becoming a member until the issuance of the policy.

Columbia Ins. Co. v. Cooper, 50 Pa. 331; *Ellenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464; *Meyers v. Lebanon Mut. Ins. Co.*, 27 Atl. 39, 156 Pa. 420.

B.B.INS.—56

In *Miller v. Hillsborough Fire Ass'n*, 42 N. J. Eq. 459, 7 Atl. 895, the court refused to give weight to the circumstance that the secretary and treasurer of a mutual company assured an assignee of a policy that there were no by-laws except those appearing on the face of the policy. The court said: "The officers of a mutual insurance company cannot dispense with terms and conditions of insurance which by-laws of the company imposed, unless they are authorized so to do." The case is reversed in *Miller v. Hillsborough Mut. Fire Assur. Ass'n*, 44 N. J. Eq. 224, 14 Atl. 278, but not apparently on this point.

A clerk of the company's agents, who attended to the issuance of a policy and made representations while so doing, was held, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121, to fall within the definition of *Starr & C. Ann. St. p. 1322*, where it is provided that the term "insurance agent" shall include any person who shall in any manner aid in transacting the insurance business of any foreign insurance company. Mere assumption to act for the company would not charge it with responsibility; but, where the company avails itself of such act, it brings the person so assuming within the purview of the statute. A decision of the same nature is found in *Mathers v. Union Mutual Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83, where, under Rev. St. § 1977, providing that whoever solicits insurance on behalf of the company or remits an application shall be deemed its agent for all intents and purposes, it was held that the company was bound by an agreement between a soliciting agent and the applicant as to the time when the insurance should take effect. Under a similar statute of Iowa (Acts 18th Gen. Assem. c. 211, § 1) the company was held charged with the agent's knowledge (*Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. 185) though the policy provided that the company would not be bound by any representation of the applicant or promise of the agent not contained therein. In *Sias v. Roger Williams Assur. Co. (C. C.)* 8 Fed. 187, a similar New Hampshire statute (Gen. Laws N. H. c. 172, § 3) was held effectual to charge the company with the mistake made by the agent of another company, to whom the applicant first went, and who brought the application to defendant's agent; and the same effect was given to the Iowa statute in *St. Paul Fire & Marine Ins. Co. v. Sharer*, 76 Iowa, 282, 41 N. W. 19.

It is decided in *Pacific Mut. Life Ins. Co. of Cal. v. Frank*, 44 Neb. 320, 62 N. W. 454, that though an agent does not have authority

to make certain contracts, the policy will nevertheless be reformed in accordance with his preliminary agreement, where the company by circulars has given insured to understand that such a contract is authorized. It seems, also, in *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 517, and *Eilenberger v. Protective Mut. Ins. Co.*, 89 Pa. 464, to have been considered as an element in charging the company with an agent's mistake that he was furnished with their blank application and receipts. The case of *Seybert v. Ætna Life Ins. Co.*, 4 Luz. Leg. Reg. (Pa.) 219, is partially, at least, based on the proposition that it could not be supposed that an agent would have authority to write down the answers, except as given him, and that in so doing he was not defendant's agent. The usual answer to this objection is that the company, having received the premium, cannot reject the mistake or fraud of the agent merely because he was not authorized to commit blunders or perpetrate frauds.

This is shown by *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Eastman v. Provident Mut. Relief Ass'n*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29; *Steinbach v. Prudential Ins. Co.*, 70 N. Y. Supp. 809, 62 App. Div. 133; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464.

It is, indeed, held in *Abraham v. North German Ins. Co. (C. C.)* 40 Fed. 717, that in the absence of contradictory evidence an assumption by an agent of authority and acceptance of the premium by the company will charge the company with his mistake. *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83), states, however, that, though the fact that the company issued the policy shows that the person sending in the application was an agent, it does not show that he had power to bind the company.

It is decided, in *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833, that a husband is so far the agent of his wife in securing a policy on his life payable to her that his mistake may be corrected as against her.

(u) Necessity of reformation.

No reformation of an insurance policy is needed where, as construed by the court, it has the same meaning it would have, were it reformed.

Steel v. Phenix Ins. Co., 51 Fed. 715, 2 C. C. A. 463; *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56, 40 N. W. 87, 1 L. R. A. 659, 14

Am. St. Rep. 196; *National Fire Ins. Co. of Baltimore v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Prac. (N. Y.) 351.

But if the policy fails to express the contract, and cannot be construed in accordance with the complaining party's contention, reformation is the only remedy.

Phenix Ins. Co. v. Wilcox & Gibbs Guano Co., 65 Fed. 724, 13 C. C. A. 88; *Clark v. Higgins*, 132 Mass. 586; *Sun Ins. Co. v. Greenville Building & Loan Ass'n*, 58 N. J. Law, 367, 33 Atl. 962; *Graham v. Insurance Co.*, 2 Disn. 255, 13 Ohio Dec. 157.

There need be no reformation where parol evidence may be admitted to resolve an ambiguity and show the real meaning of the policy to correspond with the original agreement.

Reference may be made to the following: *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6, affirming 61 Barb. 335.

To the same effect is the dissenting opinion of Slosson, J., in *Wall v. East River Ins. Co.*, 10 N. Y. Super. Ct. 264, though in such case the doctrine was unsuccessfully invoked; the court holding that there was no ambiguity. In *Dow v. Whetten*, 8 Wend. (N. Y.) 160, also, the court refused parol evidence to explain the understanding with which the word was used, suggesting that, if the policy as written failed to express the meaning of the parties, it should be reformed.

That a policy of insurance need not be reformed by the courts, where it has already been corrected by the parties thereto, is the doctrine set forth in *Fireman's Fund Ins. Co. of San Francisco v. Dunn*, 22 Ind. App. 332, 53 N. E. 251. Nor, as decided in *Breeze v. Metropolitan Life Ins. Co.*, 48 N. Y. Supp. 753, 24 App. Div. 377, does it constitute an attempt to reform an instrument at law to count on an application in its original form, where it has been wrongfully altered by one of the parties since its execution.

It is a doctrine of the Kansas and Nebraska courts that where the description of the land on which a building is situated is only a nominal part of the contract, the real intention being to insure the property, without reference to the description of the particular tract on which it is located, no reformation need be had, though the policy is erroneous in that respect.

The following cases may be referred to: *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; *State*

Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524. 20 Am. St. Rep. 696; *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144, 49 N. W. 838; *Omaha Fire Ins. Co. v. Dufek*, 44 Neb. 241, 62 N. W. 465.

The Minnesota court, however, in *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. 906, holds that reformation is necessary in cases of mistake in the description of the land.

Though it is suggested in *O'Donnell v. Connecticut Fire Ins. Co.*, 73 Mich. 1, 41 N. W. 95, and *Connecticut Fire Ins. Co. v. Judge of Monroe Circuit Court*, 77 Mich. 231, 43 N. W. 371, 18 Am. St. Rep. 398, that, in case of variance between the policy and the agreement for insurance, the policy might be disregarded and suit brought on the oral agreement, the doctrine is definitely abandoned in *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155, where it is decided that in such case reformation is the only remedy. The question would seem, however, to be dependent on whether the oral contract is merged in the policy.

It is evident that no reformation is needed where, owing to the doctrine of equitable estoppel, the party at fault is prevented from enforcing the variant clause. An exhaustive discussion, therefore, of the question when reformation is necessary in cases involving the principles of estoppel, would require a complete treatment of that doctrine. It is deemed sufficient at this point to refer to those cases involving estoppel in which the necessity of reformation or otherwise seems to have been particularly an issue.

It is a general rule that no reformation is needed to avoid the defeat of a policy on account of any matter, past or in existence at the time of the issuance of the policy, with which the company was charged with knowledge, and which, while incidental in its nature, would have rendered it void from the time of its issuance.

The following are deemed sufficient: *Williams v. North German Ins. Co.* (C. C.) 24 Fed. 625; *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. 413; *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Bennett v. Agricultural Ins. Co.*, 15 Abb. N. C. (N. Y.) 234; *Van Scholck v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *McGuire v. Hartford Fire Ins. Co.*, 40 N. Y. Supp. 300, 7 App. Div. 575; *Walrath v. Royal Ins. Co.*, 16 Ohio Cir. Ct. R. 413, 9 O. C. D. 233; *Knudson v. Grand Council of N. W. Legion of Honor*, 7 S. D. 214, 63 N. W. 911; *Medley v. German Alliance Ins. Co.* (W. Va.) 47 S. E. 101; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. 804.

So, also, in *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506, it is decided that reformation is not necessary where the company, after

the issuance of a policy, was notified of a change in the circumstances which by the terms of the policy would avoid it, and told the insured that it did not matter.

It is, however, held in *Ewer v. Washington Ins. Co.*, 16 Pick. (Mass.) 502, 28 Am. Dec. 258, and *Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366, the former dealing with the time at which a vessel was spoken, and the latter with occupancy continuing to the time of the loss, that reformation was needed, though the facts were known when the policy was issued.

In *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352, 41 N. W. 39, it was decided that reformation was the only remedy, though it was known to the company that the insured had no beneficial interest in the property; the court clearly distinguishing those cases in which the matter relied on to defeat the policy was only incidental. So, also, in *Taylor v. Glens Falls Ins. Co.*, 32 South. 887, 44 Fla. 273, reformation was held necessary where the insured was known to be dead when the policy issued. The same principle seems to govern *Holmes v. Charlestown Fire Ins. Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428, and *Landers v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801, where by the company's blunder the wrong property was inserted in the policy, and the doctrine of estoppel was held not applicable; the court suggesting that reformation was the only remedy. But the doctrine that estoppel did away with the necessity of reformation was applied in the case of *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909, reported on second appeal in 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908, where the defense of the company was that the wife was the owner, while the policy was issued in the name of the husband. It did not appear in this case whether the husband had an insurable interest. But in *Fisher v. Niagara Fire Ins. Co.*, 58 Hun, 605, 12 N. Y. Supp. 254, affirmed without opinion in 128 N. Y. 668, 29 N. E. 148, it was clearly held that no reformation was necessary, though the policy was issued in the name of a dead person, rather than his estate.

Where the breach of a promissory warranty or representation is relied on to defeat the policy, mere knowledge or agreement, at the time of the issuance of the policy, concerning such contemplated breach, will not defeat the forfeiture without reformation.

This principle is asserted in *Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *United Firemen's Ins. Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 457; *Western Assur. Co. v. Rector*, 85 Ky.

294, 3 S. W. 415; *McNierney v. Agricultural Ins. Co.*, 48 Hun (N. Y.) 239; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 23 N. E. 443, 5 L. R. A. 677; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

It would seem, nevertheless, though the facts are not very clear, that in *Williams v. North German Ins. Co.* (C. C.) 24 Fed. 625, reformation was held not essential to avoid the defeat of a policy by an alleged breach of warranty as to occupation; the agent having knowledge that the occupation would be such as it afterwards proved to be.

2. PLEADING AND PRACTICE WITH REFERENCE TO THE REFORMATION OF INSURANCE CONTRACTS.

- (a) Nature and form of remedy—*Res adjudicata* and election.
- (b) Right to reformation in action at law.
- (c) Time of bringing action.
- (d) Jurisdiction.
- (e) Parties.
- (f) Pleading.
- (g) Evidence.
- (h) Trial.
- (i) Review.

(a) Nature and form of remedy—*Res adjudicata* and election.

The effect of reformation is not to make a different contract for the parties, but to change the written form of the contract (*Maher v. Hibernia Ins. Co.*, 67 N. Y. 283). For this reason it was held, in *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293, 20 N. E. 833, that the demand for reformation, based on mutual mistake whereby the amount of insurance was doubled, could not be met by an offer to pay the difference between the premiums paid and the amount which would have been necessary to carry the certificate as written. But, in *Continental Life Ins. Co. v. Goodall*, 5 Ohio Dec. 160, 3 Am. Law Rec. 338, where it appeared that the age of insured was incorrectly stated and a less premium was paid in consequence than would otherwise have been charged, the court held that the beneficiary might elect to take only the amount of insurance which the premium actually paid would have purchased at insured's true age, instead of paying the extra premiums and taking the face of the policies, and that the company could not object; the election being obviously to its advantage.

A recovery on the policy as reformed is almost invariably asked in the same action in which the reformation is sought.

That this is a proper procedure is directly stated in the following:

Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Clem v. German Ins. Co., 29 Mo. App. 666; McHoney v. German Ins. Co., 44 Mo. App. 426; Globe Ins. Co. v. Boyle, 21 Ohio St. 119; Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 43 Atl. 764; Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 263; Hunt v. Provident Sav. Life Ins. Soc., 79 N. Y. Supp. 74, 77 App. Div. 338; Strong v. North American Fire Ins. Co., 1 Alb. Law J. 162; Wagner v. Westchester Fire Ins. Co., 92 Tex. 549, 50 S. W. 569; Hammel v. Queens Ins. Co., 50 Wis. 240, 6 N. W. 805; Trustees of St. Clara Female Academy v. Delaware Ins. Co., 93 Wis. 57, 66 N. W. 1140. And see Trust Co. of Georgia v. Scottish Union & Nat. Ins. Co., 119 Ga. 672, 46 S. E. 855, where, under Civ. Code 1895, § 4833, plaintiff was held entitled to recover to the extent authorized by the policy, though right to a reformation was not sustained.

It was decided, in *Hunt v. Provident Sav. Life Ins. Soc.*, 79 N. Y. Supp. 74, 77 App. Div. 338, that where the insured brought an action on a life policy, seeking reformation thereof and a recovery of the value of the policy as reformed, and died while the action was pending, a supplemental complaint, filed by his successor in the action, asking for the full amount of insurance, did not set up a new cause of action.

The mere fact that a prior action for reformation had been brought and dismissed for want of proper parties (*Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31, 5 South. 728) does not render the matter *res adjudicata*. Nor will the fact that a prior action was allowed to remain on the docket for a year, and eventually dismissed for lack of prosecution, bar an action for reformation, where it appears that there were repeated promises by defendant, while the prior action was pending, inducing the dilatory prosecution (*Home Ins. Co. & Banking Co. v. Myer*, 93 Ill. 271). The case of *Steinbach v. Relief Fire Ins. Co.*, as decided by the Court of Appeals in 77 N. Y. 498, 33 Am. Rep. 655, relies, however, on the doctrine of *res adjudicata*, reversing in that respect 12 Hun, 640. It appears that the Supreme Court of the United States (*Steinbach v. Ins. Co.*, 13 Wall. 183, 20 L. Ed. 615) had decided that no recovery could be had on the policy as written, while under the New York doctrine parol evidence could have been admitted to show that the policy was not vitiated by the doing of that in relation to which reformation was sought. Under the New York doctrine,

therefore, the policy as written was the same as it would have been if reformed, and the decision of the United States court that no recovery could be had on the written contract was conclusive of the whole matter.

Bringing a law action on the policy and prosecuting it to final judgment constitutes such an election to treat the written contract as embodying the real agreement as will preclude a subsequent action for reformation.

Washburn v. Great Western Ins. Co., 114 Mass. 175; *Thomas v. United Firemen's Ins. Co.*, 108 Ill. App. 278; *Steinbach v. Relief Fire Ins. Co.*, 12 Hun (N. Y.) 640.

It should be noted that, while the *Steinbach Case* is affirmed in 77 N. Y. 498, 33 Am. Rep. 655, no mention is there made of the doctrine of election. The case of *Eastman v. Provident Mut. Relief Ass'n*, 65 N. H. 176, 18 Atl. 745, 23 Am. St. Rep. 29, 5 L. R. A. 712, seems to imply a variation of the rule in the *Washburn Case*. In the *Eastman Case* reformation was granted, naming insured's administrator as beneficiary, though in *Eastman v. Association*, 62 N. H. 555, he had been defeated in a law action on the certificate. The court says: "Whether the judgment at law, rendered long before the plaintiff discovered the facts upon which his present claim for relief is founded, is a bar to this action, is a question which need not be determined. The judgment may be vacated upon the plaintiff's motion in the trial court, and thereupon there will be a decree for the plaintiff." And in *Grand View Bldg. Ass'n v. Northern Assur. Co.* (Neb.) 102 N. W. 246, it was held that the insured would not be estopped from asserting his rights by a mistake in first seeking relief at law; the mistake having been induced by the condition of the adjudicated law when he instituted his action.

The mere bringing of a law action on the policy, without the rendition of conclusive judgment thereon, will not preclude reformation.

Such was the decision in *Abraham v. North German Fire Ins. Co.* (C. C.) 37 Fed. 731, 3 L. R. A. 188, *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450, and *Lansing v. Commercial Union Assur. Co.* (Neb.) 93 N. W. 756, where the law action was still pending in the trial court without any judgment having been rendered; in *Hillerich v. Franklin Ins. Co. of Pennsylvania*, 23 Ky. Law Rep. 631, 111 Ky. 255, 63 S. W. 592, and *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386, where a judgment in favor of plaintiff had been reversed; and in *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443.

Spurr v. Home Ins. Co., 40 Minn. 424, 42 N. W. 206, and *Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31, 5 South. 728, where the judgments rendered in defendant's favor were not in their nature final.

So, also, one is not barred from prosecuting an action for reformation because of the acceptance on account, of a sum less than was claimed to be due and less than the policy as reformed would have called for (*Avery v. Equitable Life Ins. Co.*, 52 Hun, 392, 5 N. Y. Supp. 278).

(b) Right to reformation in action at law.

It is an elementary principle that courts of law have no power to reform a written instrument.

Hammell v. Queen Ins. Co., 50 Wis. 240, 6 N. W. 805; *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199. According to *Planter's Mut. Ins. Co. v. Deford*, 38 Md. 382, this rule does not prevent the introduction of parol evidence to prove that the written contract does not fully express the facts, where such contract is not the basis of an action but merely constitutes a defense.

But, where the same court administers both legal and equitable relief, reformation may be granted in an action commenced as a law action, even though the distinction between law and equity is retained.

In the following cases, an amendment asking for reformation was allowed to be filed by the moving party after it was seen to be necessary: *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Independent School Dist. of Doon v. Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956; *Hartford Fire Ins. Co. v. McCarthy* (Kan.) 77 Pac. 90; *Hillerich v. Franklin Ins. Co.*, 23 Ky. Law Rep. 631, 111 Ky. 255, 63 S. W. 592; *Mitchell v. Aetna Ins. Co.*, 6 Ohio S. & C. P. Dec. 420, 4 Ohio N. P. 386; *Graham v. Ins. Co.*, 2 Disn. 255, 13 Ohio Dec. 157; In *Trustees of St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140, and apparently in *National Mut. Ben. Ass'n v. Heckman*, 86 Ky. 254, 5 S. W. 565, a reformation was asked in an answer in a law action; and in *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550, and *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, evidence justifying reformation was admitted by way of reply.

In *Cox v. Aetna Ins. Co.*, 29 Ind. 586, commenced as a law action, it was decided that, if reformation of the contract is sought, it must be done in the complaint, and not in the reply. The case does not

clearly show whether this decision has a jurisdictional basis, or was made as a rule of pleading.

In Pennsylvania (*Manhattan Ins. Co. v. Webster*, 59 Pa. 227, 98 Am. Dec. 332), owing to the fact that equity has always been considered part of the law, and in the absence of any court which could render an appropriate decree reforming an instrument, parol evidence has been admitted in ordinary actions under circumstances justifying reformation, even though it might contradict, alter, or vary the legal effect of the contract.

This principle was apparently the one recognized in the following cases, though the relief was not always granted: *Mollere v. Pennsylvania Fire Ins. Co.*, 5 Rawle (Pa.) 342, 28 Am. Dec. 675; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. 50; *Smith v. Insurance Co.*, 24 Pa. 320; *State Mutual Fire Ins. Co. v. Arthur*, 30 Pa. 315; *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Spring Garden Ins. Co. v. Scott*, 1 Walk. (Pa.) 181, 27 Leg. Int. 76; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. 464; *Commonwealth Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 41; *Meyers v. Lebanon Mut. Ins. Co. of Jonestown*, 156 Pa. 420, 27 Atl. 39; *Dowling v. Merchants' Ins. Co. of Newark*, 168 Pa. 234, 31 Atl. 1087; *Seybert v. Aetna Life Ins. Co.*, 4 Luz. Leg. Reg. 219; *Okes v. Fire Ins. Co.*, 2 Pa. Dist. R. 747, 12 Pa. Co. Ct. R. 341.

In Louisiana, also, in the early case of *Lippincott v. Insurance Co.*, 3 La. 546, 23 Am. Dec. 467, it was said that since, in that state, the same court administered both law and equity, that would be considered as done which ought to have been done, and that the company would be bound by the contract thus corrected. *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, seems to have been decided in somewhat the same manner; but in the later case of *Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31, 5 South. 728, there was a distinct prayer for reformation and for recovery.

(c) Time of bringing action.

An action for reformation of the policy and recovery thereon falls within the statute fixing limitations on actions founded on written instruments, rather than the one dealing with actions for relief on the ground of fraud (*Grand View Bldg. Ass'n v. Northern Assur. Co.* [Neb.] 102 N. W. 246). The same case also applies to an action for reformation, the Nebraska doctrine asserting the invalidity of a clause requiring that any action for the recovery of a

claim under the policy must be brought within a certain time. The leading case of *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, affirming 13 Hun, 496, seems authority for the proposition that such a clause, though valid in general, will not apply to a suit asking for a reformation of an essential part of the contract and for recovery on the policy as reformed.

In *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550, an essentially similar clause was, however, given full effect in a similar action; the distinction, as drawn by the court, being that in the *Hay* Case the variant clause, which required plaintiff as mortgagee to first exhaust his mortgage remedy, left him with an entirely different contract from the one agreed upon, while in the *Arthur* Case the reformation sought was one merely of a phrase in relation to incumbrances. An attempt to distinguish the *Hay* Case was also made in *Steel v. Phoenix Ins. Co. (C. C.)* 47 Fed. 863, on the ground that the reformation sought in the *Hay* Case was an elimination of the limitations clause. It is true that it appears in the *Hay* Case that the original contract, in accordance with which reformation was sought, did not contain the limitations clause. But it does not appear that any reformation was sought in regard to such clause, nor does the court appear to base any argument upon it, merely mentioning the fact. The *Steel* Case and the case of *Thompson v. Phoenix Ins. Co. (C. C.)* 25 Fed. 296, an earlier stage of the same litigation, must be considered as asserting a doctrine contrary to the *Hay* Case; for the clause in each case was practically identical, and the variance in the *Steel* Case was as to so essential a matter as the person insured. The *Steel* Case was reversed in 51 Fed. 715, 2 C. C. A. 463, but not upon the point in question.

Where an action on the policy is commenced within the specified time, an action seeking reformation, brought in aid of the law action, will not be barred by the limitations of the policy, though commenced after the expiration thereof.

Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 517; *Rosenbaum v. Council Bluffs Ins. Co. (C. C.)* 37 Fed. 724.

The court, in *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550, in deciding that the limitations of the policy applied, laid great stress upon the fact that the action for reformation was not necessary, since the same results could have been secured

in a preceding law action on the policy. The court distinguishes *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 31 Conn. 517, in that under the practice in that state an action for reformation in aid of the law action afforded the only relief. It would seem, however, that in the *Arthur Case* the law action had been definitely abandoned, and it is difficult to see how the action for reformation could in any event have been considered in aid of it, as it was in the *Savings Bank Case*.

It is stated in *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, that the inconsistency between the clauses in relation to which reformation was sought, and which would have required litigation to determine the amount payable under the policy, and the clause requiring the action on the policy to be brought within 12 months, was a sufficient reason for refusing to enforce the limitations. It could not be that the parties inserting the clause complained of intended the limitations to apply.

Where the company itself induces the delay, the limitations of the policy will not apply.

Thompson v. Phoenix Ins. Co., 136 U. S. 299, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607.

It is, however, decided, in *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550, that the mere insistence by defendant in an action on the policy that plaintiff's only remedy was by reformation did not avoid the effect of the limitations clause in an action for reformation commenced by plaintiff after the erroneous decision of the trial court in the law action sustaining defendant's contention, but giving plaintiff leave to amend.

The cases of *Steel v. Phenix Ins. Co.*, 51 Fed. 715, 2 C. C. A. 463, reversing (C. C.) 47 Fed. 863, and *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, support the doctrine that the period within which the action must be brought commences from the time the loss becomes payable, and not from the date of the fire.

(d) Jurisdiction.

It is decided, in *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885, and *Williams v. Providence Washington Ins. Co.* (D. C.) 56 Fed. 159, that while courts of admiralty are equity courts in a certain sense, yet they have no jurisdiction to reform a marine policy, or even to treat it as though it were reformed, in accordance

with the prior agreement. Their jurisdiction attaches only when the contract assumes its final shape as a maritime contract, and they cannot look behind it to the parol agreement.

The case of *Laird v. Indemnity Mut. Marine Assur. Co.* (C. C.) 44 Fed. 712, was an action by an assignee, transferred from the state to the federal courts, which could not have been maintained in a federal court, had there been no assignment. The court holds that under the act of 1887 [U. S. Comp. St. 1901, p. 508] the assignment would not give it jurisdiction, where it did not otherwise have it, and that the fact that the case was one transferred from the state court made no difference.

An auxiliary action for reformation may properly be brought before a federal court, where such court has jurisdiction of the original law action.

Rosenbaum v. Council Bluffs Ins. Co. (C. C.) 37 Fed. 724; *Abraham v. North German Fire Ins. Co.* (C. C.) 37 Fed. 731, 3 L. R. A. 188.

(e) Parties.

The insured in a life policy is held, in *Hunt v. Provident Savings Life Ins. Soc.*, 79 N. Y. Supp. 74, 77 App. Div. 338, to be such a trustee of an express trust as to be entitled, under Code Civ. Proc. N. Y. § 449, to maintain an action for the reformation of the policy, though he has no beneficial interest therein.

An assignee after loss of insured's interest in a fire policy is a proper party to maintain an action for reformation (*Spare v. Home Mut. Ins. Co.* [C. C.] 17 Fed. 568). In *Hunt v. Provident Sav. Life Assur. Soc.*, 79 N. Y. Supp. 74, 77 App. Div. 338, under Code Civ. Proc. N. Y. § 756, permitting a substitution of parties where the interest of the original party has been transferred to another, an assignee of the beneficiary's interest was substituted after the insured's death in an action already commenced by the insured. In *Sykora v. Forest City Mut. Ins. Co.*, 7 Ohio Dec. 372, 2 Wkly. Law Bul. 223, where the insured's rights after the making of proof of loss were assigned to plaintiff, it was held that the assignor was a necessary party; the case differing from an ordinary suit by the assignee upon a chose in action. And in *Scott v. Provident Mut. Relief Ass'n*, 63 N. H. 556, 4 Atl. 792, it is suggested that, since equity only intervenes between the original parties and their privies, the insured's administrator should be joined with the plaintiff, who was seeking a reformation naming her as beneficiary; the contract as written being void for lack of one.

The case of *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471, 65 N. E. 281, reversing 70 N. Y. Supp. 809, 62 App. Div. 133, not only decides that the beneficiaries named in a policy are necessary parties in an action seeking to reform it by making it payable to others, but that a failure of the company to make timely objection to the defect, though it might operate as a waiver of the company's rights, would not obviate the objection, since the rights of the named beneficiaries might be impaired by the judgment, though they would not be bound thereby. It was, however, held in *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263, that the owner of a vessel named as insured, with losses, if any, payable to plaintiffs, was not such an essential party, but that the failure of the company to make timely objection would operate as a waiver of the defect in parties arising from the failure to include him. So, also, in *Hammell v. Queen Ins. Co.*, 50 Wis. 240, 6 N. W. 805, it is held that the mortgagor, who is named as insured, with loss payable to his mortgagee, is not a necessary party in an action for reformation and recovery brought by the mortgagee, in which it is alleged, and not denied, that the mortgage debt exceeds the insurance. But in Georgia a contrary doctrine has been asserted (*Trust Co. v. Scottish Union & Nat. Ins. Co.*, 119 Ga. 672, 46 S. E. 855).

(f) Pleading.

The bill or complaint must allege with particularity the facts justifying a reformation.

Durham v. Fire & Marine Ins. Co. (C. C.) 22 Fed. 468; *Davega v. Crescent Mut. Ins. Co.*, 7 La. Ann. 228; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

It is furthermore decided in the *Rogers Case* that a complaint cannot be strengthened in its averments by the reply. And in *Cox v. Ætna Ins. Co.*, 29 Ind. 586, it is said that reformation must be sought in the complaint, and not in the reply, though whether this is laid down as a rule of pleading, or as based on the futility of an attempt to secure equitable relief in a law action, does not clearly appear.

Fraud need not be specifically and positively alleged (*Hay v. Star Fire Ins. Co.*, 13 Hun, 496, affirmed in 77 N. Y. 235, 33 Am. Rep. 607). The same rule is suggested in *Bowers v. New York Life Ins. Co. (C. C.)* 68 Fed. 785. In *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, it was stated that it made no difference that there was no specific allegation of mistake; the facts alleged going to show

that there was in fact a mistake. The same principle seems to underlie *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248, where the allegations of the complaint showed either fraud or mistake, and the court held that, the defendant having excluded fraud by its contention that fraud must be specifically alleged, it was bound to find in the complaint the only other possible legal meaning, namely, a mistake. But, in *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255, the court refused to consider circumstances indicating fraud, apparently on the ground that plaintiff's case was based solely on mutual mistake.

It is suggested, in *Scott v. Provident Mut. Relief Ass'n*, 63 N. H. 556, 4 Atl. 792, that the particular relief indicated by the evidence should be prayed for. But, in *Fitchner v. Fidelity Mut. Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530, it is clearly held that the prayer for "other and further relief" will be sufficient to justify reformation indicated by the evidence, though the prayer for particular relief is defective. So, also, in *Goldsmith v. Union Mut. Life Ins. Co.*, 18 Abb. N. C. (N. Y.) 325, reformation was granted in accordance with the evidence, rather than the prayer.

The elementary doctrine that a defense, to be effective, must be set out in the answer, is applied in *Home Ins. Co. & Banking Co. of Texas v. Myer*, 93 Ill. 271; and that an undenied allegation of the complaint will be deemed true, in *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231.

The cases of *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550, and *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, seem to establish the doctrine that under the New York Code plaintiff may avoid a defense by putting in evidence, without any pleading, in reply to the defense, facts entitling him to a reformation in regard to such matter.¹

(g) Evidence.

It is a general rule that, in order to justify the reformation of a written contract, the evidence must be strong, clear, and convincing.

Reference to the following cases is deemed sufficient: *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 373; *Mitchell v. Capital City Ins. Co.*, 110 Ala. 588, 17 South. 678; *Bishop v. Clay Fire & Marine Ins. Co.*, 49 Conn. 167; *Cotton States Life Ins. Co. v. Carter*, 65 Ga. 228; *Northfield Farmers' Tp. Mut. Fire Ins. Co. v. Sweet*, 46 Ill.

¹ See Code Civ. Proc. N. Y. 1903, §§ 516, 964.

'App. 598; Lancashire Ins. Co. v. Lucas (Ky.) 84 S. W. 899; Ross v. New England Ins. Co., 120 Mass. 113; Phoenix Fire Ins. Co. v. Hoffheimer, 46 Miss. 645; Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33, 98 Am. Dec. 293; Dougherty v. Lion Fire Ins. Co., 84 N. Y. Supp. 10, 41 Misc. Rep. 285; Slobodisky v. Phenix Ins. Co., 52 Neb. 895, 72 N. W. 485; Epstein v. State Ins. Co., 21 Or. 179, 27 Pac. 1045; Lycoming Mut. Ins. Co. v. Saller, 67 Pa. 108; German Ins. Co. v. Daniels (Tex. Civ. App.) 33 S. W. 549; Westchester Fire Ins. Co. v. Wagner (Tex. Civ. App.) 38 S. W. 214.

The following cases may be referred to as not only stating the general rule, but also requiring in substance that the evidence be sufficient to convince the mind beyond a reasonable doubt: Hearne v. Marine Ins. Co., 20 Wall. (U. S.) 488, 22 L. Ed. 395; Lyman v. United Ins. Co., 2 Johns. Ch. (N. Y.) 630; Harrison v. Hartford Fire Ins. Co. (C. C.) 30 Fed. 862; Bowers v. New York Life Ins. Co. (C. C.) 68 Fed. 785; Hartford Fire Ins. Co. v. Haas, 8 Ky. Law Rep. 610; Weinberger v. Merchants' Mut. Ins. Co., 41 La. Ann. 31, 5 South. 728; National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289; Bartholomew v. Mercantile Ins. Co., 34 Hun (N. Y.) 263; Lyman v. United Ins. Co., 2 Johns. Ch. (N. Y.) 630; Home Fire Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941; Blake Opera House Co. v. Home Ins. Co., 73 Wis. 667, 41 N. W. 968; Meiswinkel v. St. Paul Fire & Marine Ins. Co., 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200.

In *Bryce v. Lorillard Fire Ins. Co.*, 35 N. Y. Super. Ct. 394, and *Devereux v. Sun Fire Office*, 4 N. Y. Supp. 655, 51 Hun, 147, it was apparently necessary to state that the rule requiring convincing evidence does not require that it be absolutely uncontradicted.

The remedy of reformation being essentially an equitable one, the weight of the evidence has been often considered by the appellate courts.

The following, in addition to those cited as stating the general rule, are deemed sufficient illustrations: *Graves v. Boston Marine Ins. Co.*, 2 Cranch (U. S.) 419, 2 L. Ed. 324; *Carpenter v. Providence Wash. Ins. Co.*, 4 How. (U. S.) 185, 11 L. Ed. 931; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 176 N. Y. 65, 68 N. E. 132; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83); *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *McHoney v. German Ins. Co.*, 52 Mo. App. 94; *Pacific Mut. Life Ins. Co. v. Frank*, 44 Neb. 320, 62 N. W. 454; *Lansing v. Commercial Mut. Ins. Co. (Neb.)* 93 N. W. 756; *Hill v. Millville Mut. Marine Fire Ins. Co.*, 39 N. J. Eq. 66; *Dougherty v. Greenwich Ins. Co. (N. J. Ch.)* 33 Atl. 295; *Goldsmith v. Union Mut. Life Ins. Co.*, 18 Abb. N. C. (N. Y.) 325; *Wilson v. National Life Ins. Co.*, 65 N. Y. Supp. 550, 31 Misc. Rep. 403; *Manhattan Ins. Co. v. Webster*, 59 Pa. 227, 98 Am. Dec. 332; *Epiph-*

B.B.Ins.—57

any Roman Catholic Church v. German Ins. Co., 91 N. W. 332, 16 S. D. 17; Ledyard v. Hartford Fire Ins. Co., 24 Wis. 496; Snow v. National Cotton Oil Co. (Tex. Civ. App.) 34 S. W. 177.

While the written application for insurance is entitled to great weight in determining the intention of the parties, it is not conclusive.

Such is the doctrine of *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 885; *Delaware Ins. Co. v. Hogan*, 7 Fed. Cas. 403; *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 373, affirming 2 Johns. Ch. 630; *Dow v. Whetten*, 8 Wend. (N. Y.) 160.

In *Trenton Potteries Co. v. Title Trust Co.*, 176 N. Y. 65, 68 N. E. 132, where the issue was as to whether by the real agreement of the parties the insurance was to have taken effect on one or the other of two days, the court held that it was error to admit testimony of officers of other companies as to how they would date a policy under similar circumstances. But, in *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y. 657, reversing in that particular 67 Barb. 72, it was held proper to admit a blank form of policy issued by another company; defendant having agreed to issue a policy in accordance with the provisions of the policy issued by the other company.

(h) Trial.

It is decided, in *Abraham v. North German Fire Ins. Co.* (C. C.) 37 Fed. 371, 3 L. R. A. 188, that where the object of the action for reformation is to secure proper evidence of the real contract for use in a preceding law action, and is thus a dependency on such law action, service, when necessary, may be had on attorneys for defendant in the law action.

The question as to whether the issues should be tried by the chancellor or a jury is, of course, determined by the rules of equity practice prevailing in the various jurisdictions.

Reference may be made to the following cases: *Ross v. New England Ins. Co.*, 120 Mass. 113; *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 83); *Winn v. Farmers' Mut. Fire Ins. Co.*, 83 Mo. App. 123; *McHoney v. German Ins. Co.*, 44 Mo. App. 426; *McHoney v. German Ins. Co.*, 52 Mo. App. 94; *New York Ice Co. v. Northwestern Ins. Co.*, 20 How. Prac. 424 (the opinion of the court in the last-mentioned case was, however, sharply criticised in 23 N. Y. 357, where the case was before the Court of Appeals); *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Miaghan v. Hartford Fire Ins. Co.*,

12 Hun (N. Y.) 321; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108; *Trustees of St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140.

It is decided, in *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119, and *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, that where both reformation and recovery on a reformed policy are sought, and the reformation is justified and a decree or judgment rendered for the complaining party, it is not essential that there should be a separate decree of reformation.

The cases of *McHoney v. German Ins. Co.*, 44 Mo. App. 426, *McHoney v. German Ins. Co.*, 52 Mo. App. 94, and *Trustees of St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140, discuss, in the light of statutes bearing on such matters, the nature of a decree for reformation in cases where there is also sought a recovery on the reformed policy.

(1) Review.

It is an elementary principle that a ruling to which no objection has been made in the lower court will not be considered on appeal.

Allen v. Mercantile Mut. Ins. Co., 46 Barb. (N. Y.) 642; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475.

Reversal cannot be had for a harmless error.

Lancaster Ins. Co. v. Lucas (Ky.) 34 S. W. 899; *Winn v. Farmers' Mut. Fire Ins. Co.*, 83 Mo. App. 123; *Van Tuyl v. Westchester Fire Ins. Co.*, 67 Barb. (N. Y.) 72; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108.

It would seem, from *Miaghan v. Hartford Fire Ins. Co.*, 12 Hun (N. Y.) 321, that the Supreme Court of New York can review the findings of fact of the lower court, and, from *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609, that the approval of such findings by the decision of the Supreme Court is conclusive on the Court of Appeals. In *Van Tuyl v. Westchester Fire Ins. Co.*, 67 Barb. (N. Y.) 72, it is said by the Supreme Court that the decision of the trial court on the facts is conclusive where the evidence is conflicting. So, also, the finding of the trial court on conflicting evidence was held conclusive on the Court of Appeals in 55 N. Y. 657, where the *Van Tuyl* Case was affirmed.

It is decided in *Clinton Mutual County Fire Ins. Co. v. Zeigler*, 201 Ill. 371, 66 N. E. 222, that under the Illinois statutes giving the Appellate Court exclusive jurisdiction of actions *ex contractu*

in which the amount involved is less than \$1,000, an appeal cannot be prosecuted from such court to the Supreme Court where the amount demanded on the reformed policy is only \$200.

3. MODIFICATION OF INSURANCE CONTRACTS.

- (a) General rule—Meeting of minds.
- (b) What constitutes a modification.
- (c) Consideration.
- (d) Form of modification.
- (e) Effect of custom or silence.
- (f) Construction.
- (g) Agency.
- (h) Pleading and practice.
- (i) Unauthorized alteration.

(a) General rule—Meeting of minds.

It is elementary that a proper modification of an insurance policy, as of every other contract, is valid and binding.

This is generally assumed, but is definitely decided in *S. S. White Dental Mfg. Co. v. Delaware Ins. Co.* (D. C.) 105 Fed. 642; *Leonard v. Charter Oak Life Ins. Co.*, 85 Conn. 529, 83 Atl. 511; *Firemen's Fund Ins. Co. v. Dunn*, 22 Ind. App. 333, 53 N. E. 251; *Kattelmann v. Fire Ass'n*, 79 Mo. App. 447.

And in *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700, the company was held bound by an agreement that the policy should cover a prior accident for which it would not otherwise have been liable, as it was, also, in *Willetts v. Sun Mut. Ins. Co.*, 45 N. Y. 45, 6 Am. Rep. 31, by an agreement in relation to a prior loss.

That a modification of the contract, to be binding, must be made by the parties themselves, or by some one authorized to act for them, is undisputed.

Fireman's Fund Ins. Co. v. Dunn, 22 Ind. App. 332, 53 N. E. 251; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338.

The doctrine is of general application, but seems to have been particularly invoked in *Connecticut Fire Ins. Co. v. Smith*, 10 Colo. App. 121, 51 Pac. 170, where it appeared that the company's agent did not understand that any alteration was desired, and in *Welsh v. Chicago Guaranty Fund Life Soc.*, 81 Mo. App. 30, where a refusal to accept a premium, unless accompanied by a health certifi-

cate not demanded by the original contract, was held not to affect the rights of the insured. But, in *Lancaster Ins. Co. v. Lucas*, 17 Ky. Law Rep. 1324, 34 S. W. 899, the court held that, though a policy had been transferred by agreement to other property, a revocation of such transfer by the agent, acting by direction of his superior, would bind the company.

Though the majority of the court, in *Union Central Life Ins. Co. v. Buxer*, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737, were of the opinion that the provisions as to forfeiture of rights to paid-up insurance were the same in the policy as in the subsequent premium note, it was unanimously decided that, if they were not, the subsequent agreement between the insured and the company would not affect the vested rights of the beneficiary. So, also, in *Western Assur. Co. v. Stoddard*, 88 Ala. 806, 7 South. 379, it was held that the amount of insurance could not be reduced, as against the insured, by an agreement between the assignee of the policy and the company. And in *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338, it was held that the rights of those named as insured were not affected by the naming of another as owner, in accordance with an agreement between the mortgagees, to whom the loss was payable, and the company, unless the mortgagees acted in the matter as the agents of those named as insured.

(b) What constitutes a modification.

Not every subsequent agreement between the parties will constitute a modification. The agreement must deal with the subject-matter of the contract in such a way as to change the terms of the original contract.

Subsequent agreements as to payment of premiums were held not to contain provisions different from those of the policy in relation to forfeiture for nonpayment in *Bryan v. Mut. Ben. Life Ins. Co.* (C. C.) 109 Fed. 748; *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300; *Union Central Life Ins. Co. v. Buxer*, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737. In *Douville v. Sun Mut. Ins. Co.*, 12 La. Ann. 259, the language used was held not to obviate the necessity of indorsement of the risk on an open policy. The insurance on freight was held by the majority, in *Field v. Citizens' Ins. Co.*, 11 Mo. 50, to be transferred by the language used to other vessels.

As pointed out in *Montgomery v. American Central Ins. Co.*, 108 Wis. 146, 84 N. W. 175, the relation of the company to the insured as to an adjustment of the loss which has happened is that of debtor and creditor, rather than insurer and insured. Therefore

the court held that a statute prescribing a standard policy and providing that every contract not made in accordance with its provisions should be void, did not prevent an agreement after loss, changing the effect of the award of the appraisers from *prima facie* evidence, as provided in the policy, to a conclusive arbitration. Nevertheless the court held the agreement to have been but a modification of the original contract, so far as the need of a separate consideration was concerned.

(c) Consideration.

The broad proposition that a contract of insurance may be modified without the passage of any new consideration is laid down in *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379, 8 Am. Rep. 556. In *Montgomery v. American Central Ins. Co.*, 108 Wis. 146, 84 N. W. 175, the court seems to proceed on the theory that an agreement that an award of arbitrators should be conclusive, considered as a modification of an original contract, needs no consideration to support it. It is difficult to see, however, why in such case the mutual promises would not operate as a consideration, the one for the other. Though the case of *Kattelmann v. Fire Ass'n*, 79 Mo. App. 447, is decided upon a question of pleading, it might be noted that a statement therein contained, to the effect that a modification reducing the amount of insurance would be binding, is qualified by a proviso, "if it is based upon a sufficient consideration." So, also, in *Gates v. Home Mut. Life Ins. Co.*, 4 Am. Law Rec. 395, 5 Ohio Dec. 313, the court, in determining the validity of a modification not under seal, stated that there could be no question, if a premium was paid after the change. There must be a consideration for an assumption by the company after loss, of a liability which it would not have incurred under the terms of the policy; but the performance by the insured of an onerous condition attached by the company to its assumption of liability will be a sufficient consideration (*Willetts v. Sun Mut. Ins. Co.*, 45 N. Y. 45, 6 Am. Rep. 31). In *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700, where also the company was held bound by a change made after the loss, for which it would not have been responsible under the original terms of the policy, no mention is made of consideration. The change, however, was considered as a correction of a mistake in the original policy, and the amount of the company's liability was also reduced by such change.

(d) Form of modification.

A policy under seal may be modified by an indorsement in writing merely signed by the secretary, provided it does not increase the amount of insurance (*Hoffecker v. New Castle County Ins. Co.*, 4 *Houst. [Del.]* 306). In *Gates v. Home Mut. Life Ins. Co.*, 4 *Am. Law Rec.* 395, 5 *Ohio Dec.* 313, the court enunciates the broader doctrine that, in the absence of a legal requirement that the policy be under seal, a modification need not be so executed.

A binding slip, given the insured, expressing a modification, and which is to take the place of the policy while it is being altered (*Belt v. American Central Ins. Co.*, 29 *App. Div.* 546, 53 *N. Y. Supp.* 316), is sufficient to bind the parties; the fire occurring prior to the alteration of the policy itself.

It is also a general rule that the modification need not be in writing.

Reference may be made to the following: *Hartford Fire Ins. Co. v. Webster*, 69 *Ill.* 392; *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 *Ind.* 300; *Ludwig v. Jersey City Ins. Co.*, 48 *N. Y.* 379, 8 *Am. Rep.* 556; *Steen v. Niagara Fire Ins. Co.*, 89 *N. Y.* 315, 42 *Am. Rep.* 297.

Though it is suggested in *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 *Vt.* 552, that a parol assent by the company to an assignment, such assent being treated as a modification, would not be good in case of a provision in the policy requiring such assent to be in writing, yet there are numerous cases stating that a clause in the policy providing against its parol modification is of no avail. The theory of such cases is that parties to a contract cannot disable themselves from making any contract allowed by law in any mode which the law recognizes as proper. On an examination of the cases, it becomes apparent, however, that they depend on the principles of estoppel, rather than modification.

Such statements as to the effect of the stipulation are contained in the following: *Fireman's Fund Ins. Co. v. Norwood*, 69 *Fed.* 71, 16 *C. C. A.* 136; *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 *Fed.* 508, 27 *C. C. A.* 212; *McElroy v. British America Assur. Co.*, 94 *Fed.* 990, 36 *C. C. A.* 615; *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 101 *Fed.* 77, 41 *C. C. A.* 207; *Westchester Fire Ins. Co. v. Earle*, 33 *Mich.* 143; *American Cent. Ins. Co. v. McCrea*, 8 *Lea (Tenn.)* 513, 41 *Am. Rep.* 647; *West v. Norwich Union Fire Ins. Soc.*, 10 *Utah*, 442, 37 *Pac.* 685.

It is stated in *Simonton v. Liverpool, London & Globe Ins. Co.*, 51 *Ga.* 76, that where, by statute, all insurance contracts must be in

writing, it would seem to follow that every modification must also be in writing. So, also, in *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552, it is implied that it is only in the absence of a charter provision or statute requiring otherwise that a parol assent or assignment considered as a modification can be held good. But the court, in *Halliday v. Eureka Fire & Marine Ins. Co.*, 7 Ohio Dec. 193, 1 Wkly. Law Bul. 286, seems to incline to the other view. The modification claimed released the company from liability, rather than increased it, and the court suggested that a charter provision requiring all policies to be executed in a certain manner might be held on that account not to defeat the parol modification. The case goes further, however, and is squarely decided under the authority of a Supreme Court decision (*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 363, 15 Am. Rep. 612) holding that such provision only applied to the execution of the formal policy.

(c) Effect of custom or silence.

In *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387,¹ it appeared that for a number of years the company had not rejected any risks submitted to it for entry under an open marine policy, as it might have done under the terms thereof. The court holds, reversing (D. C.) 105 Fed. 642, that this was not evidence of such a modification of the contract that the company would be bound to accept a risk after knowledge of the loss of the property. In order to have had this effect, there should have been instances in which risks had been actually accepted in similar circumstances. A custom to write up insurances on open policies and to pay premiums at the end of the week is held, in *Platho v. Merchants' & Manufacturers' Ins. Co.*, 38 Mo. 257, not sufficient to modify a policy requiring an indorsement to bind the company. The court says that, even though there was such an arrangement for the future indorsement of the risk as might amount to a contract upon which an action would lie for special damages, yet such agreement did not become a part of the contract of insurance contained in the policy. The usage might be sufficient to excuse the nonpayment of premiums and authorize the secretary, whose authority did not otherwise appear, to make the indorsement; but it would not take the place of the indorsement. Consequently, though the application was entered on the cargo books in

¹ Writ of certiorari denied in 22 Sup. Ct. 937, 183 U. S. 700, 46 L. Ed. 396.

accordance with the practice, the company was not bound to pay a loss of which notice was received a few minutes after the entry of the application.

Under proper circumstances, however, the court will imply an acquiescence in the proposal for modification, without a positive acceptance thereof by the one to whom the proposal was made. Thus, in *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942, the contract provided for a change of the beneficiaries with the consent of the directors. The insured gave due notice of the change, but died prior to a meeting of the board. The change was held, nevertheless, to have been duly effectuated; no reason appearing why the request should have been refused. And in *Fox v. Masons' Fraternal Acc. Ass'n*, 96 Wis. 390, 71 N. W. 363, a notification of change of occupation by a holder of an accident policy, and a written reply by the insurer fixing the indemnity under such new occupation, with which classification no dissatisfaction was expressed by the insured, was held to effectually modify the contract. But the necessity of the essentials of an estoppel in such cases is insisted on in *Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, where by the original contract the insurance covered a certain class of debts contracted after a date named, and by a slip subsequently sent the insured for indorsement on the policy the risk was limited to such debts contracted after a later date. The insured never returned the slip, and paid no attention to it; but the court held that he was not bound thereby, since there was nothing to show that his silence in any manner influenced the conduct of the insurer.

(2) Construction.

The general rule that ambiguous phrases must be most strictly construed against the company was applied in *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297, where an ambiguous modification in relation to vacancy was held to apply to all subsequent vacancies. In *Solmes v. Rutgers Fire Ins. Co.*, *42 N. Y. 416, 4 Abb. Dec. 279, reversing 21 N. Y. Super. Ct. 578, and *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379, 8 Am. Rep. 556, the knowledge by the company of facts which would have rendered the policies void in the absence of a certain construction of a modification was held sufficient to render justifiable such construction, though, considered by itself, the change made might not have had such effect. The *Ludwig Case*, however, dealt with a renewal receipt,

and, though it is discussed as a modification of the contract, it would seem more properly to belong to its execution.

Field v. Citizens' Ins. Co., 11 Mo. 50, seems to contain a departure from the rule granting a construction favorable to the insured; the majority of the court holding that a writing whereby the company promised to hold itself bound by the policies of "insurance on cargo and freight bill by the transfer of the same" to other steamers transferred the insurance on the freight and relieved the company from liability for a prior loss of freight. The ground of the decision was that any other construction would require the company to bear a double liability for the same premium. In the opinion of Napton, J., however, such writing was only a consent by the company to the transfer of the goods to other vessels.

In the case of *Leonard v. Charter Oak Life Ins. Co.*, 65 Conn. 529, 33 Atl. 511, it is decided that a phrase in the modification in relation to the appointment of a receiver referred only to the immediate appointment of a receiver, and not to one appointed long afterwards and under different circumstances; and in *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. 312, an indorsement in relation to carpenter's risk is held insufficient to extend the insurance to property in a new building built partially on the same site. That a transfer of the insurance from personal property to the building containing it will not affect the class of risk assumed by the policy, as governed by the uses to which the building might be put, is decided in *Hoffecker v. New Castle County Ins. Co.*, 5 Houst. (Del.) 101.

(g) Agency.

It is laid down in *Platho v. Merchants' & Manufacturers' Ins. Co.*, 38 Mo. 257, that the secretary of a marine company cannot be supposed, in the absence of a special showing, to have power to effect an insurance on an open policy in any other manner than by the indorsement provided for therein. In the absence of a contrary showing, a local agent, with power to contract for risks, may also indorse a subsequent permit for other insurance and for the discontinuance of a watchman (*German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660).

That a soliciting agent has no power to correct a policy is decided in *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 333, 53 N. E. 251; and in the opinion of Sanborn, J., who wrote the prevailing opinion in *Laclede, etc., Mfg. Co. v. Hartford Steam Boiler*

Inspection & Ins. Co., 60 Fed. 351, 9 C. C. A. 1, 19 U. S. App. 510, "the mere fact that the agent took away the application and brought back a policy was not sufficient to prove that he had authority to modify a contract by an oral agreement to include other property therein." Thayer, J., did not express any opinion on the question of agency. Caldwell, J., who dissented, called attention to the company's admission in its pleading that an application made to such agent was made to it, and that the company offered no evidence to show that the agent did not have authority in reference to the modification. In his opinion the question was one for the jury. A broker, who placed insurance at the solicitation of the agents of a mortgagee, to whom the loss was to be payable, and who received her compensation from the company, was held, in *Duluth National Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744, to have no authority to correct the policy, after delivery, by the insertion of a clause making the loss payable to the mortgagee. Her authority, indeed, ceased absolutely with the delivery of the policy, and from the mere fact that the policy was left in her office to be changed the mortgagee had no right to suppose that it had been returned to the company and properly corrected. The same case held that the broker's clerk would have the same authority as the broker, but, of course, no more. So, also, in *German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660, where a clerk of a local agent had issued the policy by signing the agent's name, it was held that he had authority also to modify the contract. In such case the clerk's act should be considered as that of the agent, particularly since the agent recognized it.

The fact that the alleged principal did not repudiate the modification on the ground of agency was considered an important factor as showing authority in the *Rounds Case*, and in *Belt v. American Central Ins. Co.*, 29 App. Div. 546, 53 N. Y. Supp. 316. In the *Belt Case*, indeed, silence by the insured after modification entered into by the broker's agent was considered a ratification. Of the same nature is the decision in *Gates v. Home Mut. Life Ins. Co.*, 4 Am. Law Rec. 395, 5 Ohio Dec. 313, where the fact that a modification only added to the contract the company's usual rule of action in such cases was considered of weight as showing the authority of the secretary to make the change. That a revocation of the authority of an agent with whom insured has been dealing will not affect insured, unless he had knowledge thereof, seems to be the doctrine of *Lancashire Ins. Co. v. Lucas* (Ky.) 34 S. W. 899.

(h) Pleading and practice.

It is decided in *Kattelmann v. Fire Ass'n*, 79 Mo. App. 447, that where plaintiff does not plead a modification of the contract forming the basis of the action, and defendant desires to avail himself of its provisions, he must plead it. An inconsistency in asking for reformation, when the policy has been already corrected by the parties, is held, in *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 333, 53 N. E. 251, not to afford any reason for denying the prayer for the judgment to which plaintiff was entitled under the allegations as to the corrections.

That the evidence of a modification of the contract must be clear and convincing is a rule laid down in *Connecticut Fire Ins. Co. v. Smith*, 10 Colo. App. 121, 51 Pac. 170.

The weight and sufficiency of the evidence is considered by the courts in the last-mentioned case, as also in *Laclede, etc., Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. 351, 9 C. C. A. 1, 19 U. S. App. 510, and *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387, reversing (D. C.) 105 Fed. 642.

The testimony by the insured that he did not know of the modification until a certain time after it was made was held admissible, in *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379, to prove that he never ratified the modification. It was not competent, however, for the insured to prove what he said when he first learned of the modification.

Caldwell, J., in a dissenting opinion in the case of *Laclede, etc., Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. 351, 9 C. C. A. 1, 19 U. S. App. 510, points out that the question of agency was the only one submitted on appeal and passed on by the lower court, and that therefore a consideration of a certain other branch of the evidence by the Circuit Court of Appeals was not justified. The case was, however, decided by the two other judges on the ground of the insufficiency of the evidence in regard to such other matter.

(i) Unauthorized alteration.

That an alteration of a policy by the company at the request of the mortgagee, who secured the insurance, will not amount to a tort against the insured, is decided in *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338. So far as the company knew, the mortgagee was the only person interested, and it might assume

that he had a right to request the change. Of course, if the act was unauthorized, and the mortgagee was insured's agent to procure the insurance, the mortgagor would have an action for damages against such agent for any loss suffered. But the court seems of the opinion the act could not injure the insured, since, if the mortgagee was unauthorized to request the change, it did not bind the insured, and, if authorized, the insured could not complain.

It is decided, in *Breeze v. Metropolitan Life Ins. Co.*, 24 App. Div. 377, 48 N. Y. Supp. 753, that, where an application is in the hands of the company, the mere fact that it has been counted on by the plaintiff and introduced in evidence by him, does not prevent him from proving that it has been altered since it left his hands, and that when it was executed it was as he alleged. A reply which denied the fraudulent alteration set up in the answer, and alleged that, if any alterations were made, "which plaintiff does not admit, same was made before such policy and application came into plaintiff's hands or was delivered to plaintiff, * * * but he denies that any such change was made," was held, in *Hagan v. Merchants' & Bankers' Ins. Co.*, 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493, not to constitute a confession and avoidance of the plea. In the last-mentioned case the court says that the mere fact of the alteration appearing on the face of the policy raises no presumption whatever. Therefore the burden of proving the alteration to have been fraudulent was upon the defendant, who alleged it. *Noah v. German Ins. Co.*, 69 Mo. App. 332, states, however, as a rule that, in the absence of suspicious circumstances, an alteration on the face of the policy will be presumed to have been made prior to its execution, but that, where the alteration is of a suspicious character, it may be held to have been made subsequent to the execution, without further proof. In the case at bar the court considered that the burden was on defendant, who had alleged that the alteration was fraudulent.

Stanford Law Library



3 6105 062 006 676



